

## MEMORANDUM

**TO:** Hon. Mayor Brent Gerry  
Members of West Richland City Council  
Bronson Brown, City of West Richland City Attorney

**FROM:** Kenneth W. Harper, Menke Jackson Beyer, LLP

**RE:** City of West Richland – Small Tract Act Rights-of-Way

**DATE:** November 5, 2019

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### I. Introduction

This memorandum will discuss several issues pertaining to the existence and nature of public rights-of-way crossing parcels of real property within the boundaries of the City of West Richland for which title was originally acquired from the federal government through the issuance of a land patent pursuant to the Small Tract Act of 1938 (“STA”). *See* former 43 U.S.C. § 682a.

The STA was enacted in 1938 and authorized the United States Secretary of the Interior to sell or lease certain tracts of land up to five acres in size. The Department of the Interior administered the STA by and through the Bureau of Land Management (“BLM”) with the goal of promoting “the beneficial utilization of public lands...and at the same time safeguarding the public interest...” 43 C.F.R. 257.2(a). The BLM classified federally owned land for sale or lease through the issuance of a classification order. Title to federally owned lands classified for sale was passed from the federal government to a purchaser through the issuance of a federal land patent.

Title to certain real property that is now within the boundaries of the City of West Richland was acquired from the federal government using the process set forth above. The classification order (i.e., Classification Order No. 5) for that real property was issued by the BLM on August 10, 1954. Classification Order No. 5 contained a provision stating that access to public highways from tracts leased or sold pursuant to it would “be afforded by a reservation of rights of way along the boundary of each tract for road or public utility facilities which will not exceed 33 feet in width...” In order to give effect to this provision of Classification Order No. 5, the land patents issued by the BLM were expressly “subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the boundaries of said land.”

The Federal Land Policy and Management Act (“FLPMA”) was enacted in 1976. *See* 43 U.S.C. § 1701. The FLPMA modernized the process for disposing of federal land, and included a

section that repealed the STA. Classification Order No. 5 was terminated and withdrawn by the BLM on November 18, 1981.

Recently, multiple property owners within the City of West Richland, for whom title to their property was originally acquired from the federal government through an STA land patent, have raised the issue of whether their property is still subject to the rights-of-way described in those patents.

## II. Legal Analysis

### A. Repeal of the STA and/or terminating of a classification order did not affect the rights-of-way granted in the STA land patents.

Certain BLM employees have taken contradictory positions regarding the effect of repeal of the STA and/or the termination of an STA classification order. BLM Instruction Memorandum No. 91-196, dated February 25, 1991, characterized the rights-of-way granted in an STA land patent as “common law dedications to the public to provide ingress and egress” to the patentees and “to provide access to public utility services.” According to IM No. 91-196, when small tract classifications were terminated these dedications disappeared “to the extent” they were “not accepted by actual use.” In a letter dated February 8, 2017, to City of West Richland resident Sean Hofstad, BLM Border Field Manager Lindsey Babcock cited to this language from IM 91-196 in support of the proposition that if a right-of-way was not established across patented land through prior use as of the date a classification order was terminated, then the patent’s “reservation language became null and void, and no right-of-way exists.”

On the other hand, the district manager for the BLM’s Spokane district wrote a letter to an official from former U.S. Representative Doc Hastings’ office dated March 31, 2009, stating in part that “[O]nce lands are patented the BLM has no legal authority to eliminate the reservation in patents.” This is similar to the conclusion reached in an August 5, 1957, memorandum from an associate solicitor of the BLM to the BLM director addressing whether the federal government had the ability to eliminate rights-of-way granted in previously-issued STA land patents. The associate solicitor who authored the memorandum could “find no legal authority for the United States to eliminate the reservation,” and once the patent has been issued, the Secretary of the Interior is “deprived of all rights to the lands except those specifically reserved to the United States.” Based upon our research, these conclusions correctly apply the relevant legal principles.

When the federal government issues a land patent “in accordance with governing statutes, all title and control of the land passes from the United States.” *Beres v. United States*, 64 Fed. Cl. 403, (2005) (quoting *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924)). Based upon these rules of law, once the federal government issued an STA land patent, it had no interest in the patented land and had no legislative or administrative authority to revoke or terminate a right-of-way granted in the patent. This conclusion is bolstered by the statutory

language of the FLMPA as well as the provisions of the order terminating Classification Order No. 5.

As mentioned above, the STA was repealed by the FLMPA. The FLMPA was intended to provide comprehensive authority and guidelines for the administration of a substantial portion of federal lands and their resources under the jurisdiction of the BLM. *See* Senate Committee on Energy & Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976 (1978). Subchapter V of the FLMPA outlines the general processes and requirements for granting rights-of-way subsequent to its date of enactment. *See* 43 U.S.C. §§ 1761-1771. The FLMPA specifically states that “[N]othing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.” 43 U.S.C. § 1769(a). Therefore, by its clear terms, the FLMPA had no effect on the rights-of-way contained in previously-issued STA land patents.

An analysis of the BLM order terminating Classification Order No. 5 reveals that it did not purport to affect rights-of-way contained in previously-issued STA land patents. Paragraph 1 of the termination order recited the entirety of the federal lands that were designated for sale or lease in Classification Order No. 5. Paragraph 3 of the termination order identified all land from Section 1 that was still available to lease under federal mineral leasing laws. Paragraph 4 of the termination order stated that “[T]he land described in paragraph 1, except as provided in paragraph 3, has been conveyed from the United States ownership and will not be restored to operation of the public land laws....” This can reasonably be construed as an acknowledgement by the BLM of the rule cited above that all title and control of land passes from the federal government when it issues a land patent. *Swendig*, 265 U.S. at 331. There is nothing within the termination order that provides textual support for the proposition that it constituted a revocation of rights-of-way contained in an STA land patent that had not been put to actual use by the public.

**B. Issues relating to rights-of-way granted in an STA land patent will be governed by Washington law.**

The United States Supreme Court has long held that issues regarding property ownership or interests in real property are governed by state law rather than “general federal law,” unless some other principle of federal law requires a different result. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *see also Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (where the Court states “[T]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the states”). As such, issues involving the meaning and effect of the “subject to” language contained in STA land patents for property that is now within the boundaries of the City of West Richland (subsequently referred to collectively as “West Richland patents”) will be governed by Washington law.

**C. The West Richland patents contained an offer of public dedication.**

All of the West Richland patents we have reviewed clearly state that they are “subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the boundary of said land.” Under Washington law, this language is sufficient to constitute an offer of a public dedication of an easement 33 feet in width running along the boundaries of the patented property. *See City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 502-03 (1949) (a common law dedication must be evidenced by “an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention,” and acceptance by the public); *see also Richardson v. Cox*, 108 Wn. App. 881, 890-91 (2001) (where the court notes that intent to grant a dedication can be expressly set forth in a deed); *see also Veach v. Culp*, 92 Wn.2d 570, 574 (1979) (where the court held that a conveyance described in a deed as a “right of way” gives rise to an easement); *see also Beebe v. Swerda*, 58 Wn. App. 375, 379-83 (1990) (where the court found an easement existed in part based upon the inclusion of the phrase “subject to” in the deed).

This conclusion is consistent with previous judicial decisions from the states of Arizona, Nevada, and Alaska, which have construed STA land patents that are similar to the West Richland patents as giving rise to a public easement/dedication. *City of Phoenix v. Kennedy*, 675 P.2d 293, 295 (Ariz. Ct. App. 1983); *City of Las Vegas v. Shadows Prof'l Plaza*, 293 P.3d 860, 864-65 (Nevada 2013); *McCarrey v. Kaylor*, 301 P.3d 559, 568 (Alaska 2013). There is grounds to believe that the BLM also considers the right-of-way granted in STA land patents to be public dedications. *See Bureau of Land Mngmt., The Small Tract Act: Guide Book for Managing Existing Small Tract Areas*, p. 1-94, 1-97 to -99 (April 1, 1980).

### **III. Conclusion**

The rights-of-way granted in the West Richland patents constitute offers of public dedications. Issues relating to these rights-of-way/dedications are likely governed by Washington law.