

MRS. J. W. MOORE

IBLA 71-10

Decided December 5, 1972

Appeal from decision (9181 (420) Group 394, Idaho), by Chief Division of Cadastral Survey, Bureau of Land Management, dismissing protest against the acceptance of a survey.

Affirmed.

Survey of Public Lands: Generally--Survey of Public Lands: Authority to Make

The Department is authorized to correct prior surveys where fraud or gross error has occurred.

Administrative Practice--Administrative Procedure: Burden of Proof--Rules of Practice: Appeals: Burden of Proof--Survey of Public Lands: Generally

Where a government resurvey is challenged by an appellant, he has the burden of establishing that the resurvey is erroneous and of identifying specifically reversible error in the decision appealed from. An appellant cannot expect the Department to assume his burden of searching the record and the law in an effort to find some reversible error in the decision appealed from.

APPEARANCES: J. Kent Jolley, Esq., Jolley & Eames, of Rexburg, Idaho, for the appellant.

OPINION BY MR. FISHMAN

Mrs. J. W. Moore has appealed from a decision, dated July 16, 1970, rendered by the Chief, Division of Cadastral Survey, Bureau of Land Management, dismissing her protest against the Bureau's acceptance of the plat representing a dependent resurvey of omitted lands in T. 7 N., R. 39 E., B.M., Idaho. The protest was particularly directed to lots 5 and 6, sec. 34, as reflected by such plat. The plat delineates as being in federal ownership some 5.05 acres claimed by the appellant. Appellant purchased certain land, a portion of which is delineated on the plat as said federal land.

In her appeal appellant contends that (1) the Government is precluded from arguing that it is the victim of an error or a constructive fraud, since the alleged fraud or error was perpetrated by one of its own agents, and in any event was not disclosed when a subsequent survey was conducted in 1919; (2) the Government is guilty of laches in waiting until 1970 to assert a claim to land purportedly omitted from the initial survey made in 1879; (3) at the time the tract was purchased for a substantial consideration by the Moores in 1968, none of the parties to the sale was aware that a resurvey had taken place which might result in a claim of title by the Government; (4) since taxes had been paid on the property by the record title holders from 1892, when the patent issued to what is now lots 5 and 6, until the present, and there is no recourse to the county for the recovery of such taxes, the taking of the land would result in "an absolute fraud on the citizens paying taxes"; (5) the Government has the burden of proof to show by more than "a mere presumption or supposition" that the course of the river has not changed since the original survey was made; and (6) reversion of the land to the federal government "would amount to a taking by said Government without compensation or due process of law which is in violation of the U.S. Constitution."

With respect to the first two assertions, it is settled law that a fraudulent or erroneous survey, albeit made by a Government surveyor, does not preclude the Government from correcting the survey at any time. Lee Wilson and Company v. United States, 245 U.S. 24, 29, 31 (1917). The third and fourth grounds of appeal must give way to the foregoing principles.

The fifth ground of appeal misconceives the burden of proof in the case at bar. It is not the Government's burden to establish that the resurvey is correct; rather, it is appellant's burden to show that the resurvey is in error. See Joyce Livestock Company, 2 IBLA 322 (1971); Porter Estate Company, A-30817 (December 2, 1968); James L. Knight, A-27374 (September 19, 1956). It is appellant's obligation, not that of the Board, to identify specifically reversible error. The Department, in United States v. Cascade Calcium Products, Inc., A-31187 (November 4, 1969) stated:

An appellant cannot expect the Department, on his bare allegation of error, to assume his burden of searching the record and the law in an effort to find some reversible error in the decision appealed from.

Appellant has not pointed out specifically any defect in the resurvey in issue.

With respect to the sixth ground of appeal, the purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original position according to the best available evidence. Gilbert and Logie Nolen, A-30905 (August 8, 1968). In legal contemplation the lands contained in a certain subdivision of the original survey and the lands contained in the corresponding subdivision of the dependent resurvey are identical. H. M. Meloney, 47-72797 (September 22, 1958). See United States v. Sidney M. and Esther M. Heyser, 75 I.D. 14, 18 (1968). Thus there is no "taking" by the federal government since the resurvey merely defines what passed under the original survey.

We note in passing that the resurvey of lands in the vicinity of the Snake River was specifically authorized by the Act of May 31, 1962, 76 Stat. 89.

We find that appellant has not demonstrated any error in the decision appealed from.

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.

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Frederick Fishman, Member

We concur:

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Joseph W. Goss, Member

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Anne Poindexter Lewis, Member

