



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

Nevada State Office
1340 Financial Boulevard
Reno, Nevada 89502-7147
<http://www.blm.gov/nv>

AUG 25 2011

In Reply Refer To:
NEV-048100
1864/1865 (NVS930, NVS0056)

CERTIFIED MAIL NO. 70062760000277499059 - RETURN RECEIPT REQUESTED

DECISION

Mayor Roger Tobler	:	Recordable Disclaimer of Interest
City of Boulder City, Nevada	:	Patent Correction
401 California Avenue	:	Patent No. 27-95-0022
Boulder City, Nevada 89005	:	

Application for a Recordable Disclaimer of Interest Denied
Application for Patent Correction Denied

On May 3, 2011, the Bureau of Land Management (BLM) received an application from the City of Boulder City (City) for a recordable disclaimer of interest (RDI) for any interest held by the United States in the Eldorado Valley Transfer Act (EVTA) transferred lands, or, in the alternative, a patent correction for the patent issued to convey the EVTA lands. BLM hereby denies the application in its entirety. Neither a RDI nor a patent correction is in the public interest and, as discussed further below, the City has not demonstrated why either is warranted. Although the application is denied, the BLM would like to emphasize that it and the City both share common long term goals of increasing renewable energy development in Southern Nevada in a timely and environmentally responsible manner.

BACKGROUND

The EVTA lands were conveyed from the United States to the Colorado River Commission (Commission) on July 9, 1995. That same day, the Commission conveyed the lands to the City. The patent states:

EXCEPTING AND RESERVING TO THE UNITED STATES;

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2. *Certain right-of-way corridors for transportation and public utilities as designated in Exhibit A attached hereto and made a part hereof.*

Similarly, the deed conveying the land from the Commission to the City provides:

In addition, there is by federal patent excepted and reserved to the United States:

....

2. *Certain right-of-way corridors for transportation and public utilities as designated in Exhibit C attached hereto and made a part hereof.*

The BLM understands the importance of the EVTA lands for the development of renewable energy. As a way of further demonstrating the BLM's commitment to help the nation meet its green energy future, the BLM is considering initiating the preparation of a programmatic environmental document for the EVTA corridors. The aim of such an effort would be to provide an analytical basis for future projects within the EVTA corridors and thus to create a time and cost savings for processing of future projects. Such an effort would require the BLM and the City to work together. The BLM welcomes the opportunity to discuss this possibility in more detail.

In addition, the BLM is dedicated to working with the City in support of renewable energy projects through processing ROW applications for and in support of renewable energy. Indeed, the City and the BLM have been meeting and corresponding since 2009 regarding the nature of the federal interests within the EVTA lands, and throughout these meetings, the BLM has repeatedly suggested that the City encourage project proponents to work with the BLM at the earliest possible stage in the process so the BLM can strive to accommodate the City's timeframes. The BLM has also communicated many ways that it could help ensure the timeliest processing of applications. One such method is utilization of the BLM Southern Nevada District Renewable Energy Coordination Office (RECO) to process ROW applications submitted in support of the renewable energy projects on the EVTA lands.

The BLM continues to do its part to expeditiously facilitate renewable energy in the EVTA lands area, such as processing new ROW applications for power transmission lines proposed within the federally managed ROW corridors that would provide connectivity for new proposed solar development on the EVTA lands. The BLM Southern Nevada District RECO is currently processing such a ROW application and expects to reach a decision by January 2012. The BLM welcomes the opportunity to work with the City to expedite other ROW applications required to support development on the EVTA lands in an environmentally responsible manner and to the extent allowable by law.

The BLM has a demonstrated history of being responsive to ROWs that support development of the EVTA lands. One such example is a ROW currently issued to Copper Mountain Power, Eldorado Energy, LLC and Nevada Power Company (N-61858) for 230kV overhead power transmission providing connectivity for power generation facilities operating on the EVTA lands. Following receipt of the ROW application in July 1997, the City requested expedited review of the application. The BLM processed the request and issued a ROW grant in January 1998, approximately six months after the receipt of the original application. Another example is a ROW amendment issued to Nevada Power Company for a loop in of two 230kV transmission lines (McCullough-Arden 230kV line No. 2) and a communication line to connect the Eldorado

Energy Project (N-53151). The City also requested expedited processing of this application. The BLM issued a ROW amendment for this project in June 1998, less than five months after the application was received.

The BLM stands ready to work cooperatively with the City on these important projects. However, as explained below, and after having fully considered all of the materials submitted by the City in support of its application for an RDI and/or Patent Correction, the City's application is properly denied.

I. The City Has Not Met the Legal Requirements for Issuance of an RDI

The authority for the BLM to issue RDIs is found in Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745. Section 315 grants the BLM the discretionary authority to issue RDIs, but it can exercise that discretion only in limited circumstances. Specifically, the disclaimer must help remove a "cloud on title" to lands *and* the BLM must determine that a record interest of the United States has terminated by law or is otherwise invalid.¹ The BLM's regulations mirror this requirement. *See* 43 C.F.R. § 1864.0-1 ("in general, a disclaimer may be issued if the disclaimer will help remove a cloud on the title to lands and there is a determination that such lands are not lands of the United States or that the United States does not hold a valid interest in the lands."); 43 C.F.R. § 8364.0-2(a) ("the objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest, based upon a determination of the Secretary of the Interior that there is a cloud on the title to the lands...and that ... a record interest of the United States in lands has terminated by operation of law or is otherwise invalid..."). Thus, the BLM *must* make the determination that a record interest is terminated or otherwise invalid in order to issue an RDI. Even then, the BLM *may*, but need not necessarily, issue an RDI. *See County of San Bernardino*, 2010 IBLA 153 (2011) (BLM rationally determined not to use the RDI process to resolve R.S. 2477 claims).

The RDI application maintains that a record title interest of the United States in the EVTA lands terminated by operation of law or is otherwise invalid because (1) the timeframe provided in the EVTA for identifying reservations by the United States expired prior to the United States identifying them; (2) the BLM has not provided a legal description for the corridors; and (3) the United States has taken actions consistent with acknowledging that it did not reserve an interest. None of these assertions provide a sufficient basis for the BLM to conclude that a record interest of the United States terminated by operation of law or is otherwise invalid.

A. The BLM Was Authorized to Reserve the Interests in the Corridors in the 1995 Patent

The City first claims that that under sections 4(a) and 7 of the EVTA, the BLM did not act timely to identify the lands to be reserved and therefore foreclosed its opportunity to reserve the interests that were ultimately included in the patent. More specifically, Section 4(a) of the EVTA requires the Commission to file a Proposed Plan of Development within three years of the date of the Act. Section 7 of the EVTA provides that:

¹ An RDI can also be issued in certain other limited circumstances not applicable here.

the Secretary shall include in any conveyancing instruments executed under the authority of the Act such provisions as will in his judgment protect existing or future uses by the United States of lands within the transfer area...*Provided*, That the Secretary, after consultation with the Commission, shall determine the amount and location of all lands within the transfer area which may be required for future use by the United States, and he shall have until the filing by the Commission of the proposed plan of development provided by section 4(a), to define and describe all such lands.

Without any legal or factual support, the application concludes that the BLM's failure to "define and describe" the ROW corridors by the time the Plan of Development was filed results in termination of any claim by the United States of an interest in these corridors. This argument fails for several reasons.

First, assuming the timing component of Section 7 of the EVTA somehow completely deprived the BLM of the authority to unilaterally except and reserve the corridors in the patent, nothing in Section 7 prohibits the BLM from simply asking the Commission to accept the right-of-way corridor exception and reservation (as it did) and nothing prevents the Commission from accepting it (as it did).² The Commission had its own discretion to decide whether to forego unrestricted interests it may have otherwise retained in light of the request for transportation and utility corridors meant to serve the public interest. The City has not provided a basis for illustrating how the Commission could not, by its own actions, forego certain interests in the Eldorado lands if it so wished, especially when the lands were excepted and reserved to provide for the future uses intended to benefit the public—which was the actual objective of Section 7. Simply put, Section 7 does not preclude the Secretary from asking for ROW corridors, and the Commission was not hindered by Section 7 to agree to such ROW corridors. In essence, nothing in the EVTA prevents the Commission from *waiving* its received benefit from this provision of the statute.³ Even if BLM may not have been able to demand such corridors pursuant to Section 7 (which, as discussed below, is not the case), that is clearly not what occurred in this circumstance. The Commission, the City, and the BLM were all at the same negotiation table when the conveyance was made. There is no indication that the BLM forced the exception and reservation on the Commission by claiming Section 7 allowed the BLM to do so. The BLM believes the final transaction of this land transfer was a great example of the federal government working with state and local governmental entities to complete a long overdue land transfer almost four decades in the making. And with the City involved in such final transfer, it appears the City's current request is unnecessarily contrary to its previous position and actions.

² Section 208 of the FLPMA, 43 U.S.C. § 1718, directs that the Secretary shall insert in any such patent or other document of conveyance he issues....such terms, covenants, conditions, and reservations as he deems necessary to ensure proper land use and protection of the public interest...."

³ In terms of the availability of waiver of constitutional and statutory provisions, the Supreme Court has indicated that, "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Furthermore, "A party may waive any provision, either of a contract or of a statute, intended for his benefit." *Id.* (quoting *Shutte v. Thompson*, 82 U.S. 151, 15 Wall. 151, 159, 21 L. Ed. 123 (1873)).

Second, in a more technical sense, the EVTA does not expressly state a *consequence* for a failure to timely identify the lands required for future use by the United States. In the absence of such language, any alleged failure to identify and describe the lands by the date provided does not deprive the BLM of the authority to act. *See Dolan v. United States*, 130 S. Ct. 2533 (2010) (“where, as here, a statute does not specify a consequence for noncompliance with its timing provisions, federal courts will not in the ordinary course impose their own corrective sanction”). *Brock v. United States*, 476 U.S. 253 (1986); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). In short, even if the BLM did not identify the “amount and location” of the lands in the area by the time the plan of development was filed, any such failure did not deprive the BLM of the authority to include reservations to the United States in the patent. In relation to this concept, the timing of the BLM’s request for the ROW corridors did nothing to infringe upon the intent and purposes of the EVTA. The corridors were discussed openly, prior to conveyance, and are limited in scope and location after negotiations with the patentee. This approach to identifying corridors with the patentee’s consent can hardly be said to conflict with the intent of the EVTA.

Additionally, the BLM also believes it is important to consider that other facets of the EVTA were likely not perfectly executed. For example, as the City’s application admits, the Commission itself did not complete a final and accepted plan of development until 1993—well after the initial 3-year window provided by the 1958 statute. Even though Congress provided no provision for filing multiple plans and there is no reason to believe Congress intended this transfer to take almost four decades, no party objected to this approach as no party appeared unopposed to the transfer. All parties instead appeared flexible and realized if the Commission could not finalize the transfer in a reasonable time after the EVTA’s enactment, the purposes behind the Commission’s plan of development would likely need adjustment after almost 35 years. It follows that the interests of the public to be protected by the United States would also need adjustment after 35 years.

The BLM acted responsibly and took the time necessary to carefully consider the appropriate reservations needed to protect the existing and future uses of EVTA lands by the United States when the land transfer was actually ready for completion. Though the identification of the subject exception and reservation occurred beyond the timeframe mentioned in the EVTA, the manner in which the exception and reservation was established met the congressional intent of the EVTA, which was to convey land to the Commission but allow reservation of lands or interests to in those lands necessary for future uses by the United States. In sum, nothing in Section 7 barred the BLM from excepting and reserving the ROW corridors in the patent, even if it failed to meet the time requirements of that section.

B. The Lack of a Legal Description Did Not Invalidate the United States’ Interests in the Corridors

The City also argues that even if the identification of the corridors was timely, it did not comply with what the City claims is a requirement that the BLM identify those corridors with a legal description. This argument also fails for several reasons. First, the statute does not require a legal description. It states only that the Secretary must “define and describe” the lands that may be required for future use. The patent reservation and attached map met this requirement.

In particular, Exhibit A to the patent includes delineations for the townships, ranges, and sections of the reserved corridors, providing a clear basis to discern their location.⁴

The fact that the *Commission* may have sought such a legal description in its February 27, 1961 letter⁵ (or asserted that the EVTA required such a description) does not mean that the EVTA required it. Moreover, when considering the subject letter from the Commission, it is important to understand the nature of the reservations that were being proposed. The letter was in response to the BLM requesting comments on reservations proposed by the Bureau of Reclamation (“Reclamation”). The reservations proposed by Reclamation included such language as “[t]here is reserved to the United States...the prior right to use any of the lands included within the transfer area...”. The reservations proposed by Reclamation were open ended and had the potential to encumber the entire parcel, a very different scenario than the specific excepted and reserved interests for ROW corridors that were ultimately included in the patent.

The fact that the Commission submitted this letter in response to the BLM’s letter is indicative of its willingness to allow the BLM to establish interests in the EVTA lands after the initial Plan of Development and to communicate with the BLM any concerns it had with reservations as proposed. The Commission was offered and accepted the patent along with the reservations that were included in it. There is a notable absence of a letter similar in character to the one sent in 1961 from the Commission to the BLM identifying any concerns with the location of reservations ultimately included in the conveyance instrument—which indicates that both the Commission and the BLM believed that the reservations were described in a legally sufficient manner.

Second, even if the EVTA did require a legal description, this argument fails for the same reasons as the City’s first argument: (1) any lack of compliance with Section 7’s identification requirements did not deprive the BLM of the authority to act, and even if it did (2) the Commission was authorized to, and did, waive any such requirements.

C. Any Actions by the BLM After Issuance of the Patent Did Not Invalidate the United States’ Interests in the Corridors

Finally, the City claims that the BLM has taken repeated actions that acknowledge that it did not properly reserve its interest in the EVTA lands. Even if any of these actions do in fact make such an acknowledgment, it would not invalidate the United States’ interest since “the authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers, or by their laches, neglect of duty, failure to act, or delays in the

⁴ Since the City has expressed concern regarding the quality of the patent exhibit in past meetings as it relates to planned activities within the EVTA lands, the BLM continues its offer to work closely with the City using the information from the exhibit, other records, and more contemporary technology to project the information in a more user-friendly and agreed upon format. Once complete, the expectation is that it will assist the City with their leasing of adjacent lands and help avoid any potential encroachments.

⁵ The Commission wrote BLM on February 27, 1961 objecting to certain stipulations outlined in a February 10, 1961 letter from BLM to the Commission. The Commission’s letter objected to those stipulations and asserted that a legal description was required. See Exhibit D(4) to the City’s Application.

performance of their duties.” *Alfred Jay Schritter*, 177 IBLA 238, 255 (2009)(citing *Lone Star Steel Co.*, 79 IBLA 345, 349 (1984)). In any event, none of the “actions” cited by the City constitute an acknowledgment that the reservation was ineffective in any way.

For example, the application includes an excerpt of a memo from Sharon DiPinto (Lands Staff) to the District Resources Staff dated April 12, 1993, which states that “...The Colorado River Commission (CRC) submitted their original plan of development in 1960 which terminated the timeframe for identifying any reservation to the patent that we may have wanted.” This statement was made as part of internal and informal correspondence from the project manager for the land transfer to the office resources staff. The memo was not reviewed and approved by an authorized officer, nor by its instrument was it intended to convey an official position of the BLM. However, the memo is telling as to the discussions that were taking place between the parties. It states that “...CRC and Boulder City (actual entity who will be purchasing the land) seem to be open to negotiating any valid request from us.” (reservations) There is also a handwritten note that the Western Area Power Administration wanted to “...discuss including language in the sale to allow them to complete the corridor study...” Thus, the memo is actually consistent with the BLM’s position—i.e., that Section 7 did not deprive the BLM of the ability to reserve interests in the land to the United States.

The application also provides a sampling of letters that were sent to ROW holders as evidence that the BLM acknowledged that it was no longer the property owner and thus implying that these letters may be evidence for releasing any interest of the United States in the lands. Initially, it is clear that these letters only generally refer to *fee* title; that is, that BLM was acknowledging that, in general, it was no longer the fee title landowner of the EVTA lands. Moreover these letters are not representational of the BLM’s treatment of its interest in the rest of the corridor areas.

For instance, since the issuance of the patent the BLM has asserted jurisdiction over and administered ROWs, including the issuance of new ROWs, within the excepted and reserved ROW corridors. As noted earlier, the BLM granted several authorizations in 1998 to support development of the Eldorado Energy project on the EVTA lands. Other examples include, but are not limited to, ROWs issued in 2006 to Sempra Energy Resources for a natural gas pipeline and temporary construction area (N-75473 and N-75473-01) and to the Valley Electric Association for power transmission line and communication facilities (N-75471 and N-75472). The BLM has other pending ROW requests as well, including a ROW amendment request submitted by the City for a water pipeline running through the corridors in question (N-61859). In this application, the City notes that its “Pipeline is located in corridors reserved to the United States for transportation and public facilities under patent 27-95-0022.” The application was accompanied by the City’s own maps showing the BLM administered corridors. To the extent that the BLM may have relinquished jurisdiction over any particular ROWs located within the excepted and reserved ROW corridors, such action in no way characterizes the nature of the interest retained in the ROW corridors themselves.

D. The Statute of Limitations Weighs Heavily in Favor of Denial of the Application

One additional factor, the statute of limitations, weighs heavily in favor of denial of the application. More specifically, under the Quiet Title Act (QTA), and with the exception of an

action brought by a state, a plaintiff must bring an action to quiet title against the United States within 12 years of the date it (or its predecessor in interest) knew or should have known of the claim of the United States. 28 U.S.C. 2409a(g). “State” as that term is used in the QTA does not include political subdivisions of the state (like Boulder City); thus, the City is subject to the 12-year statute of limitations. *Calhoun County, Tex. v. United States*, 132 F.3d 1100, 1103 (5th Cir. 1998); *Hat Ranch Inc. v. Babbitt*, 932 F. Supp. 1 (D.D.C. 1995) *aff’d Hat Ranch Inc. v. United States*, 102 F.3d 1272 (D.C. Cir. 1996). Since the Commission (the City’s predecessor) and the City knew or should have known of the United States’ claims to these corridors when the patent was issued in 1995, well over 12 years ago, a QTA suit brought by the City would be time-barred.

The BLM implemented the QTA statute of limitations at 43 C.F.R 1864.1-3(a), which provides that the BLM *will not* approve an application for an RDI, except for those filed by a state, if more than 12 years have elapsed since the applicant knew or should have known of the claim of the United States. *See* 68 Fed. Reg. 494, 501 (January 6, 2003) (amendment to 1864.1-3(a) intended to “amend this section to be more consistent with the Quiet Title Act”). Thus, under the BLM’s regulations, it *cannot* issue an RDI in such circumstances. Notably, however, and contrary to the courts that have interpreted the QTA’s statute of limitations provision, the BLM’s regulations define a state to include cities (and other instrumentalities of a state). 43 C.F.R. § 1864.0-5(h). Thus, here, the City falls within the exception to 43 C.F.R. § 1864-3(a) and the BLM is not *required* to reject the application under 43 C.F.R. § 1864.1-3.

Nevertheless, this factor weighs heavily in favor of denial of the application, even if the application had substantive merit. As noted above, 43 C.F.R. § 1864.1-3 was intended to implement the QTA’s statute of limitations—in other words, if the BLM were truly implementing the QTA limitation it clearly would not issue an RDI to an applicant whose QTA suit would be barred in federal court. Here, although the regulation itself does not *require* denial since the City is a “state” as that term is defined in the regulations, the principle behind those regulations would be circumvented by affirming the City’s application. Such affirmation would also appear wholly contrary to a final administrative action taken in 1995, which was open and obvious to the City, and has remained unopposed since that time.

For all of these reasons, to the extent the City’s application seeks a RDI disclaiming an interest in the ROW corridors in the EVTA patent, it is denied.

II. A Patent Correction is not Appropriate or Warranted

In the alternative, the City asserts that a patent correction is warranted due to a mistake of fact relating to the description and acreage of the transferred lands. Correction of conveyance documents is authorized by section 316 of the FLPMA, 43 U.S.C. § 1746, and the regulations are found at 43 C.F.R. § 1865. “The objective of the correction documents is to eliminate from the chain of title errors in patents...” 43 C.F.R. § 1865.0-2. The regulations go on to define error as “...the inclusion of erroneous descriptions...reservations...in a patent or document of conveyance as a result of factual error. The term is limited to mistakes of fact and not of law.” 43 C.F.R. § 1865.0-5(b).

The City asserts that the description and acreage included in the patent are in error, due to the exception and reservation of the ROW corridors. The application provided very limited information beyond the assertion. Although it is unclear precisely what the City is claiming, it appears that the application mostly rests on the same grounds as the RDI request. To that extent, it is denied for the same reasons discussed above. Moreover, although the City claims that it is asserting an error of “fact”, it is clear that its allegations are that the BLM did not *legally* have the power to reserve an interest in the ROW corridors. Since the City alleges a mistake of law, and not of fact, a patent correction is not authorized. 43 C.F.R. § 1865.0-2; *City of North Las Vegas*, 178 IBLA 377, 383 (2010) (citing *Seldovia Native Association*, 173 IBLA 71 (2008); *Steve H. Crooks*, 167 IBLA 39, 44 (2005); *Lloyd Schade*, 116 IBLA 203, 208 (1990); *Walter and Margaret Bales Mineral Trust*, 84 IBLA 29, 32 (1984)). The City cannot transform the nature of its claim by labeling an alleged mistake one of “fact” instead of “law.”

The only possible way the City would be claiming an error of fact would be an allegation that, somehow, the BLM mistakenly included the reservation in the patent. The City does not directly allege this and has provided no evidence of such a mistake. Nor does the record disclose one. Indeed, it is difficult to imagine how a reservation could accidentally make its way into a patent (which is also accompanied by a specifically identified map). As stated in the letter from the BLM to the City dated March 21, 2011, the “...BLM maintains the federal interest exists as an easement which is exclusive in nature based upon the purposes for which the corridors serve—preservation of space for current and future transportation and public utility needs and to reduce the proliferation of separate rights-of-way across the landscape.” In sum, the BLM intended to, and did, except and reserve an interest in the corridors in the patent.

The City asserts in their request that the appraisal for the EVTA lands did not account for the exception and reservation of the ROW corridors. Public Law 87-784 amended the EVTA to add the following language to section 4(c): “The appraisal shall be of fair market value of the lands as of the effective date of this Act.” In compliance with the EVTA, as amended, the appraisal conducted a valuation for lands at the 1958 value. In 1995 the Commission purchased 107,412 acres for \$1,233,100, approximately \$11.50 per acre. The Commission was offered the sale, with the exception and reservation included, at this value, accepted the offer, paid the appraised value and was issued a patent. The Commission did not raise concern over the error currently alleged by the City in the valuation done in the appraisal at the time of the transaction.

III. Conclusion

For the reasons set forth above, and based on the analysis of the information submitted in the application, including the supporting documentation, there is insufficient evidence to support the granting of either a RDI or a patent correction. Therefore, the City’s requests for both an RDI and patent correction are hereby denied.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

Though the requests for a RDI and patent correction are denied, the BLM stands ready to work with you cooperatively to achieve our common goals of supporting renewable energy development in an environmentally responsible manner and to the extent allowable by law. The BLM will continue to expedite ROW requests that are received for this area.

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'A' followed by a flourish and a long horizontal line.

Amy Lueders
State Director

Enclosure

cc: The Honorable Harry Reid
The Honorable Dean Heller
The Honorable Joe Heck
Linda Bullen, Lionel Sawyer & Collins
Distribution List (BLM ROW Holders and Other Interested Parties) (as attached hereto)