INTERIOR BOARD OF LAND APPEALS

Reynold L. Allgood

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REYNOLD L. ALLGOOD

IBLA 96-474 Decided September 30, 1999

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying application to amend Indian Allotment Trust patents. IDI-31124.

Motion to dismiss denied; decision affirmed.

1. Indians: Lands: Allotments: Generally--Indians: Lands: Individual Trust or Restricted Land: Generally--Indians: Lands: Trust Patent

Statutory authority to amend an Indian Allotment Trust patent, pursuant to the Act of Jan. 26, 1895, as amended, 25 U.S.C. § 343 (1994), to correct a mistake in the land description terminates when an unrestricted fee simple patent to the land is issued to the heir of the original Indian allottee.

APPEARANCES: Reynold L. Allgood, pro se; Randall W. Robinson, Esq., Lewiston, Idaho, for intervenors.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Reynold L. Allgood has appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), IDI-31124, dated June 18, 1996, denying his application to amend Indian Allotment Trust patent Nos. 1417a and 1442a. The request was denied on the ground that the patents were correctly issued and are legally binding.

Individuals purporting to be "affected Indian landowners" have effectively sought to intervene in the present proceeding by filing their response to Allgood's statement of reasons for appeal (SOR). (Letter to Board, dated Aug. 6, 1996.) To the extent that these individuals own lands within the tract created by Indian Allotment Trust patent No. 1417a, adjacent to or near the southern boundary line at issue here, we find that the Board's decision on appeal may potentially affect their land ownership interests and that they have standing to intervene in this proceeding. See Garfield County, 147 IBLA 328, 336 (1999); Sierra Club ! Rocky Mountain Chapter, 75 IBLA 220, 221! 22 n.2 (1983).

The essence of this dispute is the proper placement of the boundary line between the patented Indian allotments of Thomas Powers (Kol-kar-tzat) (No. 1417a) and George Washington (Wap-tos-to-e-ma-lin) (No. 1442a) as they are situated in sec. 13, T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho, within the Nez Perce Indian Reservation. Allgood is a successor-in-interest to a portion of the tract of land patented to Washington and asserts that if "the patents are not amended to conform to century old lines of use, the Appellant will lose land * * * and a home and other improvements that cannot be feasibly moved from the site."

This is the second appeal brought by appellant related to the proper location of the Indian allotments. Appellant previously challenged the survey of the allotted tracts in an appeal of a BLM decision denying his protest to the dependent resurvey by which BLM determined the location of the NE corner of sec. 13, T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho. The description of the lands embraced in the allotment patents was tied to this corner. Many of the relevant facts are set forth in our prior decision, cited as Lorna L. Boykin, 130 IBLA 301 (1994), in which we affirmed the BLM decision denying the protest of the resurvey. Subsequent to our decision, BLM adjudicated appellant's request to amend the Indian Allotment Trust patents which led to the present appeal.

The relevant boundaries (including the meandered boundary along the left bank of the Middle Fork of the Clearwater River) and subdivisional lines in the eastern half of sec. 13 were originally surveyed by David P. Thompson, a U.S. deputy surveyor, in 1873. The field notes of the survey disclose that, while surveying a portion of the east boundary of the township, Thompson established the NE corner of sec. 13. It was this corner which was referenced in the metes and bounds descriptions of the tracts of land allotted in 1889 and then patented by the United States to Thomas Powers and George Washington on June 13, 1895, as a part of two Indian Allotment Trust patents (Nos. 1417 and 1442), issued pursuant to section 5 of the Act of February 8, 1887, as amended, 25 U.S.C. § 348 (1994). Both patented allotment parcels were described in part by metes and bounds tied to the NE corner of sec. 13. The land in patent No. 1417 was described as beginning at the NE corner and then running due west 20 chains, then 7.5 chains due south, then due east to the left bank of the river, then northeasterly along the meandered bank of the river to a point due south of the place of beginning, and finally due north to the place of beginning, containing 14.90 acres more or less. The land in patent No. 1442 was described as beginning at a point 20 chains west and 7.5 chains south of the NE corner of sec. 13 (also the southwestern corner of patent No. 1417) and then running due south to the left bank of the river, then northeasterly along the meandered bank of the river to a point due east of the place of beginning, and finally due west to the place of beginning, containing 24.64 acres more or less. The western boundary of the two parcels was the north-south center line of the NE¼ of sec. 13. Thus, the two patented allotments were separated by a common boundary line running east-west, with Powers' tract (No. 1417) to the north and Washington's tract (No. 1442) to the south.

Subsequently, on January 19, 1901, Edson D. Briggs, who had surveyed the two allotments prior to patent, 1/ stated in an affidavit that he had recently determined that the allotted land was erroneously described in the 1895 Trust patents with the result that the Powers barn fell within the Washington allotment. He noted that the error was reflected in the fact that the western boundary of the land in patent No. 1417 was described as 7.5, rather than 12.5, chains long. He stated that he had monumented the allotments on the basis of the 12.5-chain measurement and the allottees had located their improvements in reliance thereon. In conjunction with a request for correction of this error in their original patents, Powers and Washington relinquished the patents by instrument dated December 15, 1900. The Secretary of the Interior authorized the issuance of new patents on March 11, 1901. The original patents were canceled and new patents issued on May 17, 1901. Patent No. 1417a, encompassing 23.02 acres (more or less), was issued to Powers and patent No. 1442a, encompassing 16.52 acres (more or less), was issued to Washington. The only change in the description of the allotted land was that the western boundary of the land in patent No. 1417a was extended from 7.5 to 12.5 chains, with a corresponding decrease in the western boundary of the land in patent No. 1442a.

Many years later, BLM conducted a supplemental survey to describe the tracts embraced in the 1901 Trust patents in order to facilitate the patenting in fee of the Washington allotment to Philip Types, an heir of Washington. The survey, accepted on April 22, 1953, and officially filed on June 8, 1953, designated the land in Trust patent No. 1442a to be patented to Types as lot 21, containing 17.33 acres. The survey also designated the land in Trust patent No. 1417a, north of the land in Trust patent No. 1442a, as lots 19 and 20, containing 22.21 acres. A fee simple patent (No. 1140461) for lot 21 was issued to Types on August 24, 1953. He then conveyed that land on March 25, 1957, to Marion P. and Ruth B. McClelland, who proceeded to subdivide the land and convey portions thereof to various parties.

In 1972, after failing to find any physical or other evidence of the original corner set by Thompson in 1873, BLM dependently resurveyed the NE corner of sec. 13, reestablishing the corner by proportionate measurement and remonumenting it. The dependent resurvey was approved on October 3, 1973. Thereafter, BLM undertook in 1989 to resurvey the east- west boundary line between patented Indian allotment Nos. 1417a and 1442a at the request of the Bureau of Indian Affairs to determine the boundaries of the allotments and whether a trespass was occurring on the land still subject to Trust patent No. 1417a. Recovering the monument set during the 1973 dependent resurvey for the NE corner of sec. 13, BLM relied upon it in establishing that boundary line. Both ends of the line were remonumented. The survey was approved on May 31, 1991. See 130 IBLA at 305.

1/ No official record of the allotment surveys was found by BLM. Lorna L. Boykin, supra at 303 n.3.

During the course of the 1991 survey, Allgood and Lorna L. Boykin, both of whom were successors-in-interest to a portion of Indian allotment No. 1442a patented to Washington by virtue of deeds dated November 17, 1986 (Boykin), and November 28, 1989 (Allgood), protested BLM's proposed approval of that resurvey. As we stated in our prior decision, their objection to the amended patents is based on the fact that the recent resurvey (together with the prior resurveys) places the boundary line between the two patented parcels such that it encompasses land which they had long assumed belonged to them. Id. at 306. After noting that a patentee takes title to the land described in his patent, as then surveyed on the ground, since the patent incorporates the lines of the survey, see Cragin v. Powell, 128 U.S. 691, 696 (1888); Robert R. Perry, 87 IBLA 380, 384 (1985), we found the sole issue in the protest of the resurvey was whether the resurveys accurately retraced the lines of the original survey and thus allowed the correct placement of the boundary line between the parcels in accordance with that survey. 130 IBLA at 306. In this regard, we held that the contention that Briggs erred in recommending an elongation of the western boundary of patent No. 1417a (from 7.5 to 12.5 chains) and the consequent shortening of the western boundary of patent No. 1442a, while perhaps relevant to the request that the Secretary amend the allotments on the ground of a mistake in the description of the land, is not material to the propriety of the dependent resurvey. Id. at 306-07 n.7. After a careful review of the evidence of record, we concluded that the appellants had not shown error in either the dependent resurvey establishing the location of the NE corner of sec. 13 or the subsequent 1991 resurvey of the boundary between the patented allotments. Id. at 308-09. The propriety of the resurveys was decided in the prior appeal and is not now an issue before us.

Upon affirmance by the Board of BLM's earlier decision denying the protest of the 1991 and 1973 resurveys upon which BLM's location of the boundary line between the two patented allotments was based, Allgood formally applied to BLM on December 27, 1994 (as supplemented November 3, 1995), requesting amendment of Indian Allotment Trust patent Nos. 1417a and 1442a, pursuant to the Act of January 26, 1895, as amended, 25 U.S.C. § 343 (1994). 2/ On June 18, 1996, following the Secretary's May 17, 1996, decision (conveyed by the Solicitor) not to assume jurisdiction over the case decided by the Board in Lorna L. Boykin, supra, BLM issued its decision, denying Allgood's patent amendment application, based on its conclusion that the 1901 amended patents "were correctly issued and are legally binding documents." (Decision at 2.)

Appellant argues that the Department mistakenly amended the original 1895 patents in 1901, extending the southerly course of the tie to the NE corner from 7.5 to 12.5 chains. He asserts that it did so in reliance on Briggs' erroneous conclusion that it was necessary to bring Powers' barn

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2/ An earlier application by Allgood and Boykin on Apr. 3, 1991, had not been adjudicated by BLM during the pendency of BLM's adjudication of their protests to its 1973 and 1991 surveys.

within his patented tract of land. (SOR at 17.) Appellant contends that Briggs' error lay in the fact that he wrongly believed that the NE corner lay five chains north of its original position as dependently resurveyed by BLM in 1973. Id. at 5-6, 9-10.

Appellant contends that this is the only explanation for Briggs' belief, as reported in his 1901 affidavit, that Powers' barn was within the Washington tract. Id. at 5-6. He asserts that, tying the original description of the two tracts of patented Indian allotment land to a point 20 chains west and 7.5 chains south of the original NE corner of sec. 13, as dependently resurveyed by BLM in 1973, places Powers' barn within the Powers tract, contrary to the 1901 report by Briggs that the original 1895 patents had erroneously placed the barn within the Washington tract. Id. at Figure 1. In addition, when the United States then amended the patents in 1901, adding five chains to the southerly course of the tie from the NE corner of sec. 13, the effect was only to include additional land including that now occupied by the Boykin house within the Powers tract. See SOR at Figure 4. In order to correct Briggs' asserted errant tie to the wrong NE corner, appellant seeks to return to the description in the original 1895 patents, by amending the 1901 amended patents to change the description of the tie from the NE corner to the western end of the boundary line between the patented tracts, using the original tie of 20 chains west and 7.5 (not 12.5) chains south. (SOR at 1.)

Appellant argues that this change in the description will, as Briggs had himself intended in 1901, properly bring the boundary line into conformance with a fence, erected by Powers and Washington shortly after receipt of their 1895 patents, along the original boundary line created on the ground by those patents and which has remained standing ever since. (SOR at 2-3, 10, 14, 16-17.) Appellant finds support for his belief that this is a fence built by Powers and Washington along that boundary line in the fact that very near it is a barn, also still standing, erected around the same time, as well as the 1912 and 1914 graves of Thomas and Maria Powers situated less than 60 feet north of the fence. Id. at 2-3, 10, 16-17. Thus, appellant argues that BLM should amend the two Indian Allotment Trust patents (Nos. 1417a and 1442a) so that they conform to the original intent of the United States and the two patentees, at the time of the original 1895 patents, regarding the actual boundary line between their patented allotments.

Intervenors move to dismiss the appeal on the ground that it is unclear from the record to what extent appellant would benefit even if there was a change in the land description from 12.5 chains to 7.5 chains in that the deed to appellant appears to describe land located north of the north line of Lot 21. (Intervenors' response at 4-5.) While the extent to which the lands within the Powers Trust patent conflict with appellant's deed is unclear from the record before us, we find that BLM's decision not to amend the patent description raises a colorable allegation of adverse affect and thus satisfies this prong of the standing requirement. Missouri Coalition for the Environment, 124 IBLA 211, 216-17 (1992). Hence, the request to dismiss appellant's appeal is denied.

Intervenors also assert that appellant claims, in essence, that a purported bearing tree, a fence, and a barn "establish that the boundary line drawn should be at 7.5 rather than 12.5 chains." (Response at 6.) As intervenors point out, these claims were rejected in our prior decision upholding the challenge to the dependent resurveys. Intervenors contend that correction of the clerical error in the description in the patents to conform to the surveyor's field notes was proper. Id. at 10.

[1] Authority for correction of errors in Indian Allotment Trust patents is found in the Act of January 26, 1895, as amended, which provides, in relevant part:

> In all cases * * * where a mistake has been * * * made in the description of the land inserted in any patent, [the] Secretary [of the Interior] is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any * * * Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof[.]

25 U.S.C. § 343 (1994) (emphasis added). One objective of the statute is to allow the Secretary to correct mistakes in land descriptions and conform the patent to the mutual intention of the United States and the Indian allottee at the time of patent and thus to eliminate an erroneous reflection of that intent. See Lizzie Bergen, 30 L.D. 258, 262-64 (1900). The claimants under the Trust Allotment, intervenors herein, however, dispute the existence of any mistake as to the land description in the amended allotment.

Appellant is not in a position to obtain relief under the Act of January 26, 1895, as amended, because he is not the holder of an Indian Trust Allotment. In order to effect a change in the description of the northern boundary of the allotted land originally patented to Washington, his remote predecessor-in-interest, in 1901, he would have to obtain a correction of the land description in the fee simple patent (No. 1140461) issued to Types, Washington's heir, in 1953. The statute, however, pertains only "during the time" that title to the land is held "in trust" by the United States for an Indian (including where a "conditional [or Trust] patent" has issued). 25 U.S.C. § 343 (1994); see Irene Mitchell Pallin, 80 IBLA 383, 387-88 (1984); Instructions, 38 L.D. 556, 557 (1910); Lizzie Bergen, 30 L.D. at 262-64. That is not the case here. The Secretary simply has no authority under that statute to amend the fee simple patent. Irene Mitchell Pallin, 80 IBLA at 388; Lizzie Bergen, 30 L.D. at 265-66; Hardy v. McClellan, 24 L.D. 285, 286-87 (1897).

Authority to correct "errors" in patents of "public lands" is contained in section 316 of the Federal Land Policy and Management Act of

1976, 43 U.S.C. § 1746 (1994). 3/ The Board has recognized that reformation of a patent under this provision is authorized where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant for relief will thereby be preserved. Rosander Mining Company, 84 IBLA 60, 64 (1984); Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980). Amendment of the patent to correct the land description could not be authorized under 43 U.S.C. § 1746 where the correction would be at the expense of another private landowner, rather than the United States.

We find the case of Foust v. Lujan, supra, cited by appellant to be distinguishable from the present appeal. The land which appellant seeks to include in an amended patent has been privately owned since the same time that appellant's predecessor-in-interest, Washington, was issued his patent. In Foust, the land was not held in trust for Indians at the time applicant's patent issued.

In any event, the record in the case before us, as contrasted with the Foust case, fails to establish that the land description in the amended Indian Trust Allotments was in error. Evidence of the purported bearing tree found by Erdman in the course of his private survey in 1965-66 in support of his relocation of the NE corner of sec. 13 was insufficient to establish this as a bearing tree from the 1873 Thompson public land survey as we noted in our prior decision. 130 IBLA at 307-08. In the present appeal, appellant states that the purported bearing tree was age-dated by growth rings to within 4 years of 1873. (S0R at 15.) Given the fact that the public land survey in which the bearing tree was marked occurred in 1873, it is not plausible that the tree found by Erdman was a bearing tree for Thompson's 1873 survey.

In addition, we previously examined the evidence regarding the location of the fence considered by appellant to represent the boundary between the allotments. In our earlier decision in Boykin, we affirmed BLM's May 31, 1991, decision not to rely on appellant's argument that the fence identified by him had been erected by Powers and Washington, shortly after receipt of their original 1895 patents, for the purpose of marking the location of the boundary line between the two patented allotments. We noted that the record indicated the position of the fence did not correspond with the boundary asserted by Erdman. 130 IBLA at 309. Recognizing that it appears from the record that the fence has been longstanding, we found "the record does not establish that it represents the location of the boundary line between the two parcels patented in 1901." Id. In its

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3/ That authority does not apply to lands held in trust by the United States "for the benefit of Indian[] [allottees]." 43 U.S.C. § 1702(e) (1994) (defining "public lands"); Foust v. Lujan, 942 F.2d 712, 715 (10th Cir. 1991), cert. denied, 503 U.S. 984 (1992).

May 31, 1991, decision reviewed in Boykin, BLM also noted that, in addition to the fence cited by appellant as evidence of the true boundary line between the two patented tracts, it also found the remains of another east- west fence running very close to 12.50 chains south of the northern line of sec. 13, about where the resurvey places the allotment boundary line. (Decision, dated May 31, 1991, at 5.)

While we find that amendment of the fee patent in this case is a remedy which cannot be provided, we have considered the impact of appellant's contentions on the prior rejection of his protest of the dependent resurveys. The principle of res judicata and its administrative counterpart, the doctrine of administrative finality, precludes reconsideration of a final Departmental decision issued to a party in the absence of a showing of compelling legal or equitable reasons. Fred H. Gagnon, 131 IBLA 368 (1996). Reviewing appellant's most recent submissions, we find the evidence insufficient to support reconsideration of our decision in the prior appeal upholding the dependent resurveys challenged by appellant.

Accordingly, 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 affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge