

CROW INDIAN AGENCY

IBLA 83-721

Decided December 12, 1983

Appeal from decision of the Acting Montana State Director, Bureau of Land Management, dismissing protest against dependent resurvey. GP 659 MT.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

The purpose of a dependent resurvey is to retrace and reestablish lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners.

2. Surveys of Public Lands: Dependent Resurveys

In an appeal from a protest timely filed pursuant to 43 CFR 4.450-2 protesting the acceptance of a dependent resurvey the appellant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

3. Surveys of Public Lands: Dependent Resurveys

Where a protestant does not meet his burden of establishing by clear and convincing evidence that a dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing his protest against the survey will be affirmed.

APPEARANCES: Wyman D. Babby, superintendent, Crow Indian Agency, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Crow Indian Agency has appealed 1/ a decision dated May 5, 1983, of the Acting State Director, Montana, Bureau of Land Management (BLM),

1/ Several individuals owning land in T. 7 S., R. 35 E., originally filed protests of the dependent survey. Frederick V. Lefthand and Wyman D. Babby filed notices of appeal from the denial of their protests. The only statement of reasons, however, was filed by Wyman D. Babby as superintendent of the agency.

dismissing appellant's protest against the dependent resurvey of T. 7 S., R. 35 E., Principal meridian, Montana. The dependent resurvey was made at the request of the Area Director, Bureau of Indian Affairs (BIA), Billings, Montana. The survey was executed by Shirley B. Hjellum (Hjellum), Supervisory Cadastral Surveyor, under Special Instructions dated July 26, 1979, for Group 659, Montana. The survey was accepted by BLM on January 24, 1983.

Acting in response to a request by the Area Director, BIA, the Acting State Director, Montana, approved special instructions for Group 659 on July 31, 1979, directing a retracement and dependent resurvey of the north, east, and south boundaries, subdivisional lines, and the survey of the subdivision of section lines in order to mark and define the boundaries of Indian lands held in trust by the United States. The retracement and resurveys were to be made in the manner described in the Manual of Instructions for the Survey of Public Lands of the United States (1973) (Manual).

In the course of searching for corners Hjellum determined that certain corners may have been moved. In order to document this fact, an affidavit was obtained which contained statements regarding circumstances surrounding an apparent past practice of moving corners. This affidavit was made a part of the field notes. It appears that during the period immediately following the 1902 survey private individuals commonly known as "boss farmers" were hired by the Indian Agency to oversee the allotments, settle disputes, and generally keep the peace. The affidavit states that "these 'boss farmers' and local lessees and/or land owners, without any authority to change existing surveyed lines, may have relocated the east west lines of sections 11, 14, 23, and 26 to a more regular shape." The statement further states that the affidavit was made with the knowledge that the position of the E-W center line of sec. 14 as resurveyed by BLM in 1978-79 intersects the affiant's personal residence. In the course of the resurvey the cadastral surveyor noted each "boss farmer" corner found and, based on the physical evidence, made a determination as to whether the corner could be accepted or must be considered to have been moved subsequent to the 1902 survey.

In its protest appellant had asserted that there were six or more "boss farmer" corners to which the surveyor gave very little weight. Appellant stated that these corners had been relied upon by people living in the area when building homes, constructing fences, and cultivating fields.

BLM's decision in response to the protest stated in part as follows:

During the retracement of the east and west lines of the second tier of sections from the east boundary, Mr. Hjellum did not recover any original evidence of the monuments established in the 1883 survey. He did recover monuments of unknown origin. At this time he had to evaluate all factors pertaining to the resurvey of these lines. After evaluating all evidence and facts, the decision was made to reestablish the lost corners by proportionate measurement using the controlling section and 1/4 section corners east and west of this tier of sections and rejecting the monuments of unknown origin based on sections 6-11 through 6-18 through 6-25 through 6-28 of the Manual of Surveying Instructions,

1973. Reference is made to section 6-28 to respond to the last sentence of item number four, and item number five [of the protest.]

"6-28. -----. However, he (surveyor) (Added.) cannot abandon the record of the original survey in favor of an indiscriminate adoption of points not reconcilable with it."

With reference to this portion of section 6-28, the two corners of unknown origin between sections 26 and 35 were accepted by Mr. Hjellum because they were reconcilable with the record of the original survey.

In its statement of reasons appellant notes that the corners determined to be "boss farmer corners" and not accepted by Hjellum had been accepted and used by the local residents for many years. The statement of reasons further noted that the corners had been used to establish boundaries and that 7.75 miles of fence had been constructed based on these boundaries, that five existing homesites and two sets of farm buildings would be affected by the relocation of the boundaries. The basis for the appeal was the statement that the boss farmer corners were believed to more accurately reflect the 1883 survey than the corners set by the cadastral surveyor in the resurvey. In support of the appeal reliance is placed upon section 6-28 of the 1973 Manual. 2/

2/ That section provides:

"6-28. Once it is accepted, a local point of control has all the authority and significance of an identified original corner. The influence of such points is combined with that of the previously identified original corners in making final adjustments of the temporary points. The surveyor must therefore use extreme caution in adopting local points of control. These may range from authentic perpetuations of original corners down to marks which were never intended to be more than approximations. When a local reestablishment of a lost corner has been made by proper methods without gross error and has been officially recorded, it will ordinarily be acceptable. Monuments of unknown origin must be judged on their own merits, but they should never be rejected out of hand without careful study. The age and the degree to which a local corner has been relied on by all affected landowners may lead to its adoption as the best remaining evidence of the position of the original corner. The surveyor must consider all these factors. However, he cannot abandon the record of the original survey in favor of an indiscriminate adoption of points not reconcilable with it.

"The field-note record of the resurvey should clearly set forth the reasons for the acceptance of a local point where it is not identified by actual marks of the original survey. Recognized and acceptable local marks will be preserved and described. Where they are monuments of a durable nature, they are fully described in the field notes and a full complement of the required accessories recorded, but without disturbing or re-marking the existing monument. New monuments are established if required for permanence, in addition to, but without destroying the evidence of the local marks." (Emphasis in original.)

The first survey of the area was conducted by John T. Blake in 1883. This survey was completed only as to secs. 1, 2, 11, 14, 23, 26, and 35 of T. 7 S., R. 35 E., Principal meridian, Montana. A second survey was conducted in 1902 by John Gonin. This second survey subdivided the balance of the township. During the course of the second survey, Gonin found and remonumented a number of the Blake corners. These corners were noted in the Gonin field notes and reflected on the plat of the Gonin survey. At the time of the dependent resurvey a number of the Gonin corners were found but fewer of the Blake corners were found. ^{3/} In the analyses of the evidence for reestablishment of the lost corners the field notes and plat of the Gonin survey were used in the determination of the location of the lost Blake corners. Many of the Blake corners were found by Gonin during the course of his survey. Each of the Blake corners found by Gonin was tied to the Gonin survey and the Gonin survey field notes give a call and distance from a Gonin corner to the Blake corner found by Gonin. A primary problem immediately apparent when comparing the location of the Blake corners found by Gonin and the location of these corners as described in the Blake field notes is that the actual calls and distances between the Blake corners as established on the ground varied considerably from the calls and distances in the Blake field notes and reflected on the plat of the Blake survey. An examination of the location of the Blake corners found by Hjellum and the relative location of these corners to the Gonin corners found by Hjellum supports the conclusion that the Gonin survey should be used when making a determination regarding the location of the lost Blake corners. ^{4/}

[1] A dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey. In legal contemplation and in fact, the lands contained in a certain section

^{3/} The dispute arises with respect to corners in secs. 2, 11, 14, 23, and 26. These sections were originally surveyed by Blake. In the field examination the following corners were found: Sec. 2, NE (reestablished by Gonin), SW, and N 1/4 (reestablished by Gonin); sec. 11, NW, SE; sec. 14, NE, W 1/4; Sec. 23, SW; sec. 26, NW, SE, SW, W 1/4, S 1/4, SE 1/16, SW 1/16. Corresponding Gonin corners found were: Sec. 3, NW, NE, SW, W 1/4, S 1/4; sec. 10, NW, SW, SE, N 1/4, S 1/4; sec. 15, NE, NW, SE, SW, N 1/4, W 1/4, S 1/4; sec. 22 NE, NW, SE, SW, N 1/4, S 1/4, W 1/4; sec. 27, NE, NW, SE, SW, N 1/4, S 1/4, E 1/4, W 1/4; sec. 12, NE, SW, SE, W 1/4; sec. 13, NE, NW, SE, E 1/4, W 1/4; sec. 24, NE, SE, SW, W 1/4, E 1/4; and sec. 25, NW, NE, SW, SE, N 1/4, S 1/4, and W 1/4.

^{4/} The NW corner, sec. 26 was found by Gonin at a point 0.65 chains south of the NW corner, sec. 27. Both corners were found during the resurvey. The NW corner was found by Hjellum to be 0.67 chains south of the NW corner sec. 37. The apparent discrepancy was 1.32 feet. The monuments for both the NW corner sec. 13 and the NE corner sec. 14 were found. The difference in distance between the Gonin survey and the Hjellum resurvey was 4.2 feet.

of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

In an appeal from a protest timely filed pursuant to 43 CFR 4.450-2 protesting the acceptance of a dependent resurvey the appellant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. 5/ See Robert Wickenden, 73 IBLA 394 (1983); Paul N. Scherbel, 58 IBLA 52 (1981).

[3] In challenging the Government resurvey, the appellant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Bethel C. Vernon, 37 IBLA 226 (1978). Where a protestant does not meet his burden of establishing by clear and convincing evidence that a dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing his protest against the survey will be affirmed. Bethel C. Vernon, 47 IBLA 315 (1980).

Corners such as those mentioned by appellant are referred to as local points of control or monuments of unknown origin in section 6-28 of the manual. There is no indication that any such corners were not accorded their proper weight or erroneously rejected out of hand in the 1979 survey. Moreover, even if all affected land owners have relied on such corners, they may, but need not necessarily be adopted as the best remaining evidence of the position of the original corners. Appellant has not presented sufficient evidence to convince us that a question exists regarding the proper use of evidence by Hjellum when determining the location of the corners. When the corners were determined to have been lost, the use of the field notes and plat of the Gonin survey as evidence of the location of the corners was proper. Appellant has not shown that Hjellum erred in doing so or that the descriptions found in the Gonin survey were in error. Appellant states that the boss farmer corners should be used. However, in order to demonstrate error, there must be an offer of proof that the corners rejected were in fact the best evidence of the location of the corners as established by the original Blake survey, and not a monument erected by a boss farmer in an attempt to resolve a dispute, without regard to the true location of the Blake corners.

Since appellant failed to show that the survey was fraudulent, erroneous, or in any other way inaccurate, BLM properly dismissed the protest.

5/ The burden of proof necessary when an appellant has protested a dependent resurvey at the time of the dependent resurvey is stated above. In those cases where a protest is lodged some time after the approval of the dependent resurvey, the burden of proof is greater. In those cases, the appellant must present clear and convincing evidence that the dependent resurvey is fraudulent or grossly erroneous. See Nina R. B. Levinston, 1 IBLA 252 (1971); State of Louisiana, 60 I.D. 129 (1948); George S. Whitaker, 32 L.D. 329 (1903).

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 affirmed.

R. W. Mullen
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

