

JEAN ELI

IBLA 83-146

Decided January 30, 1984

Appeal from decision of California State Office, Bureau of Land Management, denying appellant's protest of the result of a portion of a dependent resurvey and subdivisional survey, Mount Diablo meridian, California, Group 713.

Affirmed.

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 also has the authority to extend or correct the surveys of public lands as may be necessary.

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 original and collateral evidence has been developed.

3. Administrative Procedure: Burden of Proof -- Surveys of Public Lands: Dependent Resurveys

In an appeal from a timely protest to the acceptance of a dependent resurvey, the protestant 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. Failure to meet that burden will result in the affirmation of the decision dismissing the protest.

APPEARANCES: Jean Eli, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On November 15, 1982, the California State Office, Bureau of Land Management (BLM), received a notice of appeal from Jean Eli (Eli) seeking review of its October 12, 1982, decision. The decision appealed from denied Eli's protest of the result of the dependent resurvey and subdivision of secs. 27, 28, 33, and 34, T. 33 N., R. 9 W., Mount Diablo meridian, California.

The east boundary of sec. 27 was originally surveyed by William Magee (Magee), Deputy Surveyor, under contract dated May 20, 1872. The plat of the Magee survey was approved on September 9, 1873. The south, west, and north boundaries were surveyed by N. L. Berdan (Berdan) in 1881. The plat of the Berdan survey was approved on May 5, 1882. The survey of the subdivision of sec. 27 and sec. 34 by a cadastral surveyor was not conducted until 1978 when the section was subdivided as a part of the dependent resurvey by John H. Nelson (Nelson).

Nelson found and remonumented the SE corner, sec. 27, which had been established by Magee. The 1/4 corner between secs. 26 and 27 was also found. A local corner was found and accepted as the best available evidence for the NE corner, sec. 27. The original Berdan corner for the NW corner, sec. 27, was found and remonumented. The SW corner and W 1/4 corner, sec. 34, were also found by Nelson.

The SW corner of sec. 27 and the other 1/4 corners in that section were determined by Nelson to have been lost. These corners were reestablished by proportionate measurement. After these corners were set, Nelson surveyed and monumented the center 1/4 corners and 1/16 and 1/64 corners in secs. 27 and 34.

As a result of the resurvey and subdivisional survey of secs. 27 and 34, the boundary of the section and the properties described as subdivisions of the section are not as the property owners had previously believed them to be. Eli and other property owners submitted statements objecting to Nelson's placement of the southeast corner, sec. 27, and the subsequently placed lot corners in secs. 27 and 34.

On October 12, 1982, the California State Office, BLM, denied Eli's protest. On November 12, 1982, Eli gave notice of appeal. On September 1, 1983, Eli filed supplemental information.

While the reasons for Eli's appeal are clouded by the emotional nature of her statements, it is clear that her contention is that the survey was conducted without regard for the location of existing property lines or for

evidence available from licensed surveyors and others in the area. In support of her contention appellant has submitted a survey of her property, which was conducted subsequent to the Nelson survey, and a statement by a local licensed surveyor.

[1] The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and 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 the 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. 1/ 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/

[3] In an appeal from a timely protest to 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/ Crow Indian Agency, 78 IBLA 7 (1983); see Robert Wickenden, 73 IBLA 394 (1983); Paul N. Scherbel, 58 IBLA 52 (1981); Bethel C. Vernon, 37 IBLA 226 (1978). Where a protestant does not meet this burden, the decision dismissing the protest against a survey will be affirmed. Bethel C. Vernon, 47 IBLA 315 (1980).

1/ Manual of Instructions for the Survey of the Public Lands of the United States (1973), Sec. 6-26 at 150 (hereinafter called survey manual).

2/ Id. sec. 6-4 at 145.

3/ The burden of proof of an appellant who 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).

Appellant offers four arguments as to why the corner common to secs. 27, 28, 33, and 34 and the subsequent subdivision of secs. 27 and 33 should not be accepted. Each of these arguments will be addressed.

The first reason given by appellant for rejection of the Nelson resurvey is: "The BUREAU OF LAND MANAGEMENT Master Title Plat for Township 33 North, Range 9 West, M.D.M., shows a large separation between the Southeast line of the 'POKER BAR GOLD PLACER MINE' (M.S. #1901) and the aliquot part lines that are now encroaching on said claim." An examination of the relevant plats confirms the fact that the plat as drawn prior to the Nelson survey does not correspond with the 1873, 1882, and 1922 plats. However, this variance does not show error without proof that the prior plats are correct. In order to determine the basis for the boundary location as shown on the prior plats, one must look to the survey of the Poker Bar Gold placer claim and the survey of the sections in which this claim is located. The east boundary of sec. 27 was surveyed by Magee in 1872. The survey of secs. 26, 27, 33, and 34 was conducted in October 1881. The Poker Bar Gold placer claim was surveyed in January 1882 and tied to the NE corner of sec. 27 but had no ties to any other corners even though the corner common to secs. 27, 28, 33, and 34 was within the boundaries of the claim. There is no explanation why the Poker Bar Gold placer claim was not tied to the 1881 survey, but it clearly was not. Without a tie between the Poker Bar survey and the Berdan survey there can be no basis for a determination that the location of the Poker Bar Gold placer claim is controlling with respect to the corner common to secs. 27, 28, 33, and 34.

The second reason for the rejection of the Nelson resurvey tendered by appellant is: "The BUREAU OF LAND MANAGEMENT supplemental Plat drawn pursuant to authorization letter 'Sacramento 011171 "E" JAD dated March 23, 1922' also shows this separation."

The 1922 supplemental plat referred to in the second allegation by appellant was developed by protraction of the location of the Poker Bar Gold placer claim as it apparently related to the respective sections. The subdivision of secs. 27, 33, and 34 was made by protraction of the subdivisional lines and not as a result of a field survey. ^{4/} Since the subdivision by protraction was not verified in the field, any errors in the original plat would be carried to the subdivisional plat. This subdivision cannot be binding upon subsequent surveys.

The third basis for the rejection of the survey advanced by appellant is:

We measured in the field to an old Fir tree thirty-eight (38) inches in diameter with a very old blaze that could be the Southeast corner of Lot 7 (i.e., corner common to Lots 14, 7 and 16) in Section 27, Township 33 North, Range 9 West, M.D.M. The aliquot part lines in the vicinity of said Southeast corner would move easterly in excess of 200 feet from the present BUREAU OF LAND MANAGEMENT field location if this tree proves to be good evidence.

^{4/} The lotting of secs. 27, 33, and 34 was made for the purpose of obtaining areas and legal descriptions to accommodate mineral entry Sacramento 011171, Poker Bar Mines Company.

As stated previously, the subdivision of sec. 27 was not conducted in the field but was merely an office protraction of the boundaries as they appeared from the plats. As there was no cadastral survey, there cannot be an official monument of that survey. The blazed tree referred to is apparently evidence of a survey conducted by an unknown third party. However, without supporting evidence this blazed tree cannot be accepted as a properly established monument for the southeast corner of lot 7.

The final reason advanced by appellant is: "Parole [sic] evidence of owners in residence for the past twenty to forty years would also put these lines several hundred feet East of their present location."

Appellant merely states that this evidence exists but presents no affidavits or other documents supporting her claim. If this evidence does in fact exist, it is the burden of appellant to come forward, demonstrate its existence and submit corroborative evidence which would support this parole evidence. An allegation that the cadastral surveyor has ignored parole evidence must be supported by the parole evidence which has been allegedly ignored.

While the survey plat submitted by appellant illustrates her plight, this plat does not offer any proof as to the location of any of the original corners. In fact the entire statement of reasons is directed to the belief that the boundaries were not as Nelson determined them to be. Appellant does not address the question of why the original boundaries should be in the location claimed by her to be the true location nor does she provide any supporting evidence that the boundaries were as depicted on the plat submitted by her. There appears to be no question as to the validity of the corners actually found by Nelson. Further, there is no proof that those corners not found exist or can be established by secondary evidence. This is the proof that appellant would have had to tender in order to carry her burden of proof. Appellant having failed to do so, this Board must uphold the determination of the California State Office, BLM.

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:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

