

INTERIOR BOARD OF LAND APPEALS

Ray M. Chavarria

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RAY M. CHAVARRIA

IBLA 2003-120

Decided March 31, 2005

Appeal from a decision of the State Director, Arizona State Office, Bureau of Land Management, denying an application for corrective patent. AZA-31927.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents – Patents of Public Lands: Corrections

An applicant seeking a patent correction pursuant to 43 U.S.C. § 1746 (2000) must establish that an error in fact was made. No error is established in the Department's issuance of a regular (non-Indian) homestead certificate under the Homestead Act of 1862 to applicant's predecessor, now asserted to have been an Indian, when his entry was made after the enactment of sec. 6 of the Indian General Allotment Act of 1887, *i.e.*, when it might have been made under the general homestead law, and nothing in the predecessor's homestead record indicated his Indian status or an intent to have patent issue under the Indian Homestead Act of July 4, 1884, with restrictions on alienation, rather than under the Homestead Act of 1862, with no restrictions on alienation.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents – Patents of Public Lands: Corrections

Section 6 of the Indian General Allotment Act of 1887 declared every native born Indian who had taken up residence separate and apart from his tribe and adopted the habits of civilized life to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens, which included the privilege

to make a homestead entry under the provisions of homestead laws just as any other citizen could. When the entryman's application sought entry after enactment of sec. 6 of the Indian General Allotment Act of 1887 as a native born citizen of the United States under the Homestead Act of 1862; his entry application, affidavits and final proof made no mention of Indian status; and both the entryman and then his wife, after he died, paid all fees and commissions required for regular homestead applications, no error is established in Department's issuance of homestead patent under the Homestead Act of 1862.

APPEARANCES: George P. Vlassis, Esq., Phoenix, Arizona, and Ray M. Chavarria, for appellant; William W. Quinn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

Ray Chavarria on behalf of his family (appellant) has appealed a January 14, 2003, decision of the Arizona State Office, Bureau of Land Management (BLM), rejecting his application for corrected patent filed pursuant to 43 U.S.C. § 1746 (2000). Appellant claims that the Department's General Land Office erred in conveying the lands to Francisco Chavarria, his grandfather, as a Homestead Entry Patent (Amended Final Certificate 717) under the Homestead Act of 1862, as amended, with no restrictions on alienation, rather than as an Indian Trust Patent that would have been inalienable.

Appellant contends that, but for this error, the lands embraced by the patent would have remained in the family rather than having been lost as a result of a 1904 mortgage foreclosure action in which his family lost title to the land, or, later, a December 14, 1951, adverse possession judgment issued by the Superior Court of the State of Arizona, County of Graham, in favor of E.M. Claridge and Lillian Claridge, husband and wife.

#### Factual Background

The record on appeal contains National Archives U.S. Census Documents for the "Inhabitants in Solomonville, in the County of Pima, Territory of Arizona" between June 1, 1879 and May 31, 1880. Therein, Francisco Chavarria is listed as a "White Mexican," male, age -"36" years old having an occupation as a "Farmer." His birth place as well as that of his father and mother is listed as "N.M.," New Mexico. His "wife," "Refugia," is also listed as a "White Mexican" age 30 female with an

occupation of “Keeping House,” as is their 11-year-old daughter who is also identified as a “White Mexican.” Indians are identified in these records but Francisco, Refugia, and their daughter are all listed as “White Mexican.”

Relating that the foregoing Census “was a federal population census of Pima County, Arizona, in 1880,” the National Archives representative stated “the fact that [Chavarria’s] ancestor appears there indicates he was not part of a tribe on a reservation, but was living in the public as a US citizen. He was not being counted as a non tax paying Indian, under the protection of the government, and recorded separately on the Special Indian Schedules.” Responding to an inquiry from appellant, the National Archives representative continued: “The fact that you have already found your ancestors on the federal 1880 census suggests that it will not be possible to find the names on the BIA census. If people were counted in the federal census, they were usually not counted in the Indian census, and vice versa.” (Letter from Mary Frances Morrow, National Archives and Record Administration, Washington, D.C. (NARA), to Ramon Chevarria dated September 16, 1999 (Morrow letter), (Volume 1 of 3, Administrative Record.) The National Archives concluded that it appeared from their records that Francisco Chavarria “was judged to be a white Mexican, rather than an Indian.” To the extent Chavarria claimed his ancestor was a member of a tribe, the National Archives representative informed him that he must start with the tribe and see what documentation they suggested, referring him to the San Carlos Apache censuses from 1887 to 1912, available at regional branches of the National Archives. (Morrow letter at 2.)

Records obtained from the National Archives demonstrate that Francisco Chavarria filed several documents in the Tucson Land Office describing the same land. All documents are dated November 11, 1890, bear Francisco Chavarria’s mark “X” as witnessed by Manuel Orta, and are sworn and subscribed before and show receipt by Herbert Brown, Register of the Land Office. (All documents are in Volume 2 of 3 of the Administrative Record.)

The first document filed by Chavarria was Homestead Application No. 1459, (4-007) which states “I, Francisco Chavarria of Solomonville, Graham Co., Ariz., do hereby apply to enter, under Section 2289 [<sup>1/</sup>], Revised Statutes of the United States,

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<sup>1/</sup> “Revised Statutes section 2289,” at the time was the homestead act of May 20, 1862, ch. 75, § 1, 12 Stat. 392; as amended February 11, 1874, ch. 25, 18 Stat. 15; Mar. 13, 1874, ch. 55, 18 Stat. 22; and June 22, 1874, ch. 400, 18 Stat. 194; Feb. 23, 1875, ch. 99, 18 Stat 334; Mar. 3, 1875, ch. 131 § § 15, 16, 18 Stat. 420; Apr. 21, 1875, ch. 72, 19 Stat 35; Mar. 3, 1877, ch. 127, 19 Stat. 405; 43 U.S.C. § 161 (1970). Revised Statutes section 2289 at the time of filing of Francisco Chavarria’s homestead application on Nov. 11, 1890, referred to as “Homestead Act

(continued...)

the Lot 2, Sec. 12 and Lots 6 and 8 and S1/2 of NW1/4 of Section 13, in Township 7 South of Range 26 East, containing One hundred & thirty-six 94/100 acres.” See copy of Homestead Application No. 1459 in Volume 2 of 3 of the Administrative Record. This Homestead Application is also documented in the “Register of Homestead Applications” as required by statute. (Rev. Stat. Section 2295, Act of May 20, 1862, ch. 75 § 3, 12 Stat. 393). NARA Pacific Region (Laguna Niguel), Record Group: 49, Records of the Bureau of Land Management, Phoenix General Land Office, Register of Homestead Applications, Volume: Tucson Volume 2, 1312-3022, Box Number: 260.

The second document filed by Francisco Chavarria was Homestead “Affidavit” (4-003), which states “I, Francisco Chavarria of Solomonville Ariz. having filed my application No. 1459, for an entry under Section No. 2289, Revised Statutes of the United States, do solemnly swear that I am a native born citizen of the United States over the age of 21 years and head of a family.”

The third document was “Affidavit” (4-102 b.), which states: “I, Francisco Chavarria of Solomonville Ariz. applying to enter (or file for) a homestead do solemnly swear that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land which, with the tracts now applied for, would make more than 320 acres.”

The fourth document was a “Non-Mineral Affidavit” (4-062). The affidavit states “Francisco Chavarria, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the Lot 2, Sec. 12, and Lots 6 and 8, and S½ of N.W. 1/4 sec. 13, T. 7 S., R. 26 E. \* \* \* .”

The record contains “Receiver’s Receipt No. 1459” for “Application No. 1459” reflecting that Francisco Chavarria paid “Fifteen dollars – Fourteen cents; being the

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<sup>1/</sup> (...continued)

of 1862,” provided: “[E]very person who is the head of a family, or who has arrived in the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.”

amount of fee and compensation of Register and Receiver for the entry of Lot Two (2), Sec. 12 and Lots six (6) and Eight (8) and South 1/2 of North West 1/4 of North West 1/4 of Section Thirteen (13) in Township 7 South of Range 26 East, under Section No. 2290 [<sup>2/</sup>], Revised Statutes of the United States.”

The record reflects that Francisco Chavarria died in May 1891. (See Volume 1 of 3, Administrative Record, Copy of Death Certificate issued by the Arizona State Board of Health, reporting death on 5/23/1891, filed October 23, 1891, and signed by A. H. Hoeffler, and affidavits submitted in support of final proof, discussed *infra*, verifying death in May 1891).

On May 28, 1895, Francisco’s widow, Refugia Ortiz (formerly Refugia M. Chavarria), filed a notice of intent to make final proof to establish claim to the lands in Homestead Application No. 1459. See 43 U.S.C. § 251 (1970), March 3, 1879, ch. 192, 20 Stat. 472. Publication of the application, along with the names of the witnesses, was effected as required by law and after the expiration of 30 days, Refugia was entitled to make final proof “in the manner provided by law.”

On July 20, 1895, the following documents were filed with the Tucson Land Office with reference to Homestead Entry No. 1459:

Homestead Proof – Testimony of Witness - Abraham Diaz  
 Homestead Proof – Testimony of Witness - Eduardo Sota  
 Homestead Proof – Testimony of Claimant - Refugia Ortiz  
 Affidavit of Refugia Ortiz (Form 104a)  
 Nonmineral Affidavit filed by Refugio Ortiz  
 Final Affidavit Required of Homestead Claimant - Refugia Ortiz

In response to the question “[h]ow much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon,” Diaz stated “40 acres cultivated-raised crops 6 years.” Diaz continued “Francisco Chavarria and his family resided upon this claim continuously until May 1891 at which time Francisco Chavarria died, and the widow with her children have resided upon and cultivated the land ever since.” The second affiant, Eduardo Sota, 49, of Solomonville, Arizona, in response to the question “[w]hen did claimants settle upon the homestead and at what date did he establish actual residence thereon” stated: “[I]n the summer of 1889, Chavarria and his family established a residence on the above described land.” The affidavit “Homestead Proof – Testimony of Claimant” was sworn by Refugia

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<sup>2/</sup> Section No. 2290, Revised Statutes of the United States, 43 U.S.C. § 162 (1970), related to regular (non-Indian) homestead entry applications, affidavits and payment of fees and commissions.

Ortiz, widow of Francisco Chavarria, age 45, of Solomonville, Graham County, Arizona, and stated, consistent with the census information detailed above, that she was a native born citizen of United States, State of New Mexico, that she moved into the house with her children and Francisco in “July 1889” and “have resided there ever since.” Refugia Ortiz executed the affidavit with a mark and the witness to the mark was Jose Gonzales.

Refugia Ortiz’ “Final Affidavit Required of Homestead Claimants” repeated the location of the homestead entry and reiterated that the entry had been made “under section No. 2289 of the Revised Statutes of United States,” 43 U.S.C. § 161 (1970), and that she applied to perfect that claim as widow of Francisco Chavarria, stating that she had with him “resided upon said land since July 1889 to the present time.” The affidavit was sworn and subscribed on July 20, 1895, in the Tucson Land Office.

The National Archives record contains (1) a July 29, 1895, publisher’s affidavit as to posting of notice for Homestead Entry No. 1459 on May 28, 1895; (2) a July 24, 1895, Certificate as to posting of notice for Homestead Entry No. 1459 and (3) “Final Receipt No. 717” for “Application No. 1459 ” showing that Refugia Chavarria on July 29, 1895, paid \$5.13, that “being the balance of payment required by law for the entry of Lot Two (2) Section Twelve (12) and Lots Six (6) and Eight (8) and South-half (S1/2) of North-West quarter (NW 1/4) of Section Thirteen (13) in Township 7 South of Range 26 East, G.S.R.M. [Gila and Salt River Meridian] containing One hundred and thirty-six and 94/00 acres under section 2291 of the Revised Statutes of United States.”

Homestead Certificate No. 717 was originally issued on July 29, 1895, for Homestead Application No. 1459 to the “heirs of Francisco Chavarria, deceased of Solomonville, Graham County Arizona.” As directed by the Assistant Commissioner, General Land Office, Washington, D.C., on February 19, 1896, citing Joseph Ellis, 21 L. D. 377, the original Homestead Certificate No. 717 was “correct[ed] without erasing, and certif[ied] to the correction,” to issue in the name of “Francisco Chavarria,” the entryman, on April 15, 1896. Both the original and corrected Homestead Certificate No. 717 are duly recorded in the “Register of Entries” made at the Tucson, Arizona, Land Office. The record before the Board confirms all necessary posting and publications and that Refugia Ortiz paid the appropriate fees to fulfill the requirements of the laws and regulations for Homestead applications “under section 2289 of the Revised Statutes of United States” (the Homestead Act of 1862) as stated in Francisco Chavarria’s Homestead Entry Application No. 1459 filed November 11, 1890. Consistent with that Act, neither the original homestead certificate nor the amended certificate contained any restrictions on alienation. See Volume 2 of 3, Administrative Record.

On April 2, 1885, Francisco's brother, Regino Chavarria, filed Declaratory Statement No. 1297 for lands in sec. 13, T. 7 S., R. 26 E., G&SRM, for approximately 80 acres. No smaller legal subdivisions (aliquot parts or lots) were given, so it is not possible to determine whether these were the same lands as those applied for by Francisco Chavarria in Homestead Application No. 1459. The record does not contain any evidence that Regino Chavarria filed an application for these lands under any public land laws. The only land application of record for Regino Chavarria is Homestead Application No. 2590 filed on May 25, 1896, for lands described as 40 acres, NE1/4 SE1/4, sec. 4, T. 7 S., R. 26 E., G& SRM. On October 23, 1901, Homestead Certificate No. 1110 was issued for these lands. (NARA Group 49, Tract Book, Gila and Salt River Meridian, T. 7S, R27 -32E, Box 44, Volume 2 of 3, Administrative Record and copy of Homestead Application and Homestead Certificate No. 1110, Volume 1 of 3, Administrative Record.)

The only land entry application of record for Francisco Chavarria, according to the National Archives record, and, later, BLM, is Homestead Application No. 1459 filed under the provisions of the Homestead Act of 1862, as amended, for lands described as lot 2, sec. 12, and lots 6 and 8 and S 1/2 NW 1/4, sec. 13, T. 7 S., R. 27 E., G&SRM, containing 136.94 acres. The lands, which had been returned to the public domain by Executive Order dated August 5, 1873, were not Indian reservation lands and were open to entry under the Homestead Act of 1862, as amended.

According to appellant, Refugia Ortiz was forced off her land in 1904 due to a fraudulent mortgage foreclosure. At that time appellant's family lost contact with the land. On December 14, 1951, Superior Court Judge Benjamin Blake issued judgment in Case No. 4421, Superior Court of the State of Arizona, County of Graham, declaring E.M. Claridge and Lillian Claridge, husband and wife, to be the true and lawful owners of the property. Francisco Chavarria, Refugia Ortiz (identified in the court action as Refugia Ortiz, known incorrectly as Refugio Ortiz, formerly known as Refugia M. Chavarria), and Pablo Chavarria (son of Francisco Chavarria and the father of appellant, Ray M. Chavarria) were named as defendants in the action. The record reflects a default judgment was taken against them in favor of E. M. Claridge and Lillian Claridge, who sought a declaration of fee simple title to

all of Section 13, Township 7 South, Range 26 East of the Gila and Salt River Base and Meridian in Graham County, Arizona, lying South of the present course of the Gila River, consisting of the South half, and the South half of the North half of said Section and Lots 2, 4, 6 and 8 of said Section and including rights along the Gila River acquired by accretion, subject to a right of way for the Union Canal and Irrigation Company for canal purposes.

Lot 5 of Section 13, Township 7 South, Range 26 East of the Gila and Salt River Base and Meridian.

Lots 1, 2 and 3 of Section 12, Township 7 South, Range 26 East of the Gila and Salt River Base and Meridian.

The judgment recited, inter alia, that

plaintiffs and their predecessors in interest have had peaceable possession adverse to the defendants, and have owned, cultivated, used, enjoyed and paid taxes upon said property for more than ten years, preceding the bringing of this action and have claimed it as their own against the whole world.

That the State of Arizona, County of Graham and Graham County Treasurer have in fact conveyed all of their interest in this particular property to the plaintiffs and their predecessors in interest and that said defendants have no right, title, interest or equity in or to said property.

That certain mortgage dated December 22, 1915, recorded in Book 14 of Real Property Mortgages at page 86 in the office of the Graham County Recorder to the defendant, Arizona National Bank of Tucson, as mortgagee, and that certain mortgage dated February 9, 1904, recorded in Book 6 of Real Property Mortgages at page 264 in the office of the Graham County Recorder in which the defendant, Mrs. E. S. Mashbir, is the mortgagee and that mortgage dated April 9, 1894, recorded in Book 2 of Real Property Mortgages at page 436 in the office of the Graham County Recorder in which J. T. Fitzgerald is the mortgagee and that mortgage dated July 1, 1927 recorded in Book 22 of the Real Property Mortgages at page 286 in the office of Graham Recorder in which the Wilcox Bank and Trust Company is the mortgagee, all have been fully paid and satisfied.

Volume 2 of 3, Administrative Record.

The record before the Board also contains a copy of several birth and death certificates. Francisco Chavarria's death certificate, noted above, does not state that he was an Apache Indian. The death certificate of Regino Chavarria, Sr., reporting his death on August 3, 1931, stated his "color or race" as Mexican. Francisco Chavarria's son, Pablo Chavarria, in a "Delayed Certificate of Birth," was reported to have been born on January 25, 1884, in Solomonville and was reported in the birth certificate by his mother and sister to have been a "Male," "Mexican." The "Abstract of Supporting Evidence" on the birth certificate consisted of a Baptismal Certificate,

Church form and seal from St. Augustine, Church, Tucson, Arizona, dated May 7, 1884, along with the affidavit of a neighbor at the time of birth and the son's birth certificate from the Arizona State Department of Health, dated February 16, 1934.

The record before the Board contains a December 4, 1995, decision from the San Carlos Apache Tribe responding to Ray Chavarria's letter requesting "membership into the San Carlos Apache Tribe." The Enrollment Committee stated "[w]e, the Tribal Enrollment Committee have reviewed the documents you have submitted. However, according to the requirements for enrollment, the burden of proof must rest on the individual, which in this case your documents were reviewed in detail based on the submitted documentation."

This is to inform you that based on reviewing your documents, that we find no proof of you being a descendant of the San Carlo Apache Tribe. We have informed the Tribal Council with the recommendation of denial on your application concerning enrollment. This was done on November 16, 1995, before the Tribal Council.

The Tribal Enrollment Committee informed Chavarria that an appeal could be taken within 60 days to the full Tribal Council. Chavarria appealed and the Tribal Council in a July 1, 1996, decision stated:

The Tribal Council considered all of the relevant evidence in this matter and they decided to affirm the decision of the Enrollment Committee due to the lack of evidence of the blood quantum as required by the Enrollment Code and the Tribal Constitution. The Chavarrias simply state that their grandfather had land in the Solomonville, Arizona area in 1853, that the Solomonville area was on the reservation at that time, and therefore, by logical deduction their grandfather must have been Apache, and their lineage is Apache. However, the Tribal Council notes that the membership was established pursuant to the Tribal Constitution of 1934 and the base membership roll used at that time. The Constitution was amended in 1954 and the base membership roll was used at that time also. There were no members at these times with the surname of Chavarria. In addition, the blood quantum (1/4) of Apache-blood required pursuant to the Tribal Enrollment Code cannot be confirmed by the Chavarrias.

(Executive Summary, Miscellaneous Information, Administrative Record, Volume 3 of 3.)

After 1996, the record contains several amendments to birth and death certificates, changing in each the "race or color" from Mexican to Apache Indian.

Robert Chavarria's original birth certificate, issued December 22, 1945, reported his birth on December 18, 1945, at the Good Samaritan Hospital in Phoenix, Arizona. The birth certificate reported both his mother and father were "White," not "Indian" or "Negro." The amendment issued April 11, 1996, corrected the "color or race" from "White" to "Apache Indian." The "Abstract of Documentary Evidence" supporting the amendment lists "Apache Indian Reservation Homestead" dated "Nov. 11, 1890." See Tab C of appellant's filing dated May 9, 2001, Volume 3 of 3, Administrative Record. The record reflects that the Superior Court of Arizona, Maricopa County, on February 11, 1997, amended the Birth Certificate of Ramon M. Chavarria, and a copy of the amendment to the vital records reports the date of birth as November 8, 1927. What was changed by the amendment issued February 25, 1997, pursuant to the court order was the "Color or Race" from "White" to "Apache Indian." The "Abstract of Documentary Evidence" cites the Court Order from Superior Court, Maricopa County Arizona #misc. dated "Feb. 10, 1997" and a February 20, 1997 "Request to Correct Vital Record signed by Registrant." See Volume 1 of 3, Administrative Record.

A third birth certificate, that of "Jesus Josefa Chavarria" born March 3, 1930, of white Mexican parents, Pablo Chavarria and Rita Moreno, was amended and issued April 11, 1996, to change the "color or race" from "Mexican" to "Apache Indian." The "Abstract of Documentary Evidence" lists two items, "Affidavit to Correct Vital Records Signed by Brother" Ramon Chavarria on "March 05, 1996," and "Apache Indian Reservation Homestead" dated "Nov. 11, 1890."

The "Apache Indian Reservation Homestead dated November 11, 1890," listed as documentary evidence in support of Robert Chavarria's and Jesus Josefa Chavarria's amended birth certificates is not contained in the record and there is no evidence that an Apache Indian Reservation Homestead was issued to either Robert Chavarria's or Jesus Chavarria's predecessors. The only documents contained in the National Archives record bearing the November 11, 1890, date are the several documents commencing with the application for entry filed by Francisco Chavarria "under Section 2289, Revised Statutes of the United States" discussed above. The homestead entry application filed with the appropriate fees and commissions paid resulted in issuance of homestead Certificate No. 717 under the regular homestead laws, not under the Indian Homestead Act. The present record does not disclose, nor do the records of the National Archives disclose, an "Apache Indian Reservation Homestead" dated "Nov. 11, 1890," as stated in the vital records affidavit. It appears that the reference in the amendment to vital records is in error as to the "Apache Indian Reservation Homestead."

On June 7, 2001, the Arizona State Director, BLM responded to Congressman Duncan Hunter's inquiry of May 8, 2001, on behalf of his constituent, Raymond Chavarria, and his family, regarding the land claims of their grandfather, Francisco

Chavarria. BLM related that the family had requested a review of their grandfather's Homestead patent to determine if Francisco Chavarria's land claims should have been processed under the land laws pertinent to Indians. After detailing the facts of their research, BLM stated "[w]e are unable to find evidence in our records that Mr. Chavarria applied for lands under any Act other than the Homestead Act of 1862. After careful review of the documents supplied by the Chavarria family, we did not find any evidence that at the time of this land application, Francisco Chavarria was regarded as anything other than a citizen of the United States entitled to a homestead entry patent under the Homestead Act of 1862." (June 7, 2001, letter at 2.)

Thereafter, on September 28 and October 2, 2001, Ramon M. Chavarria submitted additional information and requested further BLM review. BLM on November 21, 2001, responded to that request for review of homestead entry patent No. 717 issued to "your grandfather Francisco Chavarria's heir, on April 15, 1896, under the Homestead Act of May 30, 1862, as amended (12 Stat. 392)." BLM related: "You asked us to determine if your grandfather's patent should have been authorized under Indian land laws rather than the Homestead Act. We have reviewed our records and find the patent was issued correctly." BLM added that pursuant to 43 CFR 1865 any claimant asserting ownership of lands described in a patent may file an application to correct an alleged error in the patent. BLM instructed Mr. Chavarria on how to file an application for correction of patent, and stated that the alleged error "must be a mistake of fact and not of law." (November 21, 2001, letter at 1; Volume 1 of 3, Administrative Record.)

On December 14, 2001, appellant filed an application to correct his "Grandfather's Homestead Patent No. 717" issued under the Homestead Act of May 30, 1862, describing the land as "Lot 2, Sec. 12 and Lots 6 and 8 and S 1/2 NW 1/4, Sec 13, T. 7 S. R. 26 E., Gila and Salt River Meridian." Appellant recounted that he had asked BLM to do an in-depth investigation to determine if his grandfather's patent should have been issued under Indian laws rather than the Homestead Act of May 30, 1862, and that BLM responded that a review of the records was conducted and the patent was issued correctly. Citing 43 CFR 1865, appellant stated:

I am claiming the mistake was due to the fact that the Recorder and Receiver did not search his Roll books and land books to see if Francisco Chavarria had any Pre-emption lands in his name prior to applying for homestead land patent in November 11, 1890.

Appellant stated:

Documentation will prove that the Recorder and Receiver made an erroneous mistake in handling our grandfather's land applications. The

Recorder and Receiver did not notice that on the books, that Francisco Chavarria, Regino Chavarria and Trinidad Chavarria were brothers. Documentation proves the fact that the Recorder and Receiver assigned the same land to two different land applications. That of Francisco Chavarria on 11/20/1890 application No. 1459 13-7S-26E and 12-7S-26E of 136 acres. Regino Chavarria on 3/30-/1885 was given the same land 13-7S-26E of 160 acres.

(December 14, 2001, application for correction of patent (Application) at 1.)

Appellant rejects the documents identified and discussed in the 1999 letter from National Archives' Morrow, maintaining:

[T]his letter shows erroneous mistakes made by the Federal Government in filing my grandfather's land applications in 1885 and 1888. Submitting Francisco Declaratory Statements of February 1, 1888. The 1885 Declaratory Statement is missing from the File of the Bureau of Land Management in Tucson and Phoenix. Explanation they gave was that those records were moved from Florence, Arizona and probably got lost in the moving of those records. This letter [Morrow letter] states that my grandfather was not a Native American, but a White Mexican. I am submitting actual facts that he was Native American of Apache Ancestry.

In 1873 Francisco and his wife Refugia and daughter Carmen Chavarria were living inside of the San Carlos Reservation Addition. After it was ceded out into the Public Domain land. Francisco Chavarria stayed in his land that was ceded out and he was living as a private citizen in his land what is called today Solomon, Arizona. Submitting documentation that shows that the Recorder and Receiver assigned the same tract of land (13-7S-26E) and 4/2. 1885 to Regino Chavarria and to his brother Francisco Chavarria in the year 11/20/1890 (13-7S-26E) This was gross negligence on the part of the Recorder and Receiver[r].

The first Indian Census was taken in 1885. This is why his name is not found in the first Indian roll book or Census. He was considered an American citizen living outside as a private citizen.

The 1880 Pima Census clearly states that the citizens of that Indian Village were Indians. My grandfather['s] name is the first one on that Census. My Grandfather's land prior to making a Homestead land Application was Pre-Exemption land under the 1842 Pre-exemption land Act. Documentation enclosed to prove this a fact. Also under the

1889 Homestead Act [h]e could Commute his pre-exemption land into an Indian trust Patent. This is w[h]ere the erroneous mistake was made by the Recorder and Receiver.

He failed to notice that Francisco Chavarria was an Indian also failed to check his book record to see if he was an owner of any other lands. The Recorder and Receiver was Gross Negligence in this procedure of filing the proper application papers for an Indian Trust Patent under the General Indian Allotment Act of 1887.

(Application at 1-3; Volume 2 of 3, Administrative Record.) <sup>3/</sup>

Detailing the proposed manner in which the error can be corrected or eliminated, Appellant states, the

United States Government Bureau of the Interior make correction on the Homestead Patent issued to Francisco Chavarria on the 1862 Homestead law to the 1884/87 Indian General homestead Act, that Francisco Chavarria was entitled by United States Citizenship as an American of Indian (Apache Ancestor). That his patent be corrected to an Indian Trust Patent under the Guardianship of United States Government, beginning from 1890 to the present time (2001). That the United States House of Representatives Judiciary Executive Committee draft a Special Bill to be present[ed] to the United States Congress for compensation on the land and all the rights of the Patent plus punitive damages for over One hundred and twelve years the Chavarria family has done without their land.

(Patent correction application at 4; Volume 2 of 3, Administrative Record.)

#### BLM's Decision

<sup>3/</sup> Detailing the impact of the alleged error, appellant stated “d[ue] to the erroneous mistake on the Recorder and Receiver filling [sic] Francisco Chavarria homestead entry application and his widow wife Refugia Chavarria Ortiz final proof papers[.] Francisco Chavarria filled [sic] for preemption land in 1885 and 1888. Francisco Chavarria submitting his Declaratory Statements. (enclosing copies of this statement and letter to testify their validity.) The U.S. Government denied of such pre-emption papers. Due to the fact of this erroneous mistake by the Recorder and Receiver in the filing of the wrong land application papers, the [C]havarria family has suffered the [loss of the] use of the family homestead lands granted to them by Federal laws for the past one-hundred and twelve years.” (Patent Correction Application at 3.)

BLM denied the application for correction and detailed the contents of NARA homestead entry 717, including the homestead entry application, affidavits, final proof through the corrected certificate. Concerning the statements made in support of application to the effect that appellant's grandfather and thereafter grandmother were Native born citizens of the United States, the decision stated:

As part of his Homestead application, Francisco Chavarria submitted an affidavit swearing that he was a Native born citizen of the United States over the age of 21 years and head of a family. This affidavit was dated November 11, 1890. Indians were not granted citizenship until passage of the Act of June 2, 1924 (43 Stat 253). The record does not contain any evidence that Francisco Chavarria presented himself to the Register of the General Land Office as anything other than a citizen of the United States of America, eligible for entry under the Homestead Act of 1862. The Bureau of Indian Affairs, rather than the Bureau of Land Management, has the authority to administer Federal Indian issues and therefore has the authority to certify Indian status. (130 Departmental Manual 1.3). The record does not contain any documentation from the Bureau of Indian Affairs or any Indian Tribes verifying Francisco Chavarria's Indian status.

(Decision at 3.) Addressing the contention that the recorder and receiver issued the same land to Francisco Chavarria and his brother Regino Chavarria, BLM stated:

On April 2, 1885, Francisco's brother, Regino Chavarria, filed Declaratory Statement No. 1297 for lands in sec. 13, T. 7 S., R. 26 E., G&SRM for approximately 80 acres. No smaller legal subdivisions (aliquot parts or lots) were given so it is not possible to determine whether these lands were the same lands as those filed by Francisco Chavarria in Homestead Application of No. 1459. The record does not contain any evidence that the Regino Chavarria filed an application for these lands under any public land laws. The only land application of record for Regino Chavarria is homestead application No. 2590 filed on May 25, 1896, for land described as sec. 4, T. 7 S., R. 26 E., G&SRM. On October 23, 1901, Homestead Certificate No. 1110 was issued for these lands.

BLM stated further that the "only land entry application of record for Francisco Chavarria is Homestead Application No. 1459 filed under the provisions of the Homestead Act 1862 for land described as Lot 2, sec 12, Lots 6, 8 and S1/2NW1/4, sec. 13, T. 7S., R. 26E. G&SRM, containing 136.94 acres. The lands, which had been returned to the public domain by Executive Order dated August 5, 1873, were not

Indian reservation lands and were open to entry under the Homestead Act of 1862.”<sup>4/</sup>

BLM concluded that the record “does not contain sufficient evidence to conclude that the land should have been conveyed under any Act other than the Homestead Act of 1862.” “According to the evidence of record,” BLM stated that the “General Land Office properly issued Homestead Certificate No. 717 based on documents filed by Francisco Chavarria, including documents relating to his status as a citizen eligible for land patent under the Homestead Act of 1862” and denied the application for corrected patent. (Decision at 3.)

### Arguments on Appeal

From BLM’s decision, this appeal ensued. Appellant’s statement of reasons (SOR) asserts that “[BLM] has not proven beyond a reasonable doubt that Francisco Chavarria was not an Indian.” He states “[m]y statement is based on the argument of the letter of rejection” and he proceeds to detail his Indian ancestry and how he came to seek patent correction. He explains that “after the discovery of the homestead certificate[,] [t]wo members of the Chavarria family went to see Senator John McCain in Phoenix [,] Arizona. We showed all the documentation that we had. We asked if they could help us find out how are [sic] grandfather Francisco Chavarria had come to have land that the family didn’t know concerning the homestead certificate.” (SOR at 2).

The answer to our inquiry came as a surprise, he states concerning

[t]he letter that Senator McCain received came from the United States Department of the Interior Bureau of Indian Affairs dated November 28, 1994. On the first paragraph it states [t]he land was granted to their Native American great--great grandfather, Francisco Chavarria. Then we made a call to [BLM] in Safford, Arizona. The answer was the Homestead Certificate No. 717 was valid. At that time the family did not know that the land they were born and raise[d on] was really their own land under this Homestead Certificate.

Appellant details further his claim of Indian ancestry:

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<sup>4/</sup> “Francisco Chavarria’s Declaratory Statement No. 2187 of May 19, 1888, describes different lands (i.e. S1/2 and NW 1/4 NW 1/4, sec. 13, T. 7S., R. 6E., G&SRM)” and no application under the public land laws was filed by Francisco Chavarria concerning these lands. Decision at 3 and n.5

Our older brothers and sisters never knew that the land was theirs. The only thing they knew concerning the land, was that it was left to [their great-grandfather Francisco and Francisco's brothers Trinidad and Regino Chavarria. Great grandfather Francisco was the Son of White Mountain Apache Coyotero chief[,] Francisco Echeverriah. Better known in the 1800[']s] as Francisco[,] the Butcher. His Indian name was (El Fresco). Our grandfather rode as a warrior with Chief Cochise of the Apache tribes in Southwest, Arizona. Our great-great Grandfather Francisco, Indian Chief of the original White Mountain Apaches was killed in 1865 at Fort Goodwin. His son, our grandfather Francisco was 23 years of age when his father was kill[ed]. He inherit the land that the Chavarrias resided since the 1700. Francisco Chavarria applied for a Pre-emption parcel of his own land after the United States bought the Upper north portion of Arizona, known today as the Treaty of Guadalupe Hidalgo. Part of our great-great-grandfather's land was on the upper part of the Gila River and the bottom portion was on the south part of the Gila River. This land was granted by Mexico to the Maricopas and Pima Indians under a land grant before the War with Mexico (1843). Then after the defeat of Mexico[,] that is the time that the United States of America bought the north portion of land.

Our grandfather Francisc[o] Chavarria was born in that part of the country in 1843, this made him a Mexican Citizen of Apache ancestry. This is his status as a native born citizen of the United States. Article VIII of the Treaty of Guadalupe Hildago, February 2, 1848, stipulates that "those who shall prefer to remain in the said territories may retain the title and rights of Mexican citizens, or acquire those of citizen of the United States, but they shall be under the obligation to make their election within one year of the date of the exchange of ratification of this treaty..." (see letter dated April 17, 1995, National Archives, Washington D.C. 20408).

(SOR at 2-3.)

Concerning Francisco Chavarria's land filings, appellant states:

Grandfather Francisco stayed on his land (present day Solomon, Arizona) and filed two Declaratory Statement[s] for land in 1885 and 1888 under the Pre-emption Act of 1841, (see letter dated June 10, 1999 from the National Archives sen[t] to Congressman Duncan Hunter (R). When Francisco Chavarria went in November 1890 to the

[General Land Office] office in Tucson. He went to commute his land into an Indian Trust Patent.

(SOR at 3).

Appellant asserts that

the pre-emp[ti]on laws were not repealed until the Act of March 3, 1891 (26 Sta[t]. 1096). This law did not prohibit Francisco Chavarria from filing his Homestead patent as an Indian trust patent under all the Homestead laws that the U.S. Congress passed for the protection of the Indian [] and those living outside of reservations [i]f they had applied for a Homestead patent land. This law, the general allotment Act and was later amended to authorize [allotments] to eligible Indians on public domain land not just on Indian Reservations[.] This law also gave them the right to commute their lands outside of reservations to Indian trust patents.

(SOR at 3.) Appellant maintains that his grandfather,

Francisco and his wife were illiterate Indian. They did not know any land laws of [the] United States of America. The [General Land Office] Recorder and Receiver should have check[ed] [their] land books to see if Francisco had applied for land before[.] If he had done that[,] [h]e would have found out that Francisco had land already and living upon it. (Look at his application and his widow wife. They both stated they were living on the land prior to filing for a homestead patent.)] (Look at the documents submitted to [BLM] showing his Graham property assessments for 1888 [] through 1889. It also gives the description of this land as the one in the patent. The Federal Judges should look into this case. They will find our birth certificates corrected by the State of Arizona to identify the Sons and daughters as Apache Indians and not white Mexicans. Indians did not have birth certificates at that time and space. Though a White person might speak mexican/spanish, that doesn't make him a mexican. His color and features gives him away. There are letters to different persons in our government. Friends who are in public Offices bear witness of our race. These persons know us by seeing us in person, not trying to guess what we are.

(SOR at 3-4.) Appellant states that he has come to summarize his whole case as a

silent conspiracy to commit fraud in removing the family from the land in order to take the gold minerals from our land. (See Senator John

McCain letter to Mr. Steve Tittla, attorney to the San Carlos Apache Tribe of Arizona). Twenty-four million was removed from our land. Who is responsible for this robbery? Who is going to make restitution to the Chavarria families?

(SOR at 4.) Appellant charges the Recorder and Register of the General Land Office with malfeasance, contending that the Recorder and Receiver made “numerous errors on this assignment of lands.” In support of this claim, appellant details several cases where the “Register of Homestead Entries,” including applications, and “Abstract of Declaratory Statements” identify lands having the same section and township numbers. (See SOR at 4-5.) <sup>5/</sup>

Asserting that the Recorder and Receiver made numerous errors, appellant reasons “[he] could have easily fil[ed] the wrong papers for our grandfather[’s] land,” stating “[t]his kind of work shows lack of knowledge of job assignments. In plain words. He was incompetent in that position.” (SOR at 5.)

Appellant charges further that the Recorder wrote down the wrong land description in Francisco Chavarria’s Declaratory Statement No. 2187, specifically recorded the range as “6E” rather than “26E:” “S 1/2 and NW 1/4 NW 1/4, sec. 13, T. 7S., R. 6E, G&SRM.” Appellant emphasizes that the family “cannot be punished for something the family did not do. They followed the letter of the law. They depende[d] upon those that held those positions in offices to help them file the proper papers. My grandfather qualified for an Indian Trust certificate by law.” (SOR at 6.)

BLM responded this appeal involves essentially two issues: first, whether the original patentee, Francisco Chavarria was an Indian and therefore entitled to an off-reservation Trust Allotment under the Indian laws of the United States; and second, whether the Secretary, BLM, or this Board has jurisdiction to correct patents when such correction involves a matter of law.

Perceiving that appellant believes the patent issued to his ancestor should have been issued as a trust patent under the authority of the 1891 amendment for Indians not residing on reservations, and not the 1862 Homestead Act, BLM responds:

Even if this assertion of Appellant could be proven, i.e., that his ancestor Francisco Chavarria was a member of an Indian tribe, such an

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<sup>5/</sup> Both the Register and Abstracts provide less detailed descriptions than the actual homestead patents and declaratory statements. There is no showing that the underlying homestead patents and declaratory statements purport to grant the same lands to different persons, as claimed.

inquiry is clearly not simply a mistake of fact, but rather a mistake (or mistakes) of law that implicates the statutes governing citizenship, Indian allotments, and homestead laws pertaining to qualification and application for patent.

(BLM Answer at 3.) Responding to appellant's claim that his ancestor Francisco Chavarria was a member of an Indian tribe, BLM states that it is appellant's burden to establish that, and further argues that appellant's "[SOR] and other documentation submitted were replete with anecdotal assertions, tales, and similar discussion of the alleged tribal affiliations of his ancestor, but there was no dispositive data or other conclusive proof, such as inclusion of Francisco Chavarria on the "Indians Not Taxed" columns or sections of the 1890 United States Decennial Census rolls, for example, that established that this patentee was Indian and not a citizen." (Answer at 4.) Moreover, BLM submits the information appellant has submitted concerning his Indian status, including a denial of his application for enrollment in San Carlos Apache Tribe, "is not relevant to the issues under consideration here." Id.

BLM cites "affirmative and conclusive proof that Francisco Chavarria was a citizen of the United States and, accordingly, would not have been classified as an Indian or member of an Indian tribe. This proof is the patentee's own sworn Homestead Affidavit, dated November 11, 1890," in which he stated: "I am a native born citizen of the United States, over the age of 21 years, and head of a family." Id. BLM emphasizes "[t]here is no reference in the affidavit of being an Indian or a member of an Indian tribe. The affidavit was subscribed and sworn to before the Register of the Land Office in Tucson, Arizona, who also signed the document." Id. BLM argues as "a citizen of the United States, and thus legally a non-Indian, Francisco Chavarria was entitled to avail himself of the land laws for entry and settlement under the Homestead Act of 1862, which he did." Id. "Conversely, as an Indian and non-citizen he would not have been able to do this." Id. at 4-5. BLM concludes that "the patent issued to him on April 15, 1896, was correctly issued, and on that basis alone the BLM was correct in denying his application for correction of that conveyancing document." (Id. at 5.)

BLM asserts that to the extent that the case presents fundamentally legal questions, i.e., whether Francisco Chavarria was a non-citizen Indian or a non-Indian citizen and, thus, under which land entry laws he was entitled to apply for settlement and a patent, such questions present a question of jurisdiction – whether the Secretary of the Interior or any appeals board can properly exercise jurisdiction to hear the matter and/or fashion a remedy. BLM submits that its January 14, 2003, decision denying correction of the patent was proper, because it did not contain, to quote Foust v. Lujan, 942 F.2d 712, 715 (10<sup>th</sup> Cir. 1991), cert. den., sub nom. Northern Arapaho Tribe of the Wind River Indian Reservation, et al. v. Foust et al., 503 U.S. 984 (1992), a "correctable mistake of fact." BLM submits that "neither it

nor any official or entity within the Department is authorized to exercise jurisdiction in order to address or resolve the grievances set forth in Appellant's application and [SOR]". (Answer at 5.) Under the circumstances, BLM submits that appellant's remedy lies elsewhere and cites the decision by the Interior Board of Indian Appeals in Ruth Pinto Lewis v. Superintendent of the Eastern Navajo Agency, 4 IBIA 147 (October 3, 1975), in support of its contention, explaining:

In Lewis, a Stock-raising Homestead Certificate was issued in fee to Ignacio Pinto, a "deceased Navajo Indian, Census No. 9355." *Lewis* at 148. The IBIA explained the issue as follows: "It is the contention of the appellant that the property in question should be subject to a trust by virtue of the Act of July 4, 1884 (23 Stat. 96)...." *Id.* Because there was no error of fact involved, the IBIA concluded with a finding that addressed both the Department's role in the matter and the Appellant's available remedy:

Upon issuance of the patent some 30 years ago on April 2, 1942, legal title to the land in question passed from the United States to Ignacio Pinto, thereby removing the land from the jurisdiction of the Department. Accordingly, the Superintendent being without authority to declare and include the tract as part of the decedent's trust assets or inventory, acted properly in refusing to do so. Any relief or remedy that the appellant may have in the matter lies with the courts.

*Lewis* at 149-50. In addition to this clear statement of the necessary result and the Appellant's potential remedy, the IBIA further stated that [the] remedy for errors of law where it concerned "[t]he issue of a patent to land within the jurisdiction of the Department, is a direct proceeding by a bill in equity to correct them." King v. McAndrews, 111 F. 860 (8<sup>th</sup> Cir. 1901).

(Answer at 6.)

BLM asserts that the necessity to proceed to Federal District Court in this case is even more compelling, maintaining

[u]nlike Francisco Chavarria, Mr. Pinto's status as Indian was clear and undisputed. Unlike the present case where patent was issued 106 years prior to its being challenged, the Pinto patent was issued only 33 years prior to its challenge. Unlike the present case, where title to the original parcel patented has changed several times and had several

different owners in the intervening years, Mr. Pinto's parcel never left his ownership. The issue common to both cases, however, is the threshold issue: both cases involved errors of law, not correctable mistakes of fact.

(Answer at 6.)

[1, 2] Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (2000), authorizes the Secretary of Interior to correct patents or documents of conveyance in order to eliminate errors. Foust v. Lujan, 942 F.2d at 714-17; Ramona and Boyd Lawson, 159 IBLA 184, 190 (2003); Mary D. Hancock, 150 IBLA 347, 350 (1999). BLM has promulgated regulations implementing this authority at 43 CFR Subpart 1865.

We have held that to justify this remedy, the party applying for the patent correction must demonstrate there was an error in fact that requires correction. Ramona and Boyd Lawson, 159 IBLA at 190; Mary D. Hancock, 150 IBLA at 351-52; Frank L. Lewis, 127 IBLA 307, 309-10 (1993); George Val Snow (On Judicial Remand), 79 IBLA 261 at 262 (1984). See Foust v. Lujan, 942 F.2d at 715. The showing of error is the legal prerequisite for correction, and "it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law." Ben R. Williams, 57 IBLA 8, 12 (1981). However, there is no requirement that the mistake be mutual: it may be unilateral. Mary D. Hancock, 150 IBLA at 352 n.7; see e.g., Mantle Ranch Corp., 47 IBLA 17, 30-34; 87 I. D. 143, 150-52 (1980). But there must be a mistake or error of fact.

The term "error" is defined as 43 CFR 1865.0-5(b) as

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.

If an error does exist, the Department will correct the patent if substantial Government or private interests are not unduly prejudiced, no third party rights are affected and substantial equities of the applicant will be preserved by the action. Ramona and Boyd Lawson, 159 IBLA at 190; Mary D. Hancock, 150 IBLA at 351; Mantle Ranch Corporation, 47 IBLA 17, 37-38, 87 I. D. 143, 153-54 (1980). Thus, it must be shown that equity and justice favor correction. Ramona and Boyd Lawson, *supra*; Mary D. Hancock, 150 IBLA at 351; Frank L. Lewis, 127 IBLA at 310; George Val Snow (On Judicial Remand), 79 IBLA at 262; Ben R. Williams, 57 IBLA at

13. The burden, nevertheless, falls on the party seeking the correction. George Val Snow (On Judicial Remand), 79 IBLA at 264.

For example, in a case involving what was contended to be an error of law, Walter and Margaret Bales Mineral Trust, 84 IBLA 29 (1984), appellant sought to have coal reservations removed from several patents. Appellant alleged in that case that the Department had made mistakes of law in including the reservations in the patents in question. Assuming such legal mistakes could have been shown, they would “not be correctable pursuant to section 316 of FLPMA, given the regulatory limitation” that corrections are limited to mistakes of fact and not of law. See 43 CFR 1865.0-5(b). 84 IBLA at 32. This Board concluded, after reviewing the matter, that the reservations contained in the patents were proper in each instance, and affirmed BLM’s denial of the application for correction of patents, stating:

The law is that only Congress can condition or limit a title conveyed by patent, and the Secretary, as an agent of Congress, can reserve only what is authorized by Congress. Shaw v. Kellogg, 170 U.S. 312, 337-38 (1898); Deffeback v. Hawke, 115 U.S. 392, 406 (1885). Pursuant to the coal acts, Congress directed that patents contain the coal reservation. Thus, the reservations in the patents in these cases were required by Acts of Congress. The reservations were not made in error or by mistake.

84 IBLA at 34.

We need not reach the issue of whether what is at issue in this case is an error of law or fact, as urged by BLM, because we agree with BLM, for modified reasons, that no error has been shown in the issuance of the subject Homestead Certificate to appellant’s grandfather, Francisco Chavarria, as a citizen of United States under the Homestead Act of 1862.

Nor do we need to reach a determination as to the status of appellant’s grandfather, Francisco Chavarria, that is whether he was “Indian” or “white Mexican,” the latter as stated in U.S. Census documents contained in the record. Rather, our analysis assumes facts most favorable to appellant: that his grandfather was “Indian and was living separate and apart from a Tribe having adopted the habits of civilized life,” as provided in section 6 of the Act of February 8, 1887. As such, the Department has held he could have sought a homestead patent like any other citizen of United States under the Homestead Act of 1862, containing no restrictions on alienation, or could have sought an Indian trust patent containing the 25-year restrictions on alienation which appellant argues the General Land Office was bound by law to issue to him.

Because the homestead record, including the homestead entry, affidavits, the ordinary fees and commissions paid, and the final proof filed by his wife, Refugia Ortiz Chavarria, unambiguously contain no reference to Francisco Chavarria's Indian status, there was no justification for issuance of an Indian trust patent with restrictions on alienation rather than the ordinary homestead patent to which we hold Francisco Chavarria was entitled under the Homestead Act of 1862 at the time of entry and at the time the Homestead Certificate was issued. Therefore, no error has been shown in the General Land Office's issuance of the Homestead Certificate under the Act of 1862 that would justify correction.

The National Archives file on Francisco Chavarria's homestead, beginning with the November 11, 1890, filing of homestead entry application No. 1459 for the land described as "Lot 2, Sec. 12 and lots 6 and 8 and S 1/2NW14NW1/4, sec. 13, T. 7 S., R. 26 E., G&SRM.," and ending with the issuance of amended final Certificate 717, on April 15, 1896, occurred after the passage of the acts of 1875, 1884, and, most importantly in this case, after the passage of the act of 1887, specifically section 6 thereof.

In 47 L. D. 613 (1921), First Assistant Secretary Vogelsang issued Instructions to the Commissioner of the General Land Office "relative to the issuance of patents on Indian homestead entries." The Assistant Secretary addressed several factual patterns, specifically homestead applications involving Indian claimants after 1884 and stated:

After the passage of the acts of 1875 and 1884, Indians could exercise the homestead privilege under said acts as fully and to the same extent as citizens of the United States but they had to do so as Indians as distinguished from citizens. In fact, under the terms of the act of 1875, they must show that they are members of an Indian tribe and have abandoned their tribal relations. They are forbidden alienation, or title to lands is held in trust for specific periods. This situation is further shown by the provision in the act of 1884, which excuses them from paying fees and commissions on account of their entries and proofs, for the obvious reason that they are Indians. But under the act of 1887 an Indian who is living apart from any tribe, or whether he is a member of any tribe or not and has adopted the habits of civilized life, is declared to be a citizen and is entitled to make entry under the regular homestead law, and upon showing compliance with said law in the matter of residence and cultivation is entitled to fee patent like any other citizen. A person who takes a homestead by virtue of the provisions of the act of 1887 is no longer an Indian within the purview of the acts of 1875 and 1884. To that class belongs the case of Jennie Adass *et al.*, (35 L. D., 80), followed in Instructions (37 L. D.,

219), and to which your office makes reference. Also of this class are the cases of *Turner v. Holliday*, (22 L. D., 215); *Feeler v. Hensley* (27 L. D., 502); *Frank Bergeron* (30 L. D., 375); and *Clara Butron*, unreported, and cited in Instructions (37 L. D., 219). See also Circular No. 427, July 27, 1915.

47 L. D. 616-617 (emphasis supplied).

The “followed in Instructions (37 L. D., 219)” reference by Assistant Secretary Wilson is noteworthy. In those instructions the relevant statutory provisions were set forth, save the act of 1906 which does not impact our analysis here.

The act of 1875 extends the benefits of the homestead law of May 20, 1862 (12 Stat., 392), to every Indian born in the United States who is head of a family or who has arrived at the age of 21 years and who has abandoned, or may thereafter abandon, his tribal relations, with the proviso:

That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

The act of 1884 provided that Indians then or thereafter located on public lands might avail themselves of the provisions of the homestead laws as fully and to the same extent as might be done by citizens of the United States and no fees or commissions were to be charged on account of entries or proofs under said laws. It was further provided:

All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow or heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his widow and heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The fourth section of the act of February 8, 1887 (24 Stat., 388), provides, in part, as follows:

That where an Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in quantities and manner as provided in this act for Indians residing upon reservations; . . . and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such land office would have been entitled had such land been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated.

The fifth section provides that upon approval of the allotments made under the act patents shall issue therefor containing restrictions against alienation for the period of twenty-five years, similar to those in the act of 1884. This sixth section reads in part:

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.

This section was amended by the act of May 8, 1906 (34 Stat., 22), as follows:

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be

issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed.

Emphasis supplied; 37 L. D. at 220-221. Assistant Secretary Wilson addressed the several cases cited in later instructions in the context of the Commissioner of Indian Affairs' question whether fee patents, issued to U.S. citizens under the homestead laws, could be substituted for Indian Homestead trust patents where requested by the entryman. Discussing the cases of Clara Butron, (August 31, 1899) and Jennie Adass, (35. L. D. 80), the Assistant Secretary stated:

The facts in the case of Clara Butron are that she made homestead entry May 23, 1892, paying the full fees and commissions thereon and stating that she was a native born citizen of the United States over the age of twenty-one years. It was not made to appear in her application paper that she was of Indian birth or blood and said application was made as in ordinary homestead cases. She submitted final proof in 1897 and at that time testified that she was a "native born Indian woman who had abandoned all tribal relations." The same statement appeared in her final homestead affidavit. A trust patent issued to her in 1898 under the Indian homestead act of July 4, 1884. She returned said patent asking for its cancelation and issuance in lieu thereof a patent in fee, alleging that she was a native born citizen of the United States and not an Indian woman nor ward of the government. It was further stated she had resided upon and cultivated the land involved for a period of over seven years and that she then resided upon said land. In reply to the request of the Commissioner of the General Land Office for instructions in the matter, the Department said:

Assuming that the statements of her affidavit in support of her application for a patent in fee are true, there is no doubt that she would be entitled to the issuance of such a patent in lieu of the trust patents which she now surrenders, and which she evidently refuses to accept.

But waiving the consideration of the sufficiency of such evidence to warrant the substitution of a patent in fee for the trust patent issued to her, it is clear that even if her testimony upon final proof were true, and she "is a native born Indian woman who had abandoned all tribal relations," her citizenship results from such condition

under the terms of section six of the act of February 8, 1887 (24 Stat., 388, 390).

After referring to the cases of *Turner v. Holliday* (22 L. D., 215) and *Feeler v. Hensley* (27 L. D., 502) the application for substitution of patent was granted, the Department stating:

It appears, therefore, that prior to her entry the applicant was clothed with full citizenship even though she might have been of Indian birth, and that she had the right to make entry of public lands without any restrictions except such as are imposed upon citizens generally.

In the case of *Jennie Adass, et al.*, the homestead entry was made August 25, 1887, under the act of March 3, 1875, although the application therefor was endorsed as having been made under the act of July 4, 1884 [Indian Allotment Act], the applicant stating that she was an Indian, born in the United States, who had abandoned relations with her tribe and adopted the habits and pursuits of civilized life. Departmental decision in that case was based upon the ruling and statements made in the *Clara Butron* decision and cases cited therein, and it was accordingly held (syllabus):

An Indian homesteader holding title under a trust patent issued to him under the provisions of the act of July 4, 1884, who, at that time of making the entry had abandoned his tribal relations and was occupying the status of a citizen of the United States under the terms of section six of the act of February 8, 1887, may, upon application therefor, have the trust patent canceled and patent under the general homestead law substituted therefor.

The Commissioner of Indian Affairs questioned the holding in the *Adass* and *Butron* cases, arguing: "To hold that Indians who made homestead entries under the act of 1884 were authorized by the provisions of the act of 1887 to alienate their lands would be, in effect, to nullify all trust patents issued under the provisions of that act, for lands formerly within an Indian reservation, as well as for lands on the public domain; and that the act of May 8, 1906 –

is the only provision of law whereby an allottee or Indian homestead entryman can be granted a fee simple patent for lands embraced in either an allotment or homestead entry prior to expiration of the period for which trust patent was issued.

Assistant Secretary Wilson rejected these arguments, stating:

The Department does not concur in these statements and, in fact, they are not in consonance with the ruling in those cases. The principle involved in those cases is this: The benefits and privileges of the acts of 1875 and 1884 are conferred upon Indians as such who locate or settle upon public lands, or those not living upon a reservation. The prerequisite to the enjoyment of such benefits and privileges is a severance of tribal relations. Prior to these acts Indians as such, even though living apart from their tribes, could not make homestead entries. In order to sustain a settlement right in the face of an adverse claim, the Indians would have to show that they were citizens of the United States. [Citations omitted] After the passage of said acts the Indians could exercise the homestead privilege as fully and to the same extent as citizens of the United States but they were forbidden alienation for specified periods. The act of 1887, however, not only declared every Indian to whom an allotment should be made under said act or any law or any treaty to be a citizen of the United States, but also declared every native born Indian who had taken up his residence separate and apart from his tribe and adopted the habits of civilized life, to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizens, which necessarily included the privilege to make a homestead entry under the provisions of the homestead laws, just as any other citizen.

37 L. D. 222-23 (emphasis supplied).

Significantly, Assistant Secretary Wilson addressed facts more ambiguous than presented in the instant case because the final proof at least made reference to the claimant's Indian status, albeit that the Indian fell under section 6. In Butron, an Indian homestead patent under the Act of 1884 was issued rather than a patent under the Homestead Act of 1862. Assistant Secretary Wilson stated that, under these facts, the General Land Office erred in issuing an Indian homestead patent, explaining:

In the Butron case, notwithstanding application was made under the general homestead law and full fees and commissions were paid, patent with restrictions was issued as on an Indian homestead entry under the act of 1884. This was a mistake and the claimant was clearly entitled, as held, upon showing full compliance with the homestead law, to substitution of patent. This holding was upon the theory, based upon claimant's assertion, that she was a native born citizen of the United States and not an Indian nor a ward of the government. But opinion

was further expressed in that case that even though claimant were a native born Indian, yet if she had abandoned all tribal relations she became a citizen under the terms of the sixth section of the act of 1887 and was therefore equally entitled to the relief prayed for. Decision in the Adass case was based upon this view, although in that case entry was applied for and allowed under the Indian homestead laws. The entry in that case was made after the act of 1887 and therefore at a time when it might have been made under the general homestead law. The fact that it was not so made was not regarded as an obstacle, under the view expressed in the Butron decision and cases cited therein, to the substitution of patent upon showing full compliance with the law under which the applicant was clearly entitled to make entry.

37 L. D. at 223 (emphasis supplied).

Distinguishing another case involving allotments on reservation lands where Indians became citizens after receiving allotments, the Assistant Secretary stated:

The Butron and Adass cases have sole reference to Indian homesteads and the decisions therein were not intended to and did not affect reservation or fourth section allotments where the Indians only became citizens after and by reason of such allotments. \* \* \*

Id. at 224.

Concerning Frazer v. Spokane County, (69 Pac. Rep., 779), Assistant Secretary Wilson cautioned

[t]hat decision in no way affects the principle announced in the Butron and Adass cases, where it is held that as to those Indians who after the act of 1887 made homestead entry under the act of 1884 the trust patents issued to them might be canceled and patents in fee issued instead, on the theory that they have earned title as other citizens, and that they might have in the first instance applied under the general homestead law. This is plainly in accordance with the discretionary and administrative policy governing Indian affairs, and the rule announced in the Butron and Adass cases is not in any manner inconsistent with the continued exercise of supervision over allotments and Indian homestead entries. As said in the case of Matter of Heff (197 U. S., 488):

Of late years a new policy has found expression in the legislation of Congress – a policy which looks to the

breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt.

In the Opinion of the Attorney-General of July 27, 1888 (19 Ops., 161), it was said, referring to section six of the act of 1887:

The interesting feature of this legislation is that it marks an epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes or bands, as heretofore.

The provisions of the act of May 8, 1906, *supra*, clearly embrace Indians to whom allotments have been made as such, and not those who by reason of their position have been allowed to make homestead entry as citizens of the United States. It was not intended by the decisions in the Butron and Adass cases that patents in fee should issue in such cases in lieu of homestead trust patents, as matter of right and without any preliminary showing.

37 L. D. at 224-225.

The Assistant Secretary cited to earlier Departmental decisions involving Indians who had sought homesteads as citizens under the ordinary allotment act rather than under the Indian Allotment Act. In Feeley v. Hensley, 27 L. D. 502 (1898), the question was whether, in contesting a Soldier homestead entry involving a native born Indian who had abandoned the tribal relations and adopted the customs of civilized life, it was necessary to serve the Commissioner of Indian Affairs or an Indian agent. The Secretary responded:

The applicant, William Hensley, although a Winnebago Indian of full blood, filed his declaratory statement, and thereafter, when he made homestead entry for the tract in controversy, declared in his homestead affidavit that he was a native born citizen of the United States, over the age of twenty-one years. It must be presumed that he was and is an Indian born within the territorial limits of the United States and one who had at the time of filing his declaratory statement and of making his entry, taken up his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, as his

citizenship could apparently be derived no other source. These conditions brought him within the pale of citizenship, where he has voluntarily placed himself. (24 Stat., 388, 390, Sec. 6), act of February 8, 1887.) It was unnecessary, therefore, to notify the Commissioner of Indian Affairs, as your office decision of October 15, 1895, held. The homestead privilege was conferred upon native born Indians who have severed tribal relations and abandoned savage for civilized life. (*Turner v. Holliday*, 22 L. D., 215). The Indian entryman did not attempt to secure an allotment to him of non-reservation lands, whereby he would become a citizen, but relied upon his citizenship as one who had separated from his tribe and had adopted the habits of civilized life. By his voluntary act, his declaration citizenship under oath, and accepting the conditions imposed by law upon other citizens, in filing his declaratory statement and making homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the government toward him, as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupillage or wardship of the latter no longer exists.

27 L. D. at 503-04. See also *Turner v. Holliday*, 22 L. D. 215 (February 21, 1896).

The First Assistant Secretary, in the Instructions to the General Land Office, 47 L. D. at 619-20, addressed whether an Indian trust patent should be issued where evidence in the homestead record placed the recorder on notice that an Indian was involved. Those facts, however, are not before us in this case as the homestead record gives no indication that Francisco Chavarria, assuming he was an Indian, was anything other than a "citizen of United States," having voluntarily taken up residence separate from any tribe and having adopted the habits of civilized life, had sought and obtained, personally upon his own application, and in final proof, through his wife, Refugia Chavarria, a regular homestead under the act of 1862 as he was entitled to do as a citizen of the United States under the act of 1887. Adhering to the Departmental Instructions and cases cited and discussed above concerning entries made after the passage of sec. 6 of the act of 1887, we decline to find that appellant has established error justifying patent correction.

Appellant's claims of preemption lands or that his grandfather resided on the lands at issue as far back as the 1700's find no support and are in fact contradicted by affidavits filed in support of final proof of Francisco Chavarria's homestead application. A final proof affidavit of his widow, Refugia stated she resided on the land "since July 1889 to the present time." The affidavit of Eduardo Soto, also filed

in support of final proof, in response to the question of when applicant settled upon the homestead, stated “in the summer of 1889.” Nor does the record contain any evidence supporting appellant’s contention that when Francisco Chavarria made his homestead application on November 11, 1890 “under section 2289 of the Revised Statute [Homestead Act of 1862]” he was commuting his homestead into an Indian Trust Patent.

Francisco Chavarria and his wife Refugia’s unambiguous sworn statements, made in affidavits and contained in the records of the National Archives, indicate no intention that he desired to be issued a trust patent under the act of 1884, containing restrictions on alienation, cannot reasonably be repudiated or impeached by his successors in interest. Franklin Silas, 129 IBLA 15 (1994); aff’d., Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996).<sup>6/</sup> Nor will appellant’s assertions of wrongdoing by Departmental officials, specifically the General Land Office Recorder and Register, be heard to create ambiguity or disputed issues where none otherwise exist.

Accordingly, we find no error requiring correction in amended Homestead Certificate 717 issued to Francisco Chavarria under the Homestead Act of 1862. Consequently, we do not reach the equitable issues because a finding of error is a predicate for relief under 43 U.S.C. § 1746 (2000).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the modified reasons set forth above.

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Will A. Irwin  
Administrative Judge

I concur:

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R.W. Mullen  
Administrative Judge

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<sup>6/</sup> Appellant’s claim that the Recorder and Receiver assigned or “gave” several parties the same land is not borne out by the record. The entries to which appellant refers did not contain a description beyond section numbers. A section is 640 acres, hence a showing that several persons received, 130, 160 or 80 acres within the same section does not justify the conclusion that they all were assigned the same land. Significantly, appellant has not produced final homestead certificates, which do contain the entire property description, showing that the same land was issued to several persons, as alleged.