



HENRY DEATON

182 IBLA 274

Decided June 21, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

HENRY DEATON

IBLA 2011-208

Decided June 21, 2012

Appeal from a July 14, 2011, decision of the Assistant Field Manager, Rio Puerco (New Mexico) Field Office, Bureau of Land Management, terminating a road right-of-way grant for lack of jurisdiction over the lands described in the grant instrument. ROW NMNM 124402.

Set aside and remanded.

1. Secretary of the Interior: Delegation of Authority: Federal Land Policy and Management Act of 1976 -- Inventory and identification: Private Land Claims: Public Lands -- Jurisdiction Over

The Secretary and his delegates are obliged to see that the public land laws are carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it. Thus, the Secretary, and BLM and this Board by designation, have both the authority and the duty to determine questions concerning the extent of the Department's interests in real property.

2. Title: Public Lands -- Jurisdiction Over: State Courts

The Quiet Title Act, 28 U.S.C. § 2409a (2006), provides that the Federal judiciary has exclusive jurisdiction over suits challenging whether the United States holds title to real property. Although a state court under § 2410 of that Act may consider a case involving property on which the United States has or claims a mortgage or other lien, Congress did not consent in that provision to suits against the Federal government where it claims a title interest in the property at issue. Thus, a state court final decree resolving a § 2410 matter is a nullity to the extent that it purports to convey title interest in Federal lands.

APPEARANCES: Michael Hoeferkamp, Esq., Albuquerque, NM, for Appellant; Steven J. Hile, Esq., Albuquerque, NM, for Intervenor; Theresa Copeland, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, NM, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Henry Deaton has appealed from a July 14, 2011, decision of the Assistant Field Manager, Rio Puerco (New Mexico) Field Office, Bureau of Land Management (BLM), terminating road right-of-way (ROW) grant NMNM 124402, issued to Deaton on May 5, 2010, for lack of jurisdiction over the lands described in the grant instrument. Relying on a State court decision purporting to dispose of the United States' fee title interest in the subject lands, BLM's decision concluded that the lands are privately owned. Because the Quiet Title Act, 28 U.S.C. § 2409a, provides that the exclusive basis for jurisdiction over suits challenging whether the United States holds title to real property lies with the Federal judiciary, and because the record does not support BLM's decision to terminate Deaton's ROW grant, as discussed below, we set the decision aside and remand the matter for further review.

I. Background

Deaton owns property in Sandia Park (sometimes referred to in the record as San Antonito), sec. 19, T. 11 N., R. 6 E., New Mexico Principal Meridian (NMPM), Bernalillo County, New Mexico, that originally derived from Small Holding Claim (SHC) 2994, Tract 5.¹ This land lies to the east of State Highway 14 and to the north of Frost Road (formerly an extension of Highway 44) – these roads intersect at a point southwest of Deaton's property. State Highway 14, previously State Highway 10, but renumbered to avoid confusion with Interstate 10, is designated as the Turquoise Trail National Scenic Byway and connects Santa Fe to Albuquerque. Highway 14 is bound to the east and Frost Road is bound to the north by lands owned by Sandra Fry (portions of what was originally SHC 2997, Tract 4, SHC 3007, Tract 4, and SHC 3002, Tract 3).² Stated another way, Fry's property is bordered to the west by State Highway 14 and to the south by Frost Road.

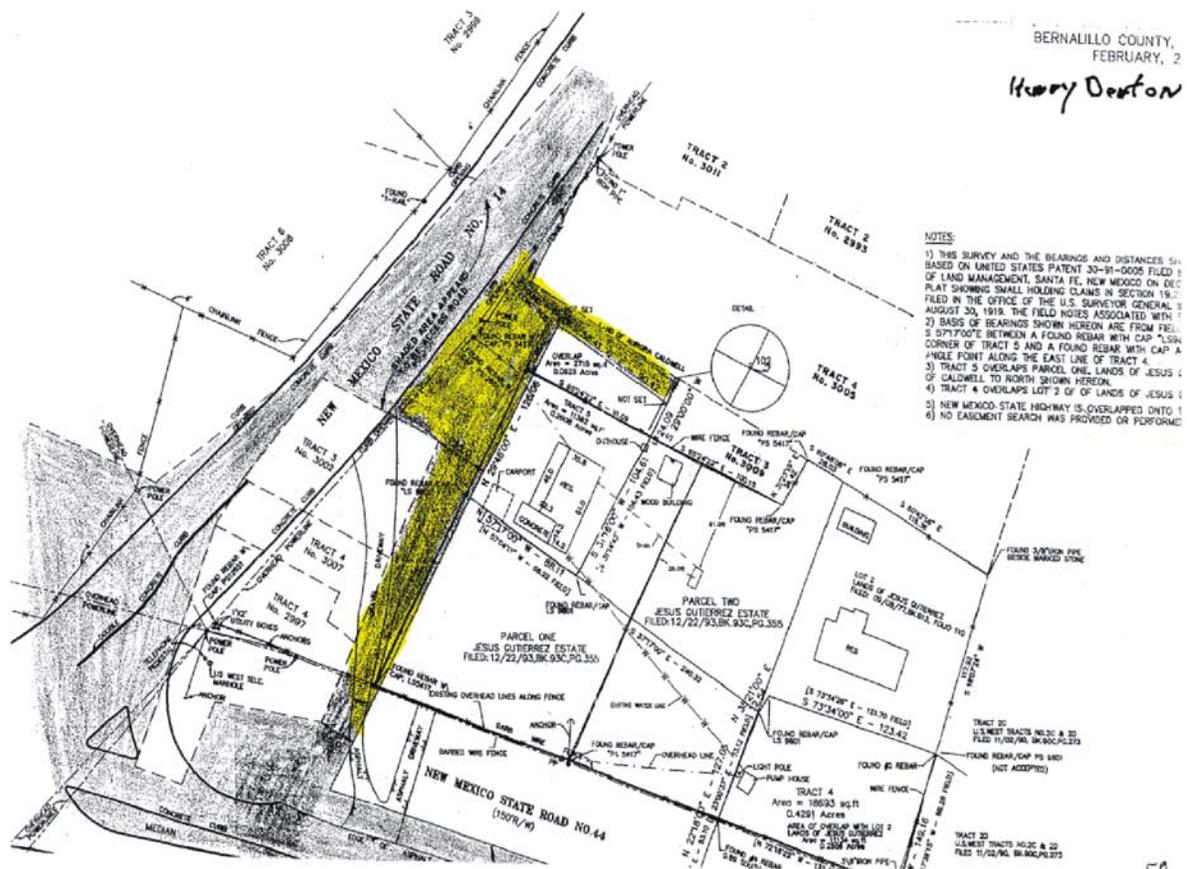
Believing that BLM owned a swath of land that once contained a road leading to State Highway 14 at the land's north end and to Frost Road at its south end (and therefore bordering the east side of Fry's property and the west portion of his own

¹ This SHC was patented to Deaton's predecessors in interest as small holding claims pursuant to the Act of Mar. 3, 1891, ch. 539, § 16, 26 Stat. 854, 861. See Statement of Reasons (SOR) at Exhibit (Ex.) 1 (U.S. Patent 30-91-0005, dated Dec. 18, 1990).

² These three SHCs were all conveyed out of Federal ownership on Dec. 30, 1902.

parcel), Deaton filed an application with BLM on February 23, 2010, requesting an ROW grant. The ROW would allow Deaton to construct a 500-foot long, 35-foot wide (0.40 acre) road in NW¹/₄SW¹/₄ of sec. 19 to access his property. See Administrative Record (AR) at 50-52.³

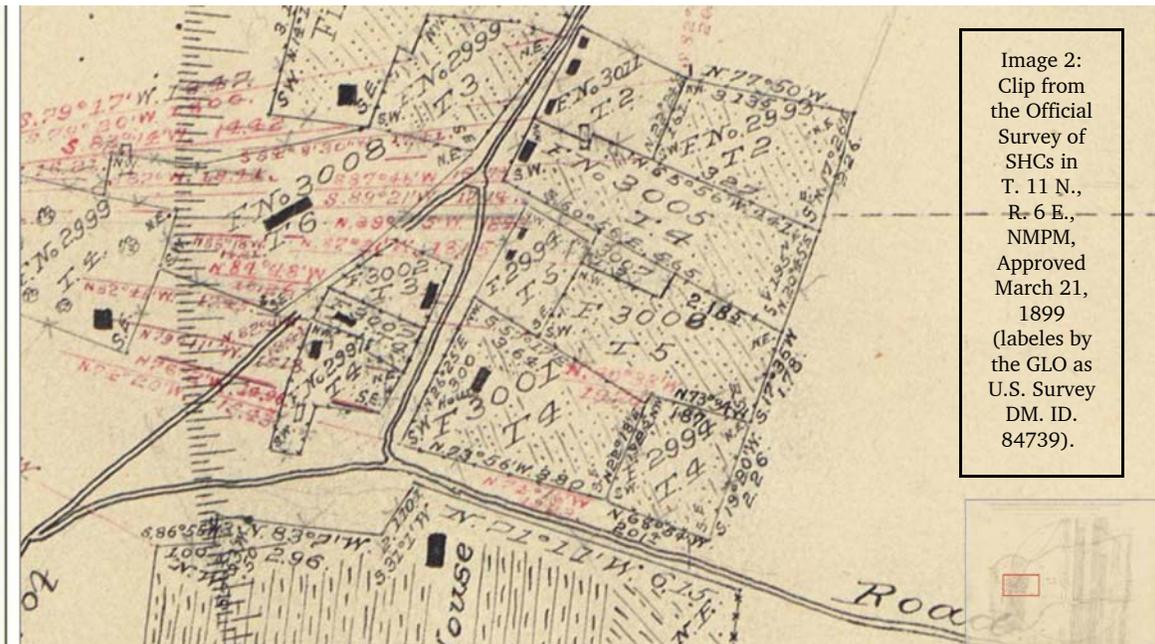
The application included a “Sketch of Intersection of [New Mexico State Road] 14 and [New Mexico State Road] 44 and Certain Small Holding Claims, Section 19, Township 11 North, Range 6 East, NMPM, Bernalillo County, New Mexico, February, 2007,” which was conducted by Hall Surveying Company (Hall/Deaton Sketch). See AR at 52; see also SOR at Ex. 6 (clearer, complete copy). The Sketch is reproduced below:



³ All AR page numbers identified in this Order are hand-paginated.

The Hall/Deaton Sketch depicts Fry's property as an island surrounded by what "appears to be access road." Fry's property borders in that Sketch State Road 14 to the west, Frost Road to the south, and the northern boundary is split between State Road 14 (northwest side) and the property presumed to be Federal land within the jurisdiction of BLM (northeast side). Fry's entire eastern boundary is shown to abut a vertical sliver of public lands. The purported BLM lands, highlighted yellow, expand north from Fry's property, with State Road 14 to the west and Deaton's property to the east and then cut directly east between Deaton's property and the southern boundary of SHC 3005, Tract 4 (Caldwell property).

The Hall/Deaton Sketch is based on an Official U.S. Survey (labeled by the General Land Office (GLO) as DM. ID. 84753), which is a supplemental "plat showing small holding claims in section 19, 20, 29, and 30, T. 11N, R. 6E, N.M.P.M. filed in the Office of the U.S. Surveyor General in Sante Fe, N.M. on August 30, 1919 [and] the field notes associated with said survey." SOR at Ex. 6 (notes section of sketch).



This supplemental amended plat of survey,⁴ conducted by Wendell V. Hall under instructions dated July 3, 1914, Group No. 37, and accepted on August 17, 1920 (herein referred to as the 1920 Survey), depicts the area described in the Hall/Deaton Sketch as the northern portion of lot 20 and the southern area of lot 27.

⁴ Unless otherwise specified, images of the U.S. surveys, corresponding field notes, and patents discussed herein are available at <http://www.glorerecords.blm.gov/>.

Lot 20 is a 42.18-acre parcel located in the W $\frac{1}{2}$ SW $\frac{1}{4}$, T. 11 N., R. 6 E., NMPM. See BLM LLD Acreage Report.⁵ Lot 20's northern boundary is highly irregular; from west to east, the lot's northern border includes at least 20 angle points. It also depicts lot 20's northern boundary as completely surrounding SHC 2997, Tract 4, SHC 3007, Tract 4, and SHC 3002, Tract 3 (what is now known as the Fry property). See the 1920 Survey. The northeastern portion of lot 20 connects to lot 27's southern boundary. Lot 27 lies in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 19, T. 11 N., R. 6 E., NMPM, directly northwest from Fry's property, shares a border with Deaton's northern boundary and a portion of SHC 3005, Tract 4's (Caldwell property) southern and entire western boundaries. This lot consists of 1.07 acres. These lots are demarcated from one another by a projected sub-divisional east/west center line, which is illustrated on the 1920 survey by a dashed horizontal line.

Moreover, the supplemental amended plat retraced the western boundaries of SHC 2994, Tract 5 (Deaton's property) and SHC 3001, Tract 4 (Estate of Jesus Gutierrez)⁶ to ascertain the direction and length of lines and to identify the monuments and other marks made during an earlier official survey of SHCs in T. 11 N., R. 6 E., NMPM, approved March 21, 1899 (labeled by the GLO as U.S. Survey DM. ID. 84739). See Field Notes for 1920 Survey of Small Holding Claims in T. 11 N., R. 6 E., NMPM, NM Vol. 0072 (Book E) at 42-43, 60. It is the field notes from the 1899 Official U.S. Survey, surveyed by Hiram T. Brown under contract No. 300, which clearly confirm that an unnamed road served as the eastern border of SHC 2997, Tract 4, SHC 3007, Tract 4, and SHC 3002, Tract 3 (Fry's property) and the western borders of SHC 2994, Tract 5 (Deaton's property) and SHC 3001, Tract 4 (Jesus Gutierrez Estate).⁷

The Master Title Plat (MTP), Supplement, secs. 19, 30, T. 11 N., R. 6 E., NMPM, undated, shows lot 27 as unappropriated public lands and states that lot 20 was patented out of Federal ownership in 1922 (U.S. Patent No. 87-82-0005 – Epifanio Garcia). This conveyance is noted on the Historical Index (HI) as occurring

⁵ We derived this information from BLM's online public land records database (LR2000), <http://www.blm.gov/lr2000/index.htm> (last visited on Mar. 14, 2012), as well as a Dependent Resurvey, DM. ID. 276029, approved Feb. 19, 1914, and accepted Sept. 6, 1917.

⁶ This property lies directly south of Deaton's parcel and east of Fry's property. In the 1920 survey, a vertical stretch of unappropriated lands separate these properties from one another.

⁷ See 1899 Original U.S. Survey Field Notes for Small Holding Claims in T. 11 N., R. 6 E., NMPM, NM Vol. S2138 (Book C) at 7 (SHC 3001, Tract 4), 12 (SHC 2994, Tract 5), 51 (SHC 2997, Tract 4), 58 (SHC 3007, Tract 4), and 62 (SHC 3002, Tract 3).

in sec. 19, but the patent itself conveys lot 20 of section 19, T. 11 N., R. 6, E., “*of the Montana Meridian, Montana.*”⁸ We could not locate a corrected patent describing lot 20 in the same section, town, and range in New Mexico.⁹

⁸ The patent was filed for record in Bernalillo County, New Mexico on Sept. 27, 1988. The patent reads in pertinent part:

Santa Fe 07861 [land office and application number]

The United States of America,
To all to whom these presents shall come, Greeting:

Whereas, a Certificate of the Register of the Land Office at *Santa Fe, New Mexico*, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862 [Homestead Act of 1862, 12 Stat. 392, formerly codified as 43 U.S.C. § 161], “To Secure Homesteads to Actual Settlers on the Public Domain,” and the acts supplemental thereto, the claim of EPIFANIO GARCIA has been established and duly consummated, in conformity to law, for the Lot twenty of Section nineteen in township eleven north of Range six east of the *Montana Meridian, Montana*, containing forty-two acre and eighteen hundredths of an acre,

according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General:

And know ye, that there is, therefore, *granted* by the United States unto the said claimant *the tract of land above described*

(Emphasis added). Those lands, as described in the patent, were withdrawn from entry for National Forest lands pursuant to the authority delegated by Congress to the President, 26 Stat. 1103 (Mar. 3, 1891). There is no evidence from the public land records we are able to access electronically that the Department ever declared these lands as agricultural lands open to homestead entry (the Forest Homestead Act, 34 Stat. 233 (June 11, 1906), formerly codified at 16 U.S.C. §§ 506-509, authorized homestead entries for lands within national forests). This patent is not listed on the HI for this township, range, state, and meridian.

⁹ Before Congress enacted the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2006), various acts authorized the Department to correct legal description errors made in a patent. *See, e.g.*, 35 Stat. 645 (Feb. 24, 1909) (“An Act to permit change of entry in cases of mistake of the description of

(continued...)

BLM serialized Deaton's ROW application as NMNM 124402 and issued the grant ¹⁰ by decision dated May 5, 2010: "By this instrument, the holder Henry Deaton, . . . receives a right to construct, operate, maintain, and terminate a 35' wide x 500' long access road to his individual residence shown on drawing ([Hall/Deaton Sketch]) on public lands . . . described as sec. 19, T. 11 N. R. 6 E., NMPM, unpatented SHC 2994, Tract 5 . . . containing 0.29 acres."¹¹

On June 15, 2010, BLM received a letter from Fry, through counsel, who informed the agency that Fry owns the lands Deaton highlighted on the Hall/Deaton Sketch (except the portion directly north of his property), delineated as the northeastern portion of patented lot 20, and therefore "BLM had no legal right to issue the [ROW] to Mr. Deaton. The [ROW] is in violation of Ms. Fry's [property] rights We hereby request that the BLM immediately revoke the [ROW] and take such additional corrective action as is necessary." AR at 19.

In support of her ownership rights, Fry supplied to BLM a September 1998 private boundary survey of her property, completed by Thomas W. Patrick, of

⁹ (...continued)

tracts intended to be entered"), later codified at 43 U.S.C. § 697 (1925), repealed by FLPMA. Under section 316 of FLPMA, "[t]he Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands." 43 U.S.C. § 1746 (2006). That authority is discretionary and has no statute of limitations. 43 C.F.R. § 1865.0-1. By regulation, *errors in patents* consist of:

the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law.

43 C.F.R. § 1865.0-5(b). Accordingly, the Secretary is empowered to correct errors that result in a party receiving title to the wrong lands. *See generally Ray M. Chavarria*, 165 IBLA 161, 181 (2005).

¹⁰ BLM granted the ROW pursuant to section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (2006), which authorizes BLM, as the Secretary's designate, to issue an ROW over, upon, under, or through public lands for roads, trails, or other means of transportation.

¹¹ The record is unclear why BLM identified the land embraced by the ROW grant as "unpatented SHC 2994, Tract 5."

Southwest Surveying Co., Inc. (Patrick/Fry Survey). It shows that her property is “bounded on the North by land of Eusebio Caldwell; East by land of Jesus Gutierrez; South by the Northerly line of State Highway No. 44 (Frost Road); West by the Easterly line of State Highway No. 1[4].” *Id.*; see SOR at Ex. 8 (Patrick/Fry Survey). Thus, this private survey shows that there is no land between the boundaries of Fry’s property and the adjoining properties to her east and to her north. See AR at 20.

Fry claims that her property boundary was defined by a New Mexico State court quiet title action issued in 1973. On July 20, 1972, Fry’s predecessors in interest filed a complaint in the Bernalillo County District Court, claiming to be “the owners in fee simple title” of, *inter alia*, lands legally described as:

PARCEL #1

A certain tract of land [containing 0.406 acres] situate in San Antonito, Bernalillo County, New Mexico, being portions^[12] of Small Holding Claim No. 2997, Tract 4, Small Holding Claim No. 3002^[13] Tract 4, and Small Holding Claim No. 3002, Tract 3, within Section 19, Township 11 North, Range 6 East, N.M.P.M., Bernalillo County, New Mexico, being bounded on the North by land of Eusebio Caldwell; East by land of Jesus Gutierrez; South by the Northerly line of State Highway No. 44 (Frost Road); West by the Easterly line of State Highway No. 1[4]; and being more particularly described by survey made by New Mexico Surveying Company as follows:

Beginning at the southwest corner of the tract herein described, said corner being the point of intersection of the Easterly line of State Road No. 1[4] and the Northerly line of State Road No. 44 (Frost Road) a highway Right-of-Way Marker (T-Rail) in place and running thence along the Easterly line of State Road No. 1[4] for the next three courses, N. 47° 14' E., 99.20 feet; thence N. 46° 27' E., 87.50 feet; thence N. 40° 40' E., 72.30 feet to the Northwest corner; thence S. 63° 07' E., 42.45 feet to the Northeast corner; thence S. 28° 32' W., 227.84 feet to the Southeast corner, a point on the Northerly line of State Road 44; thence following said Northerly line of said road N. 71° 50' W.,

¹² These parcels initially comprised approximately 0.6 acres. See U.S. Survey No. 84736 Field Notes for Small Holding Claims NM Vol. S2138. The western portions of these SHCs presumably were consumed by the width expansion of State Highway 14.

¹³ Given the other details about this parcel, it appears certain that the court and the parties intended to identify SHC 3007.

118.16 feet to the Southwest corner, being the point of beginning and containing 0.406 acres.

AR at 8 (*Gutierrez v. Gurule*, No. 7-72-04152 (Mar. 2, 1973)). The Gutierrezes' chain of title to these lands is not explained in the complaint, the final decree, or anywhere else in the record before us.

Plaintiffs named, among many others, Epifanio Garcia as a defendant. Garcia was the heir of Jose Crestino Garcia, the patentee of SHC 2998, Tract 1, to which plaintiffs also laid a partial claim (Parcel #3). Lot 20 was never mentioned by name in the complaint. The Gutierrezes also joined the Government as a defendant “pursuant to Title 28, U.S.C. 2410, by virtue of that certain mortgage from [other named defendants], to [the] Small Business Administration.”¹⁴ AR at 2 (Complaint at 2). The property that secured the lien covered 3.037 acres and was situated south of the lands now owned by Fry. See SOR at Ex. 9 (Mortgage). The record also contains a disclaimer in which “the Defendant, UNITED STATES OF AMERICA, [] hereby disclaims any right, title or interest in and to Parcel[] number 1 . . . and consents to the entry of judgment with respect to said parcel[.]” AR at 2 (*Gutierrez v. Gurule*, No. 7-72-04152, Disclaimer dated Feb. 23, 1973). While BLM’s public land records database (LR2000) denotes that the agency serialized this disclaimer as NMNM 126634, this action does not appear in the HI. Nor does the record indicate whether this apparent disclaimer was ever recorded in the Bernalillo County clerk’s office.

The State court quieted title in plaintiffs. The court’s judgment held that the named defendants in that action “are barred and forever estopped from having or claiming any lien upon or any right, title or interest in and to said premises and real estate adverse to the Plaintiffs and Plaintiffs’ title in and to said real estate be and the same hereby is forever quieted and set at rest.” AR at 8 p. 3.

Upon receiving this information from Fry, BLM wrote to Deaton, through counsel, and informed him that the agency was

¹⁴ The statute at 28 U.S.C. § 2410(a) states that, “for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, *or in any State court* having jurisdiction of the subject matter— (1) to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien. . . . [S]ervice upon the United States shall be made by serving . . . a copy of the complaint upon the United States attorney for the district in which the action is brought.” Emphasis added. Thus, Congress waived the Government’s sovereign immunity so that it could be named as a defendant in certain state-law property actions where the United States claims a security on the property.

in the process of reviewing the validity of a [ROW] access road . . . located in 11 N., R. 6 E., NMPM, sec. 20,¹⁵ unpatented lands stemming from New Mexico State Hwy 44 and adjacent to New Mexico State Hwy 14, Bernalillo County, New Mexico. This segment of old access road has been abandoned for many years. The BLM, Cadastral Survey, is in the process of reviewing the subject lands to determine the current status of the adjacent lands in question.

In order to clear this access issue, it is important that the BLM complete a survey and identify any public lands that are adjacent to private lands.

AR at 30 (Letter from BLM to Deaton, dated July 6, 2010).

The record contains a Request for Cadastral Survey, dated June 22, 2010. BLM stated in that request that an official survey is needed to “settle a dispute with two potential trespass landowners. BLM has been directed to resolve the trespass issue,” and that a survey would “attempt to settle a long running color-of-title dispute. There is an old existing road that separates the two properties in question. (Sand[ra] Fry vs Henry Deaton).” AR at 27. BLM subsequently sent its branch of cadastral survey “supporting maps and plats to survey a parcel of land in T. 11 N., R. 6 E., sec. 19, unknown lot.” AR at 7 (BLM memorandum dated June 28, 2010). BLM attached to its memorandum a copy of the Patrick/Fry Survey as well as a copy of the 1899 Official U.S. Survey, with the disputed portion highlighted in yellow and captioned “BLM unknown lot.” AR at 3, 4, 40. In the memorandum’s closing, BLM asked the branch to “[p]lease inform us of an approximate completion date for this request.” AR at 7. The case file contains no evidence of any response. Nor did BLM ever commission or perform an official resurvey of the lands at issue.

The record contains another private survey commissioned by Deaton and conducted by Harris Surveying, Inc., dated December 2010, titled “Boundary Survey of BLM Road Easement within Section 19, T. 11 N., R. 6 E., N.M.P.M., Sandia Park, New Mexico” (Harris/Deaton Survey). AR at 15. This plat of survey, filed with the Bernalillo County Clerk’s office on December 28, 2010, states that BLM owns the area surveyed and that “no property lines are being added, deleted or moved.” The plat describes BLM’s land, a 0.3456-acre parcel, as “beginning at the southeast corner,” which is a “point on the northerly line of Frost Road,” then running west “along the northerly line of Frost Road . . . to the southwest corner,” then traveling north along the eastern line of SHC 2997, Tract 4, SHC 3007, Tract 4, and SHC 3002, Tract 3 (Fry’s property), “thence continuing along the easterly line of New Mexico State Highway No. 14 . . . to the northwest corner,” with SHC 3005, Tract 4 (Caldwell

¹⁵ We presume BLM meant sec. **19**.

Property) to the immediate north, then east to the northeast corner, then south to an angle point, then west to another angle point, and then south along the western border of Deaton's property and property owned by the heirs of Jesus Gutierrez to the southeast corner – the place of the beginning. Again, this surveyor used “BLM plats and field notes from [the] 1896 survey” to establish the boundary. The Harris/Deaton Survey mirrors the Hall/Deaton Sketch, the document on which the ROW grant's land description is based.

On July 14, 2011, BLM revoked Deaton's ROW grant. The agency explained that it received notification from Fry's attorney, which “state[d] the land we issued the ROW on was private land. In researching court records we have found these lands are not within the jurisdiction of the BLM according to a decree from 1972.^[16] Therefore, ROW NMNM 124402 is terminated This ROW termination is in accordance [with] . . . 43 CFR 2807.17.”¹⁷ Deaton appealed.

II. Arguments of the Parties

Deaton contends that BLM erred in terminating the ROW because the lands over which BLM granted the ROW are public lands. The 1973 State quiet title decree did nothing to remove land from the Federal Government's ownership, argues Deaton, because only a Federal court, not a state court, has the exclusive jurisdiction pursuant to the Quiet Title Act, 28 U.S.C. § 2409a(a) (2006), to quiet title in lands the Government claims as its own. *See* SOR at 6-7. Consequently, he argues that the

¹⁶ BLM most likely was referring to the 1973 quiet title final decree issued in *Gutierrez v. Gurule*, No. 7-72-04152.

¹⁷ Under section 506 of FLPMA, 43 U.S.C. § 1766, BLM is authorized to terminate an ROW grant for “noncompliance with any . . . condition of the right-of-way.”

Section 506's implementing regulation, 43 C.F.R. § 2807.17, states in relevant part:

(a) BLM may suspend or terminate your grant if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant (such as rent payments), or if you abandon the right-of-way.

(b) A grant also terminates when:

(1) The grant contains a term or condition that has been met that requires the grant to terminate;

(2) BLM consents in writing to your request to terminate the grant; or

(3) *It is required by law to terminate.*

(Emphasis added.)

1973 final decree is void as against the lands described in his terminated ROW grant. He requests reinstatement of his ROW grant. *Id.*¹⁸

On appeal, BLM does not deny that lands embraced by the now-terminated ROW grant may have been public lands but retorts that it “properly relied upon the state court’s determination of the status of the land and revoked Appellant’s ROW upon concluding that the BLM did not hold title to the entire ROW area.” Answer at 1. It avers that “[e]xamining the state court’s authority to issue a decree determining title to the subject land is outside the purview of the BLM,” that “[t]he current dispute regarding the status of the ROW area is actually a private dispute between Appellant and the adjacent land owner, Sandra Fry,” and that BLM has no interest in inserting itself into a private title controversy granting an ROW on lands a

¹⁸ Deaton also complains that BLM failed to provide him adequate due process as required by the Fifth Amendment to the U.S. Constitution. See SOR at 9. Since the ROW grant was a property right, Deaton claims, without citing any legal authority, that BLM was required to discuss with him the basis for termination before actually revoking his grant. See *id.* “This Board has long held that it is not the proper forum for deciding constitutional questions.” *Mark Patrick Heath*, 175 IBLA 167, 196 (2008) (citing *Rainer Huck*, 168 IBLA 365, 400 (2006); *Fred E. Payne*, 159 IBLA 69, 80 (2003); *Carey Horowitz*, 138 IBLA 330, 345 (1997); *Laguna Gatuna, Inc.*, 131 IBLA 169, 173 (1994); *Organized Sportsmen of Lassen County*, 124 IBLA 325, 330 (1992); *Slone v. Office of Surface Mining Reclamation & Enforcement*, 114 IBLA 353, 357-58 (1990)). As in *Heath*, we will not address appellant’s constitutional due process argument.

We will, however, briefly review the Department’s adherence to certain procedures required under FLPMA and Departmental regulations. Section 506 of FLPMA, 43 U.S.C. § 1766, governing termination procedures of ROW grants requires BLM to give the grantee notice and an opportunity to cure noncompliance with the grant’s terms, conditions, stipulations, or applicable law, within a reasonable time, before cancelling the ROW. See 43 C.F.R. § 2807.18(a). In this case, BLM wrote to Deaton on July 6, 2010, informing him that the agency was investigating whether the United States owned the lands over which the ROW grant traversed. AR at 30. This information put Deaton on notice that the property underlying his ROW may not be Federally owned, and thus, that the grant may be void. Deaton took the opportunity to then submit to BLM the Harris/Deaton Survey to show that the Government continued to hold title to those lands and that his grant should not be rescinded. See AR at 15.

In addition, Deaton had and availed himself of the opportunity to challenge BLM’s decision before the Board, which has afforded him independent review of the decision. See *Hoyle v. Babbitt*, 129 F.3d 1377, 1386 (10th Cir. 1997); *Christopher L. Mullikin*, 180 IBLA 60, 73 (2010); *Dvorak Expeditions*, 127 IBLA 145, 151 (1993); *Coachella Valley Water District*, 85 IBLA 389, 392 (1985).

New Mexico state court decreed to be private.” *Id.* at 1-2. According to BLM, the fact that the State court found the property of Fry’s predecessors in interest entirely bordered to the north and east by private property justified its conclusion that it does “not hold title to the entire ROW area,” and, consequently, that it properly revoked the ROW grant. *Id.* at 1.

In her answer, Fry also maintains that BLM properly terminated Deaton’s ROW grant,¹⁹ arguing that the United States disclaimed in State court any interest in any lands it may have owned to the east and north of Fry’s property. *See* Fry Answer at 3. Such a disclaimer of interest is safe from any collateral attack or claim of sovereign immunity, argues Fry, because of the well-recognized “*res judicata* rule of finality of judgments.” *Id.* at 4. Moreover, Fry’s predecessors in interest filed the 1972 complaint in State court three months before the Quiet Title Act came into effect and therefore the Federal statute had no bearing on the final decree’s current validity – the State court correctly had subject matter jurisdiction over the parties in 1972 and its judgment is binding on the United States. *See id.*

III. Discussion—Lots 20 and 27 Remain Public Lands

The issue presented in this case is whether BLM reasonably determined the basis for its decision to terminate the ROW—that it has no jurisdiction over the lands embraced by the ROW—and whether that determination is supported in the record. As we show in the pages that follow, the record before us does not support BLM’s decision to revoke Deaton’s ROW grant.

BLM has broad discretionary authority under Title V of FLPMA to approve or disapprove FLPMA ROW applications. *Graham Pass, LLC*, 182 IBLA 79, 87 (2012) (citing *Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Tom Cox*, 142 IBLA 256, 257 (1998)). “[I]t is incumbent upon [BLM] to ensure that its decision is supported by a rational basis which is explained in the written decision and is substantiated by the administrative record accompanying the decision.” *Mark Patrick Heath*, 181 IBLA 114, 128 (2011). While the burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis, failed to give due consideration to all relevant factors, or that BLM’s decision is otherwise unsupported by the record, this Board will set the decision aside when the record shows no rational connection between the facts found and the choice made. *See, e.g., id.*; *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93, 104 (2008). Because BLM’s principal reason for its decision is not supported by the record, we set it aside and remand it to the agency for appropriate action.

¹⁹ Along with her answer, Fry filed a request for intervenor status on Oct. 27, 2011. That request is granted in light of Fry’s interest in the outcome of this case.

In effect, BLM declared the ROW grant null and void *ab initio* because the agency believed, based on the State court final decree, the permitted land use embraced private lands, which are not subject to FLPMA. Section 501(a) of FLPMA provides general authority for BLM to grant ROWs for roads on “public lands.” 43 U.S.C. § 1761(a) (2006); *see* 43 C.F.R. § 2802.10(a). “Public lands” is defined by the statute as “any land and interest in land owned by the United States.” 43 U.S.C. § 1702(e). According to BLM, the lands in dispute passed out of Federal ownership pursuant to a 1973 final State court decree, Deaton’s ROW grant did not relate to the use of public lands, and therefore BLM had no authority to grant an application for use of such land in the first instance. Because BLM essentially contends that it never issued a valid ROW grant under Title V of FLPMA, it reasons that it could not terminate the grant within the meaning of its implementing regulations permitting termination when required by law. *See* 43 C.F.R. § 2807.17(b)(3).²⁰

[1] BLM seems to disclaim any obligation or authority to determine the status of alleged public lands. However, as Justice Lamar, who had previously served as Secretary of the Interior, stated in *Knight v. United Land Ass’n*, 142 U.S. 161, 181 (1891): “The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.” Thus, the Secretary, and BLM and this Board by designation, have both the authority and the duty to determine questions concerning the extent of the Department’s interests in real property. *See Mallon Oil Co.*, 104 IBLA 145, 150 (1988) (citing *City of San Antonio, Texas*, 65 IBLA 326, 330-31 (1982)); *State of Montana*, 11 IBLA 3, 13, 80 I.D. 312, 316-17 (1973)); *see also Cameron v. United States*, 252 U.S. 450, 460 (1920); 43 U.S.C. §§ 2, 52, 751-53, 772 (2006) (authorizing the Department to consider what lands are public lands). As the propriety of BLM’s decision to declare Deaton’s ROW grant void *ab initio* obviously depends on whether the United States has any property interest in which an ROW could be granted, we turn to the question of title.

The record shows that lot 20 and lot 27 were not originally a part of SHCs 2997, Tract 4, 3002, Tract 3, and/or 3007, Tract 4. The patents for these three SHCs

²⁰ The technical distinction between a grant that terminates by operation of law and an agreement that was void upon its inception is important for at least one reason: rental payments collected by BLM pursuant to an invalid ROW grant are refundable. *See* 43 U.S.C. § 1734(c) (“[i]n any case where it shall appear to the satisfaction of [BLM] that any person has made a payment under any statute relating to . . . public lands which is not required . . . by applicable law and the regulations issued by the Secretary, [BLM], upon application or otherwise, may cause a refund to be made from applicable funds”); *ST Services*, 169 IBLA 207, 211-12 (2006).

conveyed lands only as described by the 1899 original survey and corresponding field notes. See Act of Mar. 3, 1891, ch. 539, § 16, 26 Stat. 854, 861; *Tracy V. Rylee*, 174 IBLA 239, 245 (2008) (citing *Timothy J. Bottoms*, 150 IBLA 200, 217 (1999)); see also *United States v. Reimann*, 504 F.2d 135, 140 (10th Cir. 1974) (holding that the last accepted survey prior to the issuance of a patent controls the location of the conveyed lands). All three SHCs were patented in 1902, and the boundary lines of those lands, as illustrated by the 1899 original survey (the accepted survey in effect at the time of conveyance) clearly shows interstitial, unappropriated public land north of SHC 3002, Tract 5, east of SHCs 3002, Tract 3, 3007, Tract 4, and 2997, Tract 4, and west of SHCs 2994, Tract 5 and 3001, Tract 4. We find no evidence that either the respective patentees, their heirs, or their devisees ever lodged a complaint with the Department regarding the correctness of the description of their patented lands. Thus, the record shows that the United States still held fee title to those interstitial lands, lots 20 and 27, at the time these SHCs were conveyed out of Federal ownership.

In 1922, the United States purportedly conveyed some of those interstitial lands contained in lot 20 out of Federal ownership. Unfortunately, the conveying instrument's land description fails to describe the actual land in controversy: It describes land in Montana, not New Mexico. Thus, this instrument, on its face, does not pass title to land in New Mexico.²¹ It is self evident that, regardless of what is recorded in the public land records, a properly-executed patent from the United States conveys title only to land described in that conveyance document. *Beau Hickory*, 160 IBLA 166, 184 (2003) (holding that title to public lands is granted by patent, not by the status reflected in land records) (citing *Hudson Investment Company*, 17 IBLA 146, 170, 81 I.D. 533, 545 (1974)); see 43 C.F.R. § 1810.3(c) ("Reliance . . . on records maintained by land offices cannot operate to vest any right not authorized by law."). Consequently, the lands in lot 20, due to a land description error in the patent, were public lands when the Gutierrezes filed their quiet title action in State court.

In 1972, the Gutierrezes filed their complaint with the district court of Bernalillo County because "the real property which is the subject matter of this cause is situated in the County of Bernalillo, in the State of New Mexico." AR at 2. The complaint stated that the United States only claimed a security interest in the disputed lands. Nothing therein indicated that the plaintiffs attempted to affirmatively litigate the question of the Government's title interest in that property.

²¹ Nor does the patent pass title to lands in Montana because the Santa Fe land office lacked the authority to convey lands outside its district. See *Alaska Placer Claim*, 34 L.D. 40, 41 (1905) ("The officers of a land district have no jurisdiction or control over lands outside the limits of their district. . . . [T]here is no authority of law for the officers of one land district to dispose of land lying in another district.")

Then the State court issued the 1973 final decree, which declared, without explanation, that the plaintiffs possessed fee simple title status over, *inter alia*, Parcel 1, which includes Federal lands.²² However, the attempt, implicitly or explicitly, by the State court to determine and dispose of the United States' rights to Federal lands is simply without effect.

[2] Before Congress passed the Quiet Title Act on October 25, 1972, neither a state court nor a Federal court could adjudicate a claimant's property rights as against the United States (unless the United States voluntarily brought a quiet title or similar action) because of the bar of sovereign immunity. The Department, as authorized by Congress, had exclusive jurisdiction over disposing of the public domain. As early as 1906, the Department determined that a state court judgment related to Federal lands is not binding upon the Department "as to the question of title to such right and of all matters determined by said court in that proceeding." *J.G. Parker*, 35 L.D. 123, 128 (1906); see *United States v. Lee*, 106 U.S. 196, 248 (1882) (holding that, except in instances of unconstitutional action, the United States can only be sued as a party defendant if the government consents to suit or Congress has provided for consent by statute); *Watson v. Moore, Assignee of Watson*, 50 L.D. 321, 322 (1924) ("It is settled law that until patent issues, title to public lands under any of the homestead laws remains in the United States The State courts are accordingly without jurisdiction to vest or divest title until . . . title passes from the United States to the entryman or his assigns.").

The law regarding a state court's jurisdiction over the disposition of public lands has remained unchanged. The Quiet Title Act, 28 U.S.C. § 2409a, provides the exclusive basis for jurisdiction over suits challenging whether the United States holds title to real property. *Block v. North Dakota*, 461 U.S. 273, 286 (1983); see 28 U.S.C. § 1346(f) (stating that Federal district courts "have exclusive original jurisdiction of civil actions under [28 U.S.C. §] 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States"); *The Wilderness Society v. Kane County, Utah*, 581 F.3d 1198, 1219 (10th Cir. 2009), *rev'd en banc on other grounds*, 632 F.3d 1162 (10th Cir. 2011); see also *Herbertson v. Iliff*, 108 N.M. 552, 554, 775 P.2d 754, 756 (1989) (holding that New Mexico state court had no jurisdiction over dispute regarding title to public lands); *U.S. v. Marvin C. Ramsey*, 14 IBLA 152, 154 (1974). Although a state court under § 2410 may consider a case

²² As previously described, Parcel 1 more likely than not includes the northern portion of lot 20 and the southern area of lot 27, sec. 19, T. 11 N., R. 6 E., NMPM. Compare the Patrick/Fry Survey, *i.e.*, the survey commemorating Parcel 1's legal description, *with* both the Hall/Deaton Sketch and the Harris/Deaton Survey as well as the U.S. plats of survey and corresponding field notes discussed above. However, without an official resurvey of the disputed property, there is no way of determining the exact overlap.

involving real or personal property on which the United States has or claims a mortgage or other lien, Congress did not consent in that provision to suits against the United States where the United States claims a title interest as distinguished from a lien interest. See *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291, 292 (9th Cir. 1973) (per curiam) (holding that the statute providing that the United States may be named a party in a suit to quiet title to property on which the United States has or claims a mortgage or other lien does not constitute consent to quiet title action against the United States where the United States claimed a title interest). Thus, the 1973 State court final decree is a nullity to the extent that it purported to convey Federal lands to the Gutierrezes.

Nor can we find that the Government's disclaimer in the State quiet title action functions as a blanket waiver of sovereign immunity or a blanket disclaimer of interest to the public lands described in Parcel 1. As previously noted, the United States was named as a defendant in State court pursuant to 28 U.S.C. § 2410(a), which applies to actions "to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." This statute, which waives the Government's sovereign immunity, "will be strictly construed, in terms of its scope, in favor of the sovereign." *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (citation omitted); see *Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995) ("[A] waiver of sovereign immunity . . . may not be extended beyond the explicit language of the statute."). Thus, the scope of any claim of waiver of sovereign immunity, including the matter before us, must be strictly construed, within the meaning of the Federal statute, in favor of the sovereign.

In so doing, we find that the statute only granted the State court jurisdiction over the Government with respect to the Small Business Association mortgage and therefore the United States' disclaimer extends only to the security interest the Government may have had in those lands, not to actual legal title.²³ See *McEndree v. Wilson*, 774 F.Supp. 1292, 1295 (D. Colo. 1991) (recognizing "that the words 'quiet title' in 28 U.S.C.A § 2410(a)(1) . . . cover[s] a suit to remove a cloud on title" and not a suit to establish fee title to property) (internal citations omitted). Consequently, the disclaimer only operates to estop the United States from asserting an interest in or the ownership of lands for the purpose of satisfying an unsettled debt. It does not prevent BLM from claiming a title interest in the land.

Moreover, the United States' appearance in those State court proceedings did not, by itself, serve to waive sovereign immunity against any other legal claim that might have been presented or adjudicated in that case. See *Governor of Kansas v.*

²³ In New Mexico, a mortgage is merely a lien and does not convey title to the mortgaged property. See N.M. Stat. Ann. § 48-10-8 (1953 Comp.); *Texas Am. Bank/Levelland v. Morgan*, 105 N.M. 416, 417, 733 P.2d 864, 865 (1987).

Kemphorne, 516 F.3d 833, 845-46 (10th Cir. 2008) (noting that the Federal government's appearance in court through its officers and agents does not waive the government's sovereign immunity). Fry's arguments to the contrary are unpersuasive.

IV. Conclusion

It is not our task in this appeal to determine whether Deaton has a valid ROW grant or where lot 27 exists on the ground. Nor is it our role to correct the patent for lot 20. The propriety of BLM's decision to terminate Deaton's ROW grant was our focus. Because the record fails to support the decision, we set it aside and remand the matter for further review.²⁴

²⁴ Our analysis and conclusions do not prevent the agency from recognizing, based on appropriate evidence, that the United States inadvertently misdescribed in the 1922 patent the lands to be conveyed (*i.e.*, that the acreage amount stated on the U.S. Survey accepted on Sept. 16, 1917, and the patent are the same; that the patent was recorded on the HI for T. 11 N., R. 6 E., NMPM; that the Land Office at Santa Fe, New Mexico, and not the Land Office in Helena, Montana, issued the patent; and that the patent was filed with the Bernalillo County Clerk's office, etc.). If a corrected patent were deemed appropriate, then the cloud on lot 20's chain of title would be lifted, and the legal title to the originally-intended lands would be transferred out of U.S. ownership, effective from the date of the original patent. As a result, this Department would no longer have jurisdiction to adjudicate conflicting claims of title and interest between non-Federal parties. *See* 43 C.F.R. § 1865.3; *see, e.g., Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897) (*cited in City of Las Vegas*, 178 IBLA 377, 382 (2010)); *Gordman Leverich L.L.P.*, 177 IBLA 52, 60 (2009); *Ramona Lawson*, 159 IBLA 184, 190 (2003). Until then, Deaton's ROW grant cannot correctly be declared void *ab initio* on the basis that it traverses private lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge