

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing the protest of the dependent resurvey of a portion of T. 33 N., R. 9 W., Mount Diablo meridian, California.

Hearing ordered.

1. Secretary of the Interior--Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. He has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys, and making resurveys to reestablish corners and lines of earlier official surveys.

2. Surveys of Public Lands: Generally--Surveys of Public Lands: Dependent Resurveys

The dependent resurvey is designed to restore the original conditions of the official survey according to the record. It is based, first, upon identified corners and other acceptable points of control, and second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey. Corners established by the original survey should be located, if possible, by considering all the relevant evidence and not simply one or two factors. The rules for the restoration of lost corners should not be applied until all available original and collateral evidence has been developed.

3. Administrative Practice--Administrative Procedure: Hearings--Hearings--Rules of Practice: Hearings--Surveys of Public Lands: Dependent Resurveys

Where there exist factual questions about the location of a subdivisional corner in a dependent resurvey, the Board of Land Appeals may order a hearing pursuant to 43 CFR 4.415 to resolve these questions.

APPEARANCES: Elmer A. Swan and Mazie S. Swan, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Elmer A. Swan and Mazie S. Swan (Swans), who are owners of a tract of land located in sec. 32, T. 33 N., R. 9 W., Mount Diablo meridian, Trinity County, California, have appealed the decision of the California State Office, Bureau of Land Management (BLM), dismissing Swans' protest of the decision upholding the results of a dependent resurvey of the boundary between sec. 31 and sec. 32, and the location of the westerly 1/4 corner of sec. 32 as established by the dependent resurvey.

The boundary between sec. 31 and sec. 32 was initially established by a survey conducted by N. L. Berdan in 1881. Subsequently, most of sec. 31 was granted to the Southern Pacific Railroad, and is now owned by Southern Pacific Land Company. A portion, but not all of sec. 32 was patented to private individuals by the Federal Government.

In 1978 the Redding District Manager, BLM, formally requested that a portion of T. 33 N., R. 9 W., be resurveyed to facilitate a timber sale. Subsequently, the scope of the resurvey was expanded to include the boundary and corner in issue before this Board.

The survey field notes of the dependent resurvey contain the following notations at pages 43-44:

41.64 Point for the 1/4 sec. cor. of secs. 31 and 32,
at proportionate dist.; there is no evidence of the original cor.

Set an iron post, 28 ins. long, 2-1/2 ins. diam., 22 ins. in the ground, and in a mound of stone, 2 ft. base, to top, with brass cap mkd.

T33N R9W
1/4
S31/S32
1979

from which

An alder, 9 ins. diam., bears S. 57 degrees E.,
42 lks. dist., mkd. 1/4 S32 BT.

An alder, 9 ins. diam., bears S. 25 degrees W., 184 lks. dist.,
mkd. 1/4 S31 BT.

Cor. is located on an island of the Trinity River, 40 lks. N of a side branch of the Trinity River, 30 lks. wide, course S. 30 degrees W. and 1.00 ch. S of the main branch of the Trinity River, 80 lks. wide, course S. 50 degrees W.

From this point an unmarked iron pipe, 1-1/2 ins. diam., firmly set, protecting 6 ins. above ground, bears S. 32 degrees 40' E., 2.30 chs. dist. There are no accessories to this pipe and its origin is unknown.

from the same point local bearing trees

An oak stump, 26 ins. diam., bears N. 72 degrees E., 2.95 chs. dist., with metal tag mkd. LS 2822; there are no scribe marks visible.

An oak, 14 ins. diam., bears S. 76-3/4 degrees E., 1.56 chs. dist., locally bark scribed 1/4 S31 BT on E face, with metal tag mkd. LS 2822.

There is no cor. monument to accompany these bearing trees and no record of survey in the county records. Local testimony indicates they were mkd. by Knute Nelson, LS 2822, in 1958. Certain local surveyors have used the NE tree as an original bearing tree. After an extensive investigation of the conditions surrounding this cor. it was determined the trees did not fit the description of the original bearing trees mkd. by N. L. Berdan, in 1881, and there was no evidence to substantiate this position as being a perpetuation of the original cor. Due to lack of physical evidence and the disagreement of local landowners and private surveyors as to the validity of this cor., it is not utilized in the course of this resurvey.

It appears that for many years the oak stump found, rejected, and referred to in the field notes quoted above had been considered to be a bearing tree for the W 1/4 corner of sec. 32 by many of the landowners in the vicinity. About 1958 this oak tree was tagged LS 2822 by Knute Nelson, a licensed surveyor, as a corner accessory for the 1/4 corner. Little evidence apparently exists concerning this 1958 survey. Whether or not this oak stump was a bearing tree for the original survey, or a bearing tree for a subsequent "unofficial" survey is unknown. The record reveals conflicting evidence whether the oak stump was sufficiently old to have been the size described in the original survey, although evidence regarding tree size is not conclusive as the original surveyors had occasionally misjudged tree size. One of the reasons used for rejecting Swan's contentions was that the second bearing tree scribed by Berdan at the 1/4 corner was missing. However, appellants claim to have personal knowledge that this bearing tree existed until it was destroyed by a flood in the 1950's. The decision notes that the location of the 1/4 corner, as determined by Knute Nelson, was questioned by a local survey firm in two separate surveys. Appellants claim that a road may have destroyed the original 1/4 corner monument. The record does not disclose whether or not the governmental body which built and/or maintains the road does or does not have evidence with respect to the road's location proximate to the legal subdivision. The original survey placed the 1/4 corner on the south bank of the Trinity River. The resurvey places the

corner on an island in the middle of that river. We are unable to determine from the record if the banks of the river are "hard" or if the river could reasonably have been expected to have moved that distance in the period of time between the survey and the dependent resurvey. 1/

This Board must now consider whether or not the cadastral surveyor correctly reestablished the 1/4 corner of secs. 31 and 32 in light of the facts and the directives found in the special instructions and general instructions with respect to the conduct of a dependent resurvey.

[1] The Secretary of the Interior is authorized to consider and determine what lands are public lands, what public lands have been or should be surveyed, and has the authority to extend or correct the surveys of public lands and make resurveys to reestablish corners and lines of earlier official surveys. Mr. & Mrs. John Koopmans, 70 IBLA 75 (1983).

[2] The dependent resurvey is designed to accomplish a restoration of what purports to be the original conditions according to the record, based, first, upon identified existing corners of original survey and other recognized and acceptable points of control, and second, upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey. Titles, areas, and descriptions should remain unchanged in a typical dependent resurvey. Bethel C. Vernon, 37 IBLA 226 (1978); Alfred Steinhauer, 1 IBLA 167 (1970).

A dependent survey, such as the one conducted in this case, is a retracement and reestablishment of the lines of the original survey in their original positions according to best available evidence of the original corners. The section lines and other lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of the lands patented on the basis of the plat of the original survey. In law and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are the same. 2/ The dependent resurvey is based, first, upon the identification of the original corners and other acceptable points of control, and second, upon the restoration of any lost corners by proportionate measurement in harmony with the record of the original survey. Some flexibility is allowed in applying the rules of proportionate measurement in order to protect the bona fide rights of claimants. 3/

1/ This is one of four appeals now before the Board regarding the dependent resurvey of T. 33 N., R. 9 W., Mount Diablo meridian (IBLA 82-1212, IBLA 83-30 (two appeals), and IBLA 83-146). This Board's ability to make a determination has been hampered in these cases by the fact that each of the files, as forwarded to us, was disorganized and each contained information pertinent to the other. We fear that none may have been complete.

2/ Manual of Instructions for the Survey of the Public Lands of the United States (1973), 6-4 at 145 (hereinafter called Survey Manual).

3/ Id. 6-26 at 150.

Three questions arise regarding this resurvey by reason of the resolution by the cadastral surveyor and directives found in the Survey Manual. Briefly these questions are:

1. Is there sufficient physical evidence regarding the location of the original corner to allow a reasonable determination that the location of the corner is known?
2. If sufficient physical evidence is not present, is there sufficient collateral evidence to allow the reestablishment of an obliterated corner?
3. If the corner cannot be reestablished pursuant to 1 or 2 above, is this a case where "flexibility" should be used in order to protect bona fide rights of claimants?

In a resurvey, a corner is categorized in one of three ways: (1) Existent (known); (2) obliterated; or (3) lost. There is no question that none of the parties have been able to find the monument (post) set by Berdan in 1881. There is a question whether, in fact, the corner is existent, obliterated or lost. If, as appellants claim, the stump is a bearing tree, the corner is existent. If there is sufficient evidence to establish the location of the corner, even though no monument or accessories can be found, it is obliterated. Nelson concluded that it was lost.

5-5. An existent corner is one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony.

Even though its physical evidence may have entirely disappeared, a corner will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.
[Emphasis in original.]

Survey Manual, 5-5 at 130.

5-9. An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

A position that depends upon the use of collateral evidence can be accepted only as duly supported, generally through proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony.
[Emphasis in original.]

Survey Manual, 5-9 at 130.

Thus, it can be seen that a corner with a monument and accessories which have been completely destroyed may, under certain circumstances, be considered not to have been lost.

5-20. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.

Survey Manual, 5-20 at 133.

A dependent resurvey seeks to restore the original conditions of an official survey by reliance upon existing corners to the fullest extent possible. Therefore, the cadastral surveyor's primary responsibility when conducting a dependent resurvey is to act as a "detective" who gathers all available information and uses his best effort to determine the location of the original corners. Proportionate measurement is an admission that the puzzle cannot be solved. "The rules for the restoration of lost corners should not be applied until all original and collateral evidence has been developed. When these means have been exhausted, the surveyor will turn to proportionate measurement, which harmonizes surveying practice with legal and equitable considerations." Survey Manual, Par. 5-21, at 133.

Appellants have raised issues of fact with respect to the proper acceptance and use of information, including testimony and other evidence regarding the location of the Berdan 1/4 corner prior to the restoration by proportionate measurement and with respect to the use of proportionate measurement "which harmonizes with legal and equitable considerations." We believe it appropriate to grant appellants a hearing to determine (a) the validity of the claimed original bearing tree which would allow the determination that the corner is existent; and/or (b) if there is sufficient proof, through testimony and other evidence, to reestablish the 1/4 corner, even though it might be obliterated.

[3] Where factual questions exist regarding the location of a subdivisional corner, this Board may order a hearing pursuant to 43 CFR 4.415 to resolve these questions. United States v. Hudspeth, 384 F.2d 683 (1967); Bethel C. Vernon, *supra*; Domenico A. Tussio, 30 IBLA 92 (1977).

This case shall be referred to the Hearings Division, Office of Hearings and Appeals, of this Department for assignment to an Administrative Law Judge for hearing.

At the hearing appellants will have the burden of proof to establish by a preponderance of the evidence that the location of the W 1/4 corner, sec. 32, T. 33 N., R. 9 W., Mount Diablo meridian, as surveyed by N. L. Berdan is at the location claimed by appellants to be the location of said 1/4 corner.

This burden should not be taken lightly. In order to prevail appellants, or their attorney, must present technically complex and detailed factual evidence in a competent and convincing manner.

In addition to the information regarding the W 1/4 corner, sec. 32 as set by Berdan in 1881, appellants may desire to present evidence and testimony regarding the general results of the Berdan survey, how physical evidence of the Berdan survey on the ground relates to the bearings and calls found in the notes and plat of the survey, the basis for the placement of subsequent survey points, or any other evidence which would indicate the approximate or exact location of the W 1/4 corner. As the proportionate measurement method of determining the location of a lost corner contemplates the fact that the bearings and distances reported were close to those found on the ground, appellants may desire to use this evidence to show how the "flexibility" standard in applying the proportionate measurement may best protect the bona fide rights of the claimants. ^{4/}

Accordingly, 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 set aside, a hearing is ordered, and the case is referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge at which evidence regarding the location of the W 1/4 corner of sec. 32, T. 33 N., R. 9 W., Mount Diablo meridian shall be received. Thereafter, the Judge shall issue a decision which shall be final for the Department, absent a timely appeal to this Board.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

^{4/} While we recognize that the Survey Manual contemplates some flexibility, it does not contemplate that the rules should be ignored in favor of the claimants. Public Lands Surveying - A Casebook, prepared by BLM in 1975, contemplates alternative methods of reestablishing lost corners (including irregular boundary adjustment) which might be applicable to this case.

