

OJO CALIENTE CRAFTSMEN, INC.

IBLA 90-150

Decided June 8, 1993

Appeal from a decision of the State Director, New Mexico State Office, Bureau of Land Management, dismissing protest of dependent resurvey. Group No. 754, New Mexico.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

BLM properly dismissed a protest of a dependent resurvey of the southern boundary of a Spanish land grant that was unsupported by evidence tending to show that the Department failed to properly perpetuate the location of the southeastern and southwestern corners of the grant, as determined by a survey approved in 1894 by the United States Court of Private Land Claims.

APPEARANCES: Frederick M. Mowrer, Esq., Raymond G. Sanchez, Esq., and Robert J. Desiderio, Esq., Albuquerque, New Mexico, for appellant; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

By letter dated September 15, 1989, Ojo Caliente Craftsmen, Inc. (OCCI), protested a Bureau of Land Management (BLM) dependent resurvey, accepted on February 8, 1977, of the Ojo Caliente land grant, contending that the survey had moved both the eastern and southern boundaries of the grant, as they were originally surveyed in 1894, to the detriment of OCCI. The protest alleged that "[i]n 1894, when the plat was completed by the surveyors, it clearly shows that the BLM southern boundary was south of the arroyo. The BLM boundary now is about 200 f[et] north of the arroyo and the eastern boundary is in the bottom part of the foot hills." On November 22, 1989, the New Mexico State Director, BLM, dismissed the OCCI protest of the dependent resurvey, concluding that the monuments set in that resurvey were a "true perpetuation of the 1894 survey position." He explained:

In 1894 the southwest corner of the grant was established through testimony and monumented with a granite stone, the southeast corner was established east of the southwest corner and monumented with a schist stone. In 191[9] the southwest corner was recovered and rehabilitated, the southeast corner was

recovered and new marks added to the stone. In 1975-76, both corners were recovered and remonumented in their original 1894 positions with brass capped iron posts.

With respect to an arroyo that OCCI placed north of the grant's southern boundary on the 1894 survey plat, but which allegedly is now south of that boundary as a result of the BLM dependent resurvey, the State Director found that the 1894 survey plat shows a gulch (not an arroyo) immediately north of the grant's southern boundary and that the arroyo to which OCCI referred is the "Cañada de Buena Vista," located south of that boundary. OCCI appealed from the State Director's November 1989 decision.

The OCCI statement of reasons for appeal (SOR) contends that BLM improperly resurveyed the southern boundary of the Ojo Caliente grant, placing it 55.45 chains north of its "original position," thereby depriving OCCI of 222 acres of grant land (SOR at 1). In the SOR and a supplemental SOR, OCCI now argues that the original position of the southern boundary of the grant was established in a 1877-78 survey performed by Griffin and McMullen. It is postulated that after the initial survey efforts by these surveyors in 1877, the U.S. Surveyor-General of New Mexico concluded that a portion of the eastern and all of the southern boundary was erroneously surveyed as a result of improper placement of the southeast and southwest corners of the subject grant and he therefore directed the surveyors to correct this error. See Supplemental SOR at 2-3. OCCI alleges that Griffin and McMullen were instructed to move both the southeast and southwest corners 55.45 chains to the south.

OCCI contends that Coleman, in his 1894 survey, improperly returned to the position originally established by Griffin and McMullen, thereby perpetuating the error sought to be corrected by the U.S. Surveyor-General. This error, it is urged, was continued by the 1919 and 1975-76 resurveys. OCCI concludes that the 1877-78 survey accurately established the southern boundary of the subject grant and that the 1975-76 resurvey, which ultimately relied on the 1894 survey to establish that boundary, is in error.

It is undisputed that on September 11, 1793, Governor Fernando de la Concha granted a petition from 53 settlers covering certain lands on the outskirts of the Cañada de los Comanches upon which they had settled and established the town of Ojo Caliente, and ordered the alcalde of the Pueblo of Santa Cruz to survey the granted lands and deliver juridical possession to the settlers. Pursuant thereto, Alcalde Manuel Garcia de la Mora proceeded to Ojo Caliente and, in conformity with the law, delivered juridical possession, designating the boundaries of the claim as:

On the north, the Cañada de los Comanches; on the south a landmark which I ordered to be constructed of stone and mortar, with a holy cross made of cedar placed in the center, just below the said tower of José Baca; on the east the foot of the hill, and on the west the foot of the other hills on the opposite side of the river.

Pursuant to Article VIII of the Treaty of Guadalupe Hidalgo terminating the Mexican War, 9 Stat. 631, Congress adopted the Act of July 22, 1854, 10 Stat. 308, creating the position of Surveyor-General of New Mexico who was charged with investigating all land claims originating before the Treaty and reporting thereon to Congress. Pursuant to a petition filed on February 28, 1873, Surveyor-General James K. Proudfit conducted a hearing and, thereafter, recommended to Congress that it confirm title to the petitioners "according to the boundaries set forth in the Act of Possession." While Congress never took any action to confirm the grant, a preliminary survey was subsequently conducted by Griffin and McMullen in 1877-78, which returned the grant as containing approximately 38,590 acres. This survey, however, was protested and never approved.

In 1891, concerned with the slow pace of adjudication of Spanish and Mexican land claims, Congress established the Court of Private Land Claims. See Act of March 3, 1891, 26 Stat. 854. Pursuant to this Act, two individuals filed suit with the court seeking recognition of the Ojo Caliente grant. On April 28, 1894, the Court confirmed the grant as described in the original concession. See Answer, Exh. F at 3. To resolve a dispute over the width of the grant, the court concluded that the eastern and western boundaries were the foot of the first row of hills on either side of the Rio Ojo Caliente, thereby significantly reducing the size of the grant from that surveyed by Griffin and McMullen. No changes, however were made to the northern or southern boundaries, except for those made necessary by the reduction made in the width of the grant. See id. at 4. Finally, the court ordered a survey of the confirmed grant, in accordance with the boundaries so established. No appeal was taken from the court's judgment.

In September 1894, U.S. Deputy Surveyor Sherrard Coleman, at the direction of the court, surveyed the grant lands. Based on the testimony of two witnesses supplied by the "parties in interest," Coleman determined the location of the landmark that established the point of beginning at the southwest corner (Field Notes of 1894 Survey (Exh. F attached to BLM Answer) at 5). The total area of the grant returned by Coleman was 2,244.98 acres. There were no objections to his survey, which was approved by the U.S. Surveyor-General of New Mexico on January 28, 1895, and by the U.S. Court of Private Land Claims on March 30, 1895. A patent was issued on November 6, 1895.

The grant was partially resurveyed in June 1919 by U.S. Cadastral Engineer William B. Douglass, who recovered the original southeastern and southwestern corners of the 1894 survey. The resurvey was approved by the U.S. Surveyor-General of New Mexico on June 17, 1921, and finally accepted on March 9, 1923. Between July 1975 and June 1976, BLM resurveyed a portion of the southern boundary of the subject grant in conjunction with a dependent resurvey of the northern boundary of the Antonio de Abeytia Grant, which was also resurveyed by Douglass in 1919. The portion resurveyed was the common boundary between the two grants. This resurvey also recovered the original southeastern and southwestern corners of the grant. The survey was accepted on February 8, 1977.

[1] One who challenges a BLM dependent resurvey after it has been approved bears the burden of establishing by a preponderance of the evidence that the resurvey was either fraudulent or grossly erroneous. James O. Steambarge, 116 IBLA 185, 188 (1990). Such fraud or gross error must have compromised the nature of the resurvey as a faithful retracement and reestablishment of the original survey. Crow Indian Agency, 78 IBLA 7, 11 (1983). Because the 1894 survey was accepted as the official U.S. survey of the subject grant, it was thereafter properly relied upon by BLM in resurveying the southern boundary of the grant. As BLM correctly points out, only the 1894 survey was finally approved by the U.S. Court of Private Land Claims as the official survey of the land which had passed under the original Spanish land grant and been confirmed by the court. That survey therefore created the southern boundary of the grant. Cox v. Hart, 260 U.S. 427, 436 (1922). On the record before us, the existence of prior private or unapproved surveys is neither relevant to the question whether later surveys conformed to the 1894 survey or material to any question concerning the retracement of the 1894 survey by later surveys. We therefore reject the arguments raised by OCCI that attempt to impeach the accuracy of the 1894 and later United States surveys by references to the survey run in 1877-78.

OCCI has not contended nor offered evidence to show that there was any shift in the location of the monuments established in 1894 for the southeastern and southwestern corners of the subject grant as of the time of the 1919 and 1975-76 resurveys or that the location of these corners was not accurately perpetuated on both occasions. We therefore conclude that the 1975-76 resurvey is a faithful retracement and reestablishment of the 1894 survey, because there is no evidence of fraud or gross error. See Burton E. Edwards, 78 IBLA 62, 63 (1983).

Even if the 1877-78 survey conducted by Griffin and McMullen could be said to have any relevance to the question of the proper situs of the southwestern corner of the Ojo Caliente grant, an examination of the record clearly establishes that the OCCI contentions in that regard cannot be credited. A reading of Surveyor-General Atkinson's supplementary survey instructions in 1878 makes clear that the southwest corner was never moved. Atkinson directed:

I find on examining your notes of the survey of the Ojo Caliente grant No. 77 that a portion of the east and the whole of the south boundaries are erroneously established. The east boundary, (a "point" formed by the western extremity of the Ojo Caliente hill) clearly should have been extended south to a point for the S.E. corner, due east of the established S.W. corner, and the south boundary, (determined by the "point" where you ascertained the landmark constructed of stone and mortar with a cedar cross, formerly stood) should have been established on an east and west line between the present S.W. corner and the S.E. corner above referred to. [Emphasis supplied.]

You will return to the field and complete the survey of this grant in accordance with this view by surveying and marking the east boundary from the present corner at 55.45 chains thereon

to the said S.E. corner, and by surveying and marking the south boundary on an east and west line between said S.W. corner and S.E. corners.

You will destroy the corner now standing at the present terminus of the east boundary and the corners now standing upon the present south boundary of the survey.

These instructions confirm that the southwest corner was correctly established but was not on a line (as it should have been) with the SE corner which was located 55.45 chains too far north. Accordingly, Griffin and McMullen were directed to move the southeast corner south so that it would be located due east of "the established S.W. corner." This, of course, required removal of the southeast corner monument and all other monuments along the southern boundary which were set at mile intervals. See, e.g., Manual of Surveying Instructions (1890) at 221. It did not, however, include the obliteration of the southwest corner, which Atkinson had referred to as "established" and which served as the basis for the determination that the southeast corner was located too far north.

That this was the interpretation of Griffin and McMullen is shown by examining their supplemental survey notes recording that "[i]n compliance with the foregoing instructions, I make my commencement at the S. W. corner previously established, from which I run E." The OCCI contention that, pursuant to Atkinson's instructions, Griffin and McMullen moved both the SW and the SE corner 55.45 chains south is thus contradicted not only by Griffin and McMullen's actual record but by the text of Atkinson's supplemental instructions as well.

Moreover, any movement of the southwest corner would have resulted in a location for that corner that was inconsistent with the language of the original concession. The alcalde of Santa Cruz, in delivering juridical possession, expressly stated that the landmark which he established on the southern boundary was "just below the tower of José Baca." In establishing the southwest corner for the 1894 survey, Coleman noted that, consistent with the grant of juridical possession, the point at which he established the corner was "a little below the ruins of an old tower which the witnesses testified as being the old "Torreon of Jose Baca." Indeed, the location of the "Ruins of the Tower of José Baca" is shown on the 1894 plat to be just north of the southern boundary. Yet OCCI admits that its location of the SW corner would be "approximately 55.45 chains in distance from the ruins of the old tower, commonly known as the Torreon of Jose Baca" (SOR at 4). It is difficult to see how this placement of the southwest corner can be made consistent with the original concession, the preliminary 1877-78 survey, or the 1894 survey. Moreover, a review of the BLM master title plat shows that OCCI's placement of the southwest corner of the Ojo Caliente grant would result in a substantial invasion of the Antonio De Abeyta grant to the south. There is nothing in the record before the Board to provide even minimal support for OCCI's assertions on appeal that the 1894 survey was, itself, erroneous.

Any arguments raised by OCCI not directly addressed by this opinion have been considered and rejected. All pending motions not discussed herein are denied. Accordingly, we conclude that the State Director, in his November 1989 decision, properly dismissed the protest challenging the location of the southern boundary of the Ojo Caliente Grant, as determined by the 1975-76 BLM dependent resurvey.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge