

THE COAST INDIAN COMMUNITY

IBLA 71-46

Decided October 5, 1971

Boundaries--Surveys: Generally

In surveying a boundary line created by a metes and bounds description in a private conveyance of land, calls to landmarks or monuments are pre-eminent, calls to boundaries are of secondary importance, calls of courses will prevail over calls of distances, and the recital of the quantity or area of land conveyed will be least influential.

Boundaries--Surveys: Dependent Resurveys

In the performance of a dependent resurvey in order to find a boundary line described by metes and bounds, the grant boundary method of distributing any error along the entire length of the line cannot be utilized where the apportionment depends on locating and fixing the terminus of the line by accepting one record distance call and allowing that distance to control the alteration of all of the other courses and distances recited in the record description of the boundary.

IBLA 71-46 : Group 555-C, Calif.
THE COAST INDIAN COMMUNITY : Protest against dependent
: resurvey dismissed
: Reversed

DECISION

The Coast Indian Community has appealed from that action taken on August 19, 1970, by the Chief, Division of Cadastral Survey, Bureau of Land Management, whereby he dismissed appellant's protest against the acceptance of a dependent resurvey of a portion of the boundary of the Ressighini (Resighini) Rancheria in sections 14 and 23, T. 13 N., R. 1 E., H.M., California.

All of the land with which we are here concerned was privately owned in 1907 by James C. and Martha E. Isle. By deed dated November 29, 1907, and recorded in book X of deeds at page 217, Del Norte County, California, the Isles sold the southern portion of their land to one John McCreary. The line described in that deed separating the McCreary property to the south from the retained Isle property on the north is the subject of this appeal. The Isle property remaining after the conveyance to McCreary was transferred by mesne conveyances to various owners until January 7, 1938, when Gus Ressighini conveyed the property by warranty deed "to the United States in trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the Act of June 18, 1934 (48 Stat. L., 984)."

Subsequent uncertainty as to the location of the Isle-McCreary division line resulted in the employment of G. H. Griffith, a licensed land surveyor, who conducted a survey of a portion of the boundary between the Ressighini Rancheria and the McCreary property in March 1967, at the request of the Bureau of Indian Affairs. In January of 1968, Richard B. Davis, also a licensed surveyor in the State of California, beginning at one of the points established by Griffith, continued and completed the survey of what we have referred to as the Isle-McCreary line. The line established by these two surveyors will be hereinafter referred to as the Griffith-Davis survey.

In July 1968, the Bureau of Land Management, at the request and expense of the Bureau of Indian Affairs, initiated its own resurvey to establish the south boundary of the Ressighini Rancheria. Because the BLM surveyor utilized a different method from that employed by Griffith and Davis, a different result was obtained. Appellants lodged their protest against the Bureau of Land Management's acceptance of the plat depicting that dependent resurvey and restoration of the portion of the boundary of the Rancheria.

The issue to be resolved, therefore, is whether the plat of the dependent resurvey performed by the Bureau of Land Management should have been accepted as correct.

The 1907 deed which created the Isle-McCreary line describes the land thereby conveyed to McCreary as follows:

Commencing at the section corner common to sections 13, 14, 23 and 24 in Township 13 North of Range 1 East of Humboldt Meridian, and running thence true courses:

1. North 19.50 chains
2. S 73 degrees W. 9.50 chains
3. S 5 degrees E 6.73 chains
4. West 4.50 chains
5. N. 18 degrees W 3.50 chains
6. S 66 degrees W 14.50 chains
7. S 20 degrees W 1.50 chains.
- 8 West 2.50 chains to a redwood stake 4 inches square marked R.
- 9 West 7.00 chains
10. N 30 degrees W 4.50 chains
11. West 13.07 Chains
12. S 25 degrees W 16.00 chains to land of Ward thence along same
13. South 5.44 chains to corner of Indian Allotment of Frank Isle.
14. East 20.00 chains, along said Allotment.
15. North 10.00 chains along said Allotment and thence
16. East 40.00 chains to the place of beginning, containing 78.42 acres.

The Griffith-Davis survey line began at the corner common to sections 13, 14, 23 and 24 and proceeded to follow the courses and distances set out in the deed in the order given. However, upon reaching deed reference 12 and proceeding thence upon a course of S 25 degrees 00' West 16 chains, as called for by the deed, Davis found that the line would not reach the east boundary of "the land of Ward." Accordingly, Davis simply extended the length of his line an additional 229 feet (approximately 3.47 chains) to a point of intersection with the Ward boundary and terminated on the point thereby reached without reference to the remaining calls in the deed required to complete the description of the tract conveyed to McCreary.

Cadastral surveyor Norman J. McDonald, who performed the dependent resurvey for the Bureau of Land Management utilized the Grant Boundary method. In accomplishing this he began at the southeast corner of section 14 and traversed north along the section line a distance of 19.50 chains to the point designated by the deed as number 2 (A.P. 1). He then returned to the southeast corner of section 14 and proceeded to resurvey the line between sections 14 and 23, establishing the West 1/16 section corner of sections 14 and 23. He then located the northwest corner of the Frank Isle Indian Allotment in section 23 and proceeded north along the east boundary of the land of Ward, establishing the western terminus of the Isle-McCreary line at a distance of 5.44 chains at A.P. 12. Having established the eastern and western terminals of the Isle-McCreary line by this method, McDonald then returned to the eastern terminus to conduct the actual survey of that portion of the south boundary of the Ressighini Rancheria. Because the line described in the deed would not reach the east boundary of the land of Ward, McDonald distributed the error along the entirety of the Isle-McCreary line. In making this apportionment he was obliged to alter every course and distance described by the deed along the entire length of the line.

The boundaries of sections of 14 and 23 were originally surveyed in 1882. This survey was suspended in 1884. In 1886 John Gilcrest resurveyed the fractional township as shown on the official survey approved July 30, 1889. The Bureau resurvey by McDonald disclosed that there was an excess of 1.64 chains (108 ft.) in the line between sections 14 and 23 over what was shown by the 1886 survey record. If not the sole cause, this discrepancy undoubtedly contributed to the failure of the line described by the deed to close upon the east boundary of the land of Ward. It might also be noted that the 1886 Gilcrest survey described the boundary line between section 14 and section 23 as bearing North 89 degrees 54' West whereas the resurvey by McDonald described the east half of the same line as bearing South 89 degrees 56' West and the West half as South 89 degrees 59' West. The extent to which this discrepancy of a few minutes of angle may have influenced the error in the Isle-McCreary line is not indicated by the record. 1/

1/ In the course of this review other discrepancies have been noted which do not affect our conclusion. The dependent resurvey plat accepted by BLM contains an error in the addition of distances, and the bearing of the east line of section 14 is shown as N. 0 degree 05' E. on the Bureau's plat and as N. 00 degree 01' 30" W. on the plat prepared by Davis.

One effect of the adjustment of the south boundary of the Rancheria accomplished by the McDonald resurvey was to eliminate a small tract of land which previously had been regarded as part of the Rancheria. In 1962 this tract was rented under a revocable permit issued by the Bureau of Indian Affairs to Wunderlich Company, General Contractors, Palo Alto, California, for the erection of a truck and machinery maintenance shop building, equipment storage, and maneuvering and repair area. In addition, the record contains an unsupported allegation that wood was taken from the disputed land in the past under authority of permits issued by the Bureau of Indian Affairs. Appellants state that after paying the rental for some time, the permittee refused to make further payments, asserting for the first time that the land was not part of the Rancheria and in fact had been transferred away from that parcel by the sale to McCreary in 1907. It was this assertion which caused the Coast Indian Community to contract for the private survey and the Bureau of Indian Affairs to arrange for the Bureau of Land Management to perform the dependent resurvey with the divergent results described above. Insofar as can be determined, the owner of the land lying south of the Isle-McCreary land did not have a survey made of that line, and the record leaves the Board in some doubt as to who the present owner of that land actually is. 2/

Appellant refers to an old fence which existed for several decades and served as the division between the Isle and McCreary properties. The fence is no longer there, but two residents of the Rancheria of long standing accompanied Richard B. Davis on his survey and their affidavits assert that these residents, through their knowledge of the location of the past location of the fence, were able to predict with precision where the line surveyed by Davis would run. Davis has supplied his own affidavit confirming this. Both of the resident-affiants have included statements that the land upon which the shop building is presently situated was cleared and used as pasture by Indians of the Rancheria. They further state that the land lying easterly of the fence at this point was covered with brush and trees

2/ The file contains a reference to the fact that the Agnew Timber Company of Brookings, Oregon, presently claims ownership of the metal building erected by the Wunderlich Company and the disputed land. There is also an indication that the "land of Ward" is owned at this time by one S. J. Agnew. Neither S. J. Agnew, the Agnew Timber Company, nor the Wunderlich Company has been served with copies of the protest, the Bureau's decision, or this appeal. The decision of the Chief, Division of Cadastral Survey, recites that "There are no known adverse parties in this case", despite the obvious interest of the owner of the land lying south of the Isle-McCreary line, wherever that ultimately may be established.

and is a steep hillside. Appellant argues that the boundary has long been accepted as described in the Isle-McCreary deed and as corrected by the Davis extension of the line, as demonstrated by the use permits granted for wood and for occupancy, by the clearing and use of the land as pasture by the Rancheria residents, and by the old fence line as fixed in memories of those who knew its precise location. It is asserted that the Bureau of Land Management made no effort to locate the boundary on the basis of its long established reputation. Appellant further argues that the dependent resurvey purports to alter the southern boundary of the Ressighini Rancheria and that this will alter and impair the bona fide vested rights of the appellants' contrary to statute, citing 43 U.S.C. § 772 (1964). Moreover, it is charged that the dependent resurvey ignores the intent of the grantor and the grantee who carefully described angles, courses and distances in the record of their private conveyance. It is apparent that McCreary intended to purchase only the mountainous upland, whereas the Isles intended to retain all the lands susceptible to agricultural use. The disputed tract is said to be relatively low as compared to the steep hill which lies immediately beyond to the southeast.

Appellant also contends that because the Isle-McCreary line was created at a time when the land was in private ownership in a conveyance between private parties and in accordance with a private survey the resulting boundary description was fixed in accordance with state, not federal law, and that rights were vested pursuant thereto.

Finally, appellant vigorously contends that the dependent resurvey by McDonald was improperly accomplished because it relies totally upon the acceptance of one distance in the original transfer as exact--the distance between A.P. 12 and the corner of the Indian Allotment of Frank Isle (5.44 chains); and on the basis of this single distance call, changed every other distance and course and all of the important, carefully measured and stated angles on the boundary. It is asserted that in so doing the surveyor allowed a distance to control courses contrary to law and accepted practice.

We think that appellant's argument is essentially correct. The survey instructions given to McDonald required him to follow the procedure by which he accomplished the resurvey. Therefore, he did not attempt to establish the boundary by any other method. He did not take into account the long standing recognition and acceptance of the boundary, nor did he seek to ascertain its location by reputation, or by determining the position of the old fence. He did not seek evidence to indicate the intent of those who created the boundary.

The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting

descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. 12 Am. Jur. 2d, Boundaries § 2, and cases collected therein.

Ancient boundaries and landmarks may be proved by reputation. Broadman v. Reed, 6 Pet. (U.S.) 328 (1832). A boundary line having been established by acquiescence, all land within that boundary is included within the original description and passes with a conveyance of the property to which it had become attached. Esher v. Vender, 61 N.W.2d 143 (Mich. Sup. Ct. 1953). In determining the boundaries of an Indian reservation the recognition by the Interior Department of a boundary as such for many years will be deemed controlling. Sol. Op. M-36539 (November 19, 1958); Boundary of San Carlos Indian Reservation, 55 I.D. 560 (1936). But see Sol. Op. M-36770 (January 17, 1969), to the effect that such long-standing recognition by the Department is not controlling when the exact location of the boundary has never been indicated on a map prepared for that purpose or officially surveyed and established on the ground.

Although past recognition, acceptance, acquiescence, reputation and historic use may not have dictated the result of the boundary survey, it was error for the Bureau to proceed without regard to the evidential value of these considerations.

We also concur in appellant's contention that the creation of the line by the private conveyance from the Isles to McCreary was accomplished in contemplation of and was fixed by the laws of the State of California. There can be no doubt that McCreary received only that to which he was entitled under the laws of the State. Therefore, to whatever extent the resurvey by BLM failed to conform to the requirements of State law, it was in error. However, we have not found it necessary to review the specific application of the law of that jurisdiction to resolve the issue presented by this appeal.

In fixing the location of boundary lines, all words and descriptions used in the grant must be harmonized and given effect if possible; and none of them should be disregarded if there is a reasonable way of using them. St. Louis v. Rutz, 138 U.S. 226 (1891).

It is not known whether the deed description of the Isle-McCreary line was based on an actual survey (although the call to the redwood stake would lead one to suppose that it was), but both the Bureau and the appellant have speculated that at least the distance of the final leg of that line (Deed ref. 12-13; 16 chains) was calculated on the basis of the then-official Gilcrest survey. That stretch of land is very marshy, has much standing water, and is covered with thick brush, making survey difficult. A surveyor, reaching deed reference 12 and having measured his angle and taken

his bearing for the call to the boundary of Ward's land, might well have then simply calculated the distance at 16 chains in reliance upon the official governmental survey. If we assume that this was what happened, we may reasonably assume further that had the Gilcrest survey been accurate the distance between Deed reference 12 and the Ward boundary would have been calculated more precisely, and this issue would not have arisen. It was on this basis that Davis sought to remedy the error by extending the line the required distance.

However, our conclusion that the Bureau's dependent resurvey is in error rests on a more fundamental premise. In the retracement or resurvey of a boundary described by metes and bounds there is a long established order of importance ascribed to the various kinds of calls. Calls to monuments, natural or man-made, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary. Calls of courses take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of the quantity or area of land conveyed or retained will be the least influential. United States v. State Investment Company, 264 U.S. 206 (1924); Galt v. Willingham, 11 F.2d 757 (5th Cir. 1926); 12 Am. Jur. 2d Boundaries § 65 (1964); Don Pelletier, Ethel Pelletier, A-28327 (July 11, 1960); Phillips Petroleum Company v. Threlkeld, 123 F.2d 434 (10th Cir. 1942); U.S. v. Big Bend Transit Company, 42 F. Supp. 459 (D. D.C. 1942); Cf. Cities Service Oil Company v. Dunlap, 115 F.2d 720 (5th Cir. 1941), rehearing denied, 117 F.2d 31, cert. denied, 313 U.S. 566; R. G. PATTON, LAND TITLES § 154 (2nd ed. 1957).

This order of precedence has general application, but is subject to change if the circumstances warrant. See Cities Service Oil Company v. Dunlap, supra.

Both Davis and McDonald gave full significance to the call to the boundary of the land of Ward. Both recognized that the Isle-McCreary line had to terminate on the Ward boundary. But McDonald's method depended on his locating a specific point on that boundary where the Isle-McCreary line would terminate before he could survey the line itself. To fix this terminus he was obliged to locate the northwest corner of the Indian allotment and reverse the record call to that point and survey back along the Ward boundary the distance of 5.44 chains called for by the deed. In so doing, he gave full value and effect to

a single distance call and allowed that call to control the alteration of all of the other calls for both course and distance along the length of the Isle-McCreary line. The assumption that this one distance was correct, and that the others must yield to conform to it was, under the circumstances, an arbitrary choice, and one not sanctioned by any rule of law or survey procedure known to us.

Had the final call of the Isle-McCreary traverse been to a monument or landmark situated on the Ward boundary, it would have been necessary to adjust courses and distances to reach the point designated in accordance with the priority accorded controls, supra. But in the absence of any such monument or landmark and in view of the reliance by the deed description upon the accuracy of the Gilcrest survey, which later proved inaccurate, no point on the Ward boundary properly could be selected in advance of the survey of the Isle-McCreary line and designated as the point of termination of that line.

Therefore, the acceptance by the Bureau of Land Management of the dependent resurvey was in error and the rejection of the protest against such acceptance was improper.

This decision does not constitute an approval of the Griffith-Davis survey nor does it purport to locate any portion of the south boundary of the Ressighini Rancheria, but is limited to a consideration of the efficacy of the survey performed by the Bureau of Land Management.

It should be noted that, regardless of how this survey has placed the line or how it may be placed by future federal surveys, the United States is merely exercising its right to survey and resurvey what it owns, and what it thus does is "for its own information" and "cannot affect the rights of owners on the other side of the line already existing." Lane v. Darlington, 249 U.S. 331, 333 (1919). However, as a practical matter, such a survey, if improperly performed might constitute a cloud on title.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed for the above stated reasons.

Edward W. Stuebing, Member

Frederick Fishman, Member (concurring)

Frederick Fishman, concurring.

I concur in the main opinion as to the efficacy of the dependant resurvey since that opinion is amply supported by showing that, even utilizing the principles governing Federal surveys, the dependent resurvey is not acceptable.

However, I do not believe that Federal law is controlling here. We are not concerned with simply restructuring a Federal survey.

By deed of November 29, 1907, James C. and Martha T. Isle conveyed part of their land to John McCreary. This was a transaction between private parties. The effect of the deed at that point of time obviously was governed by California law. The subsequent transfer of the retained land, after a number of mesne conveyances "to the United States in trust for such Indians of Del Norte and Humboldt counties, in California, eligible to participate in the benefits of the Act of June 18, 1934 (48 Stat. L 984)" did not vitiate the boundary line as it was created under California law.

The dependent resurvey was apparently treated as a survey of public domain. But, it should have been simply the defining on the ground of a boundary created by a private conveyance.

I fully recognize that 25 U.S.C. § 176 (1964) may be cited to the contrary. It provides:

Whenever it becomes necessary to survey any Indian or other reservations or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules of and regulations under which other public lands are surveyed. (Emphasis supplied.)

The Act of March 3, 1909, as amended, 43 U.S.C. § 772 (1964), concerning BLM resurveys, provides in part "[t]hat no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement . . ."

It cannot be contended tenably that the fortuitous circumstance of the title to the retained land passing into the United States in trust for Indians vitiated the boundary created by the transaction of the private parties under California law.

Were it otherwise, a boundary would be subject to fluctuation based upon the ownerships of the adjoining tracts. 25 U.S.C. § 176 (1964) cannot, therefore, be read as a mandate to disregard private rights.

It appears that the Davis extension of some 229 feet (approximately 3.47 chains) was largely, if not completely, necessitated by the finding that there was an excess of 1.64 chains (108 feet) in the common boundary of secs. 14 and 23. Accepting this postulate, did the Bureau of Land Management define on the ground the boundary created by the deed under California law?

Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars. C.C.P. § 2077(1).

In the instant case, the deed description lends itself generally to full delineation on the ground. It is immaterial that a description of land be false in part if what remains is sufficient for the purpose of identification. Hall v. Bartlett, 158 C. 638, 112 P. 176 (1910); Irving v. Cunningham, 66 C. 15, 4 P. 766 (1884); see Podd v. Anderson, 215 Cal. App. 2d 660, 30 Cal. Rptr. 345 (1963); Reed v. Spicer, 27 C. 58, 63 (1864).

The call ". . . S. 25 degrees W 16.00 chains to land of Ward . . ." is tantamount to a monument, since a known boundary line may be a monument as well as a physical object upon the ground. MacGregor v. Knowlden, 102 C.A. 42, 282 P. 438, 441 (1929). In determining parties intent ^{1/} as to what property passed by deed, where permanent and visible or ascertained boundaries are inconsistent with measurement of lines (as is the case here with respect to that call) of boundaries or monuments are paramount. See Shelton v. Malette, 144 Cal. App. 2d 370, 374, 301 P.2d 18 (1956); Steele v. Shuler, 211 Cal. App. 2d 698, 27 Cal. Rptr. 569, 570 (1963). This is made explicit in C.C.P. § 2077(2) which recites as follows:

When permanent or visible or ascertained boundaries or monuments are inconsistent with

^{1/} The intention of the parties is the controlling consideration in construction of boundaries. Pierce v. Freitas, 131 Cal. App. 2d 65, 280 P.2d 67, 69 (1955); Kimball v. Semple, 25 C. 441, 449 (1864).

the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

This is not to say that I regard the Davis survey 2/ as necessarily being a correct depiction of the boundary lines.

I also note that the official dependent resurvey, even if judged by the procedures of the Manual of Surveying Instructions, 1947, 3/ appears to be wanting. That survey treated the distance from the common sections corners of secs. 13, 14, 23 and 24 to point 1 (19.50 chains) and the distance of 5.44 chains to the corner of Indian Allotment of Frank Isle as sacrosanct, changing all other distances. The "constant ratio" prescribed by the manual was not followed.

I must conclude, therefore, that the protest against the dependent resurvey is properly sustained.

2/ It is my view, however, that the Davis survey in its basic approach, follows the requirements of California law.

3/ Sec. 381 of the manual reads in part as follows:

"381. Grant Boundaries. . . . The grant boundary field notes may call for natural objects, but these are frequently supplemented by metes-and-bounds descriptions. The natural calls are ordinarily given precedence, then the angle points of the metes-and-bounds survey, so far as these are existent and have been recovered.

. . . .
 "The retracement of an irregular grant boundary should be based on the record courses and distances, then, if it appears that one or more angle points are missing and that these are to be replaced, the trial lines should be corrected uniformly to the right, or to the left, and the lengths of the several courses should be adjusted on a constant ratio, longer or shorter as may be needed; both the angular and the linear corrections will be made as may be required to take up the falling of the trial lines.

"The process of making the adjustments may be compared to that of transferring one drawing to another drawing of slightly different scale, where the pantograph or photograph method may be used for the reduction or enlargement of one drawing"

(Emphasis supplied.)

Martin Ritvo, dissenting.

I would affirm the dismissal of the protest against the acceptance of the dependent resurvey. I agree that this dependent survey differs from the ordinary one in that its purpose is to reestablish a boundary line created by a private survey through then privately owned land, whereas the usual dependent survey seeks to resurrect a line of a public land survey. As a result, the controlling law, as both the major and concurring decisions point out, is that of California.

However, it is my conclusion that even under the California law the dependent resurvey was properly accomplished.

The major decision rests primarily on the conclusion that an order of importance must be attached to the various kinds of calls, and that McDonald's establishment of the point on the Ward boundary by measuring back the record distance from a corner of the Isle Indian allotment gave unwarranted importance to that one call and was an arbitrary determination which invalidated the entire survey. The concurring opinion points out, that in addition, to establishing a point on the west boundary by record distance the dependent survey also established a point on the east boundary on the section line between sec. 13 and 14 at the record distance north from their common section corner. This line as well as the other, it says, should have been subjected to the same correction as the other intervening ones.

As the majority opinion points out, the boundary line in dispute consists of a line which zigzags from point to point from east to west over a distance of almost one mile. Of the lines of the survey with which the dependent resurvey is concerned, only the east one begins at an accepted corner of the public land survey and runs along a section line of the public land survey. In addition the west line runs along a subdivision of section line of the public land survey and terminates at a corner of an Indian allotment which has been reestablished by a private surveyor in 1956.

The issues then become whether the grant boundary is the proper method of reestablishing the boundary line, and if so, whether it was properly applied here.

In dismissing the protest, the Bureau of Land Management said:

In the absence of found corners or collateral evidence of the corners and fence lines, all courses and distances must be given equal weight. This is the procedure outlined in the Section 400, Manual of Surveying Instructions, 1947, which says; "The dependent resurvey is designed to accomplish a restoration of what purports to be original conditions according to the record based upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey." The grant boundary method of adjusting lines by proportionate measurement, used by the Bureau in this resurvey, is the only logical way to restore a boundary by giving all courses and distances equal weight.

Any type of a survey, to establish intermediate points within a section between two previously defined boundaries or resurvey to reestablish these intermediate points, must start with a resurvey of the controlling section lines. In this case, the previous record was the 1886 survey by Gilcrest. Our experiences with original surveys in California has revealed that there are frequently vast differences in measurement between section corners in surveys done in the late 1800's than what is shown in the record. This is undoubtedly known to all private land surveyors in California but Griffith in 1967 and Davis in 1968 apparently made no attempt to retrace and remeasure the controlling section lines. The Bureau resurvey revealed that there was an excess of 1.64 chains (108 ft.) in the line between sections 14 and 23 over what was in the 1886 survey record. To make a true restoration of the intermediate points controlled by this section line, the excess in measurement should be equally distributed along all courses and distances between the intermediate points. This is done by the Grant Boundary method of proportionate measurement.

The contention . . . that the Bureau resurvey was done in reverse is unfounded. The 1907 deed description begins at the corner of sections 13, 14, 23 and 24 and runs North 19.50 chs. to a point on the section line and then runs in a southwesterly direction to the corner of the Indian Allotment of Frank Isle. After the section line

control was established, this is the exact procedure followed by the Bureau. It should be pointed out that, if at some future time should it be again necessary to recover some of the corners on the South boundary of the rancheria by survey, a future surveyor could start from either end of the survey and get the same results if the record of the Bureau resurvey were used. This would not be true for the Griffith or the Davis survey.

In summary, it is our contention that the resurvey method, used by the Bureau and shown on the plat accepted on December 19, 1969, which utilizes a mathematical solution to reestablish that portion of the rancheria boundary in question, is the best method available in the absence of any substantial physical and/or collateral evidence of the original boundary line.

At our request the Chief, Division of Cadastral Survey, reexamined the problem. In doing so he also plotted the boundary by applying the grant boundary method to the first and last courses of the description as well as to the intermediate points. He reported:

The subsisting survey record in 1907 was that of the section lines returned in the survey represented on the plat approved July 30, 1889. In the absence of evidence to the contrary it must be assumed that the survey or deed description was based on that record. No other basis was available. The metes-and-bounds description in the deed shows only one reference to the original survey, and that is the cor. of secs. 13, 14, 23, and 24. However, the westernmost boundary is shown as the east boundary of the Ward holding, thence south to the corner of the Isle Allotment, that is, along a regular subdivision-of-section line. The cor. of secs. 13, 14, 23, and 24 was recovered and perpetuated and the corner of the Isle Allotment was established on the ground by Bones in 1956 before either Griffith or Davis made any survey in the area. Presumably, Bones's

survey was made in accordance with California State law. There were therefore two points of the metes-and-bounds survey in existence, both mentioned in the 1907 deed. This deed showed no topography, nor did it state that the boundary followed every sinuosity of the edge of the bottom in order to segregate hill land from bottom land. The only valid evidence is the deed itself. The theory that the last course was computed to fall where it might so long as it was located along the edge of the bottom is only a hypothesis. It is an obvious principle that a conveyance of land must describe the parcel to be conveyed so that it may be specifically and exactly identified. Bona fide rights are certainly involved, but they do not exist in a vacuum to the detriment of the bona fide rights of other interested landowners.

There is no record of the method used to arrive at the courses described in the 1907 deed. The facts that courses between APs 2-3, 10-11, and 12-13 contain distances given to one link, while the other distances are in multiples of fifty links, and the reference to "a redwood stake 4 inches square marked R" at AP8 are conclusive that actual measurements were made on the ground. The bearings undoubtedly were obtained by magnetic compass because they are returned in single degrees. Magnetic compass bearings are notoriously erratic. We believe that ours is a more reasonable explanation of why the record end of course AP 11-12 does not terminate at the "land of Ward" than the theory advanced by Mr. Davis. He theorizes that the original metes-and-bounds survey was not carried beyond AP 11 and the remaining two metes-and-bounds courses "were computed from the government maps available at that time." We conclude that it would be wrong to assume the exact record should be run for all courses but the last two. From a technical standpoint this would be poor surveying practice. The most equitable restoration of the boundary is one that gives equal weight to every part of the official deed.

We have proceeded on the basis that all corners on the traverse have been "lost" except APs 1 & 12 because no evidence of the original location remains. Angle points 1 & 12 are points identifiable as part of the rectangular survey system. In the absence of acceptable evidence of original corner locations we must use mathematical methods of reestablishment. Once we depart from long established rules and precedents we enter an area of supposition and expediency. We must maintain a rational and substantial basis for administrative findings of fact that will not adversely affect valid private rights. No taint of arbitrariness or capriciousness can be permitted to enter into such decisions.

In commenting on the application of the grant boundary method to the boundary, he stated:

The resurvey gives more weight to the section and subdivisional lines at either end of the traverse than to intermediate points. The location of these lines is fixed by law and it is believed that points of the traverse on such rectangular survey lines can be more properly located by evidence of the rectangular survey than points not a part of the rectangular survey system. Angle points 1 and 12 have been treated as corners witnessed by the rectangular survey points to which they are tied. The method shown on the sketch by the red line [that is, by readjusting the first as well as the last call] would have invaded the SW 1/4 of sec. 13. On the west there would be little difference in the result from that obtained in the resurvey. On the north, between angle points 7 and 8, the line would have intersected two buildings, one of them a dwelling.

Thus, the alternate method of computing a grant boundary would have no more favorable result and would have some additional undesirable consequences.

These explanations are, in my opinion, entirely persuasive as to the propriety of ascertaining the boundary by the grant boundary method and the manner in which it was applied here. 1/

1/ In discussing resurveys and restoration of lost corners, Clark on Surveying and Boundaries (1939) states:

" § 141. Proportionate measure more reliable than adjustment of chain.--The old practice required the surveyor to adjust his chain to suit the former measure, but recent instructions require the surveyor to pursue the 'proportionate measurement' practice. This will be found more desirable and more accurate. It is seldom that the recent and former measurements will agree. Such differences occur in a variety of ways, such as using a chain too long or too short; the failure to level up in measuring an incline; by carelessness in setting pins; by failure to measure in a direct line or by an error in entering or transcribing the notes. The surveyor should avoid all of these errors in retracement as in the original survey. 'A proportionate measurement is one that gives concordant relation between all parts of the line, i.e.--the new values given to the several parts, as determined by the remeasurement, shall bear the same relation to the record lengths as the new measurement of the whole line bears to that record.'

" § 142. Resurvey must be initiated and finished at certain and known points.--It will be seen that a resurvey must be initiated at some certain and known point, and it must likewise be finished at some certain and known point. Such points being fixed and known, the original measurement known, the principal distances between different points on the same line being known, the surveyor can, by a proportionate measurement, reestablish such points with reasonable accuracy. If such intermediate points are known, their locations can not be changed. If lost and there is no evidence as to their former location then the regulations require their relocation by proportionate measurements. . . .

" § 376. Proportionate measurement.--'A proportionate measurement is one that gives concordant relation between all parts of the line, i.e.--the new values given to the several parts, as determined by the measurement, shall bear the same relation to the record lengths as the new measurement of the whole line bears to that record.' It is seldom that the old and new measures agree. The error may be caused by a chain used, of erroneous length, by neglecting to set the pin perpendicular; by failure to level the chain, by erroneous entry or transcribing of notes. The surveyor should avoid all of these in retracement of the original survey. It was the practice in former days to 'adjust the chain' to suit the original measure, but in recent times the method of proportionate measurement is used for computing the surplus or shortage.

Reliance upon the order of calls and the weight to be given them in the major and concurring opinion are, of course, correct statements of law. But as the quotations above point out they are not applicable here because no corners have been found and there is no acceptable collateral evidence of the corners for boundary lines. ^{2/} In such a situation, the rules of precedence which control calls from a known or recovered monument to the next point are not applicable.

There is no indication that the grant boundary method is inconsistent with California law.

(fn. 1 continued)

This method gives more reliable results.

" § 377. Equitable part of surplus apportioned to entire line.--It must not be forgotten that a survey must be initiated at some well-defined and unquestioned starting point on the original survey. So, too, it must terminate at some identified point in that survey. Intermediate corners will be placed along the line to be retraced by proportionate measure. For instance, should the east side of a section be originally reported to be 80 chains, and the late measurement be found to be 82 chains, then the quarter corner planted at 40 chains by the government survey would be placed at 41 chains, recent survey. The proper proportion would be as follows: 80 : 82 :: 40 : x. Thus every part of the line is given its equitable part of any surplusage and must bear its part of any deficiency.

"§ 470. Variance in measure--Presumed in whole line.--Variance in distances in recent measurement from former surveyed line, it is presumed, arose from an imperfect measurement of the whole line, and not from any particular part. 'On a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not to be presumed that the variance was caused from a defective survey in any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from imperfect measurement of the whole line; and such variance must be distributed between several subdivisions of the line, in proportion to their respective lengths.' Hence in locating points along the recent or new line such principle will be taken into consideration and such points will be located on the new line so as to bring them into harmony with the former location. This is usually referred to as a proportional measurement of the entire new line." (Footnotes omitted.)

^{2/} In the report quoted above the Chief Cadastral Engineers commented on the fence as follows:

It is also noteworthy that the standard authorities are critical of a survey described only by courses and distances without calls to monuments. One states:

The calls for monuments, bearings and distances described the survey and upon recording make it a matter of public record. Merely reciting bearings and distances without calls from monuments set or discovered deprives a call for survey of a great amount of force. What the surveyor did must then be proved by testimony and, after the surveyor is gone, this is difficult. Brown and Eldridge, Evidence and Procedure for Boundary Location, John Wiley and Sons, Inc., New York and London, 1962, p. 413.

The Manual of Surveying Instructions 1947, United States Department of Interior, Bureau of Land Management says:

Ordinarily the one-point control is inconsistent with the general plan of a dependent resurvey. The courts have frequently turned to this as the only apparent solution of a bad situation, and unfortunately this has been the method

(fn. 2 continued)

"Where the line between secs. 14 and 23 reaches the bottom, the BLM surveyor notes that he ran 'thence over nearly level bottom land, through heavy alder timber and dense reeds.' It is difficult to see how even longtime residents could point out in such an area where a fence had been located before a flood that occurred several years previously. Nor is there any indication in the statements furnished that the fence had been built along a surveyed line, but rather just 'along the edge of the bottom.' There is no mention of a fence's having been constructed along other courses of the projected deed line, and no indications of a fence are mentioned in the field notes of the resurvey. Since that resurvey crosses or approximately coincides with the projected deed line along the higher courses, it appears that either no fence was constructed along those stretches or it was built along the edge of the bottom without regard to any line whatever. Certainly, any higher portions of a fence would not have been washed out in the flood. The field surveyor, when queried on this matter by telephone on July 23, said no evidence of a fence anywhere along the line was noted. Whatever the intention of the original conveyance, the purported once existent fence can not be considered as strong evidence of what was conveyed."

applied in many local surveys, thus minimizing the work to be done, and the cost. Almost without exception the method is given the support that "it follows the record," overlooking the fact that the record is equally applicable when reversing the direction of the control from other good corners, monuments, or marks, if such can be recovered by careful retracement. The use of the one-point control may be applicable where the prior survey was discontinued, by record, or through the failure actually to run and establish the line called for. If by record, the field notes may be followed explicitly. If discontinued by evident unfaithfulness in execution, its use would be limited to the making of a tract segregation where the claimant had given confidence to the so-called field notes. ^{3/}

Finally the acceptance of the dependent's resurvey does not preclude the appellant from pursuing its claim to the land they say should fall within its boundary. As citizens of California and the United States they may enforce whatever rights they have to trust land despite the acceptance of the dependent survey. Poafbitty v. Skelly Oil Co., 390 U.S. 365 (1958); Gilbert and Logie Nolan, A-30905 (August 8, 1968).

Martin Ritvo, Member (dissenting)

^{3/} In a somewhat analogous situation where, after an owner has divided a tract into lots, it turns out that there is either a shortage or excess along a boundary line, the deficiency or excess is distributed equally among all the lots rather than having the end lot bear the burden or gain the benefit: Patton on Titles, § 158.

" § 158. Apportionment of Excess or Deficiency and of Omitted Strips. Where a tract of land is subdivided, and is thereafter found to be larger or smaller in any dimension than the aggregate of the tracts comprising it, as shown by the survey, the excess or deficiency, with a few exceptions, is apportioned among its several component parts. The discrepancy is computed between one permanent or known monument and another, and is apportioned to the intervening tracts only. It is presumed to have arisen from an imperfect measurement of the whole line, and not of any particular part of it.

(fn. 3 continued)

"Variances found in the length of surveyed lines of private surveys are also adjusted by the rule that excesses or deficiencies are computed between one permanent or known monument and another, and are apportioned to the intervening tracts only. Where, therefore, the original corners of a lot can be found, it is not affected by any discrepancy in the size of the block in which it is located. But if the evidence available locates the corners of the block only, the excess or deficiency must be distributed to the several lots in proportion to their platted widths. It is usually held that a lot which differs in width from the others in a block is no exception to the rule. But other courts hold that, where a tract is subdivided into lots of regular and specified dimensions, leaving at the end a remnant of irregular and unspecified size, the apparent intentions of the proprietor and his grantees are carried out by according to the regular lots the dimensions indicated by the plat and by placing the entire excess or deficiency in the irregular lot. In at least one jurisdiction, the foregoing rule has been applied even when the plat gives the size of the irregular tract."

To the same effect Clark, *supra*, § 174, 175 and 184.

California follows the general rule. See Sullivan v. Balestrieri, 298 P.2d 688 (Cal. 1956), although with some reluctance. Chandler v. Hibberd, 332 P.2d 133, 141 (Cal. 1958). For a good discussion see Gaines v. City of Sterling, 342 P.2d 651 (Colo. 1959).

