

Appeal from a decision of the State Director, Nevada, Bureau of Land Management, dismissing protest of dependent resurvey. Group No. 599.

Set aside; referred for hearing.

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

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

APPEARANCES: Stephen D. Hartman, Esq., and Thomas J. Ray, Esq., Carson City, Nevada, for Stoddard Jacobsen; Robert C. Downer, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Stoddard Jacobsen and Robert C. Downer have appealed from a decision of the State Director, Nevada, Bureau of Land Management (BLM), dated July 5, 1984, dismissing their protest of a dependent resurvey of a portion of the subdivisional lines of T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada (Group No. 599).

The dependent resurvey was prompted by a substantial disagreement between two private surveys of the section line between secs. 4 and 9, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada, by Downer Engineering (Downer) of Carson City, Nevada, and AER, Inc. (AER), of Reno, Nevada. Between April 19, 1982, and January 5, 1983, BLM conducted its dependent resurvey pursuant to Special Instructions approved March 29, 1982. ^{1/} The

^{1/} On Mar. 29, 1982, the State Director approved special instructions for the dependent resurvey, which was to resurvey subdivisional lines between secs. 3 and 4, 4 and 5, 4 and 9, and 9 and 10, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada. In the field notes for the dependent resurvey, Robert A. Pratt, cadastral surveyor, states that:

north boundary of the township and its subdivisional lines were originally surveyed in 1881 by T. K. Stewart and G. W. Conkling, deputy surveyors. In 1913, H. W. Reppert, transitman, resurveyed a portion of the subdivisional lines. Finally, in 1973, Neil R. Forsyth, cadastral surveyor, resurveyed the north boundary.

On March 23, 1983, appellants filed a protest with BLM challenging the dependent resurvey. ^{2/} In its July 1984 decision dismissing appellants' protest, BLM concluded that appellants had not presented "clear and convincing evidence that the BLM resurvey is not an accurate retracement and reestablishment of the lines of the 1881 original survey." BLM concluded that, however poorly executed the original survey was, it controls the boundaries of land patented in accordance with the survey, and that the resurvey is the "best possible identification" of these original boundaries. BLM stated that "the lands contained in section 4 of the original survey and the lands contained in the 1982 BLM dependent resurvey of section 4, are identical."

[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. In legal contemplation 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 should be identical. In determining the location of the original survey lines, reliance is placed on identification of the original corners by verifying evidence of monuments or their accessories or, if that fails, by referring to other acceptable points of control, e.g., record distances to natural objects, stream crossings, line trees, and offline tree blazes, and other collateral evidence. If original corners cannot be found, reliance is then placed on the restoration of lost corners by proportionate measurement, i.e., reference to two or more interdependent corners, in harmony with the record of the original survey. Elmer A. Swan, 77 IBLA 99 (1983).

In a protest timely filed pursuant to 43 CFR 4.450-2 challenging a dependent resurvey, prior to acceptance of the resurvey, 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. Robert N. Caldwell, 79 IBLA 141 (1984). The same burden rests with an appellant who appeals from a decision dismissing the protest. Crow Indian Agency, 78 IBLA 7 (1983). ^{3/}

fn. 1 (continued)

"Before restoring the corners, the lines of the original survey were retraced and diligent search made for any evidence of the original corners and other calls of the original field note record.

"The rules of proportionate measurement were applied in order to ascertain the position of lost corners, after completing the necessary retracements to connect with the identified corner locations."

^{2/} Appellants explain that Jacobsen is the owner of 160 acres of land originally patented to William Carter as a homestead on June 1, 1882, described as the W 1/2 NE 1/4, E 1/2 NW 1/4 sec. 9, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada, and that Downer originally surveyed that land in 1965.

^{3/} However, as noted later in this decision, at an evidentiary hearing before an Administrative Law Judge, the burden is to prove by a preponderance of the evidence that the resurvey is not accurate.

Appellants principally contend that they have accurately established the location of the north line of sec. 9, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada, in contradistinction to BLM. Appellants argue that the line can be located "on the ground by double-blazed line trees, many line cuts, rock piles, and a squared tree trunk" (Protest at 2). Appellants submit a copy of a letter dated November 20, 1984, from the Laboratory of Tree-Ring Research, University of Arizona, which states that one of the blaze scars "appears to have been formed very soon after the end of the 1880 growing season, probably in 1881." Downer also argues that there is another definite series of "line cuts," running north-south, which intersects at appellants' purported location of the NW 1/4 of sec. 9 (Statement of Reasons at 1). However, BLM discounts appellants' reference to small rock piles and cuts on trees, to establish section lines, because the field notes of the 1881 survey make no mention of them. BLM notes that one of the other blaze scars was dated prior to the 1881 survey.

Despite the fact that at least one of the blaze scars was probably made in the year of the original survey, appellants have not offered proof that the rock piles and line cuts were made in conjunction with the 1881 survey, as an indication of the location of the pertinent section lines. Thus, if this had been the only evidence offered by appellants with respect to the location of the north line of sec. 9, we would not conclude that appellants have raised a substantial question regarding the location of that line. However, when viewed in light of other evidence, discussed, *infra*, such a question is raised.

Appellants also contend that the original survey of the north line of sec. 9 is tied to an old tunnel, a creek, an old telegraph line, the Bodie Stage Road trace, and "Carter's Station," a freight station operated by William Carter on the Bodie Stage Road. Downer contends that appellants' line more closely agrees with "all record calls" in the field notes of the 1881 survey (Statement of Reasons at 1). The 1881 field notes state that a tunnel was located 1 chain south of the section line. Downer states that his line passes approximately 1 chain north of the tunnel and BLM's line passes approximately 1.5 chains south of the tunnel. Downer also states that there are indications of the Bodie Stage Road crossing appellants' line at the point set forth in the 1881 survey, that there are two old telegraph wire insulators in trees 100 and 200 feet northwest from appellants' line at the point set forth in the 1881 survey where the telegraph line, bearing northwest and southeast, crossed the line and that the gulch described in the original survey crosses the line established by him within 5 feet of the point set forth in the 1881 survey.

Appellants also contend that they located the N 1/4 corner of sec. 9, on their purported section line, using the stump of the original bearing tree, which was the only stump within 100 feet of that location. Downer states that this corner also ties to the barn at Carter's Station (whose foundation is still visible) with a bearing of S. 12 degrees E. and a distance of 15.5 chains. Downer states that the barn was the "center of activity" at Carter's Station (Statement of Reasons at 2). Downer notes that the corner identified in the 1881 survey was tied to "Carter's House" with a similar

bearing of S. 12-1/2 degrees E. and a distance of 16 chains. ^{4/} Downer also states that the corner is in "good agreement" with the record distance to the NE corner of sec. 9. Appellants point out that the N 1/4 corner established by BLM is 2.6 chains short of the record distance to the NE 1/4 corner of sec. 9.

BLM challenges appellants' location of the N 1/4 corner of sec. 9. It argues that appellants' purported bearing tree has "no [visible] evidence of scribe marks or blaze scars." BLM also states that the two different locations of the corner in the 1982 and 1983 Downer survey maps ^{5/} could not reflect the 1881 location of the corner, which was tied to Carter's Station, because they were not located where the station would have been visible at a point three chains to the west (as stated in the 1881 field notes), whereas BLM's corner was located where the station would have been visible at that point.

BLM states that it did not find the original monument for the N 1/4 corner of sec. 9, described as a post (4 inches in diameter) set in a mound of earth, or the original bearing tree. However, BLM argues that its corner is tied to various topographical features. BLM notes that the corner is tied to a bladed road (believed to be the Bodie Stage Road) and a gulch at distances of 11.40 and 16.20 chains. The 1881 survey gave the distances to the road and the gulch as 11.50 and 16 chains.

BLM also states that it located the original position of Carter's Station using a 1919 highway map and data from a 1917 highway field book. ^{6/} BLM states that it then compared the various locations of the N 1/4 corner of sec. 9, as tied to Carter's Station, in terms of bearings and distances. The 1881 survey gave the bearing as S. 12-1/2 degrees E. and the distance as 16 chains. The 1982 resurvey gave the bearing as S. 14 degrees 18' E. and the distance as 12.73 chains. In contrast, the two Downer surveys, respectively, gave the bearings as S. 17 degrees 15' E., and S. 19 degrees 37' E., and the distances as 16.33 and 16.98 chains. However, BLM states that the 1881 surveyor probably estimated distances where topographic features were located in the interior of a section.

We conclude that appellants have raised a substantial question regarding BLM's location of the line between secs. 4 and 9 and the corresponding location of the N 1/4 corner. In particular, appellants' line and corresponding

^{4/} In an affidavit dated Aug. 23, 1984, Cora Sayre, who was born in 1897 and is familiar with Carter's Station (having traveled there as a child), states that the house and barn were apparently across from each other, and were separated by the Bodie Stage Road and a creek.

^{5/} Downer has prepared a total of two surveys of the area. One survey (RLS 446) resulted in the recordation of two survey maps on May 7, 1965, and Nov. 25, 1966, in Douglas County, Nevada. This survey was supplemented by a Mar. 23, 1983, map prepared by Downer. The other survey (RLS 2350) was completed on Mar. 22, 1982.

^{6/} In an affidavit attached to appellants' protest, dated Mar. 23, 1983, Jacobsen stated, based on his personal recollection, that the location of Carter's Station on the 1919 highway map was accurate.

corner results in a closer match with the call to "Carter's Station" (which appellants contend on appeal is the location of the old barn foundation) than BLM's line and corner. As noted, *infra*, we are not willing to conclude that the original surveyor did not accurately measure the pertinent bearing and distance. BLM, on the other hand, argues that, based on appellants' line, the station would not have been visible at the point indicated in the 1881 field notes. However, the notes do not state that the station was visible. In fact, the original surveyors may have marked out the distance between the line and the station by surveying from the station to the line, rather than vice versa, and, not being able to see the N 1/4 corner, the traverse intersected the line at a point three chains west of the N 1/4 corner. Appellants' location of the N 1/4 corner of sec. 9 appears to more closely match the record distance to the NE corner of sec. 9 than BLM's location. In addition, appellants' line more closely matches the record call to the old tunnel.

Both BLM and appellants rely on the agreement between their respective resurveys and the 1881 survey regarding where certain linear features (*e.g.*, the Bodie Stage Road) cross the line between secs. 4 and 9. This agreement, such that the 1881 survey and the 1982 resurvey lines intersect such features at the same distance from any particular corner of sec. 9, is therefore not conclusive with respect to either survey.

Appellants also contend that BLM did not accurately locate the NW corner of sec. 9. BLM states that the monument found, described as a trachyte stone (22 X 17 X 9 inches) set in a mound of stones with five grooves on the south face and four grooves on the east face, closely resembles the monument described in the 1881 survey as a trachyte stone (24 X 18 X 17 inches) set in a mound of stones. ^{7/} In addition, BLM notes that it found the remains of the four pine bearing trees with "open blazes and scribe marks" which were tied into the monument by bearings and distances in the field notes of the 1881 survey. BLM states that the discrepancy in the diameters of the trees, which were uprooted, and the bearings and distances as between the 1881 and 1982 surveys, is "not uncommon." ^{8/} BLM further states that a segment of one of the bearing trees was analyzed by the Laboratory of Tree Ring Research at the University of Arizona and the blaze mark was determined to have been made in 1881. Finally, BLM notes that the corner is located on a Nevada State Highway Department map, approved August 4, 1939, and the 1982 survey map prepared by AER.

^{7/} The field notes of the 1881 survey indicate that the dimensions of the trachyte stone were 24 x 18 x 12 inches.

^{8/} The 1881 survey referred to the four pines as follows:

<u>Diameter (inches)</u>	<u>Bearing</u>	<u>Distance (links)</u>
12	N. 80 degrees W.	19
16	S. 79 degrees W.	23
10	S. 54 degrees E.	31
8	S. 62 degrees E.	28

The 1982 resurvey located the stump holes of the uprooted pines as follows: Diameter (inches)

<u>Bearing</u>	<u>Distance (links)</u>	
6	N. 18-1/2 degrees E.	23
12	S. 43-3/4 degrees E.	18
8	S. 56-3/4 degrees W.	22
8	N. 50-1/2 degrees W.	14

However, appellants contend that BLM's measurements, with respect to the location of the bearing trees, are substantially different from those in the field notes of the 1881 survey. Downer states that it has been his experience that Government surveyors were "reasonably accurate" in measuring bearings and distances to bearing trees (Statement of Reasons at 1). Downer also notes that large surviving trees, within 10 feet of BLM's purported corner, were not blazed as they "would have been." Id.

Discrepancies between bearings and distances in old and more recent surveys are "not uncommon" and are "not sufficient alone" to disprove the reestablishment of a corner. State of Oregon, 78 IBLA 13, 20 (1983), quoting from Alfred Steinhauer, 1 IBLA 167, 172-73 (1970). However, this is not to say that the bearings and distances in original surveys may not be shown to be accurate. In the present case, appellants have presented a number of instances where, if their survey is accepted, such measurements appear to be very accurate, e.g., the relation between appellants' section line and "Carter's Station." Moreover, there is considerable discrepancy between the 1881 survey and the 1982 resurvey not only with respect to the bearings and distances to all four of the bearing trees for the NW corner of sec. 9, but also as to the diameter of these trees. We are reluctant to conclude that the original surveyors were as inaccurate as BLM indicates. Thus, appellants have called into question BLM's location of the NW corner of sec. 9.

Appellants also contend that BLM did not accurately locate the W 1/4 corner of sec. 4, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada. BLM states that the monument found, described as a granite stone (14 x 6 x 4 inches) set in a mound of stones with "1/4" marked on the west face, does not resemble the monument described in the 1881 survey as a trachyte stone (42 x 22 x 20 inches) set in a mound of stones, but that it is "quite common" for the size of a monument to "differ substantially" as between an original survey and a resurvey. BLM further states that the monument ties in with the section corners to the north and south and that the corner is located on the 1939 State highway map and the AER map. BLM also notes that the corner is tied to the bladed road (believed to be the Bodie Stage Road) and a telephone line (believed to be the location of an old telegraph line which could not be found) with the distances of 3.20 and 2.30 chains and that the 1881 survey gave the distances to the road and the telegraph line as 3.15 and 2.15 chains.

Appellants, however, claim that they have located the W 1/4 corner of sec. 4, which is an embedded boulder (trachyte stone) with "1/4" chiseled on its west face and surface dimensions of 42 x 22 x 20 inches, matching the description in the 1881 field notes. BLM states that it found "no definite chisel marks" on the stone. Downer states that "1/4" is "definitely" chiseled on the face of the stone ^{9/} and that the surrounding mound of stone probably

^{9/} Downer submits a copy of a letter from Dr. Robert A. Jones, dated Aug. 21, 1984, which states that the stone is "deeply inscribed" with a "1/4" mark:

"The slash between the 1 and the 4 has been chiseled along an existing natural crack in the rock, a site where any prudent man would pick as a point of weakness. Both the 1, above, and the 4, below the slash have been cut to at least 1/4 [inch] in places."

The letter also states that BLM's W 1/4 corner of sec. 4 is not a trachyte stone and has surface dimensions of 12 x 8 x 6 inches, even though it also has a vivid "1/4" mark.

washed away due to "cloudbursts from the nearby creek" (Statement of Reasons at 4). Downer states that appellants' corner is 3.5 chains south of where the line between secs. 4 and 5 crossed the Bodie Stage Road (as located on a 1923 highway map) and that BLM's corner is 7.5 chains south of that point. The field notes of the 1881 survey indicate that the record distance is 3.15 chains. Downer also states that appellants' corner is in line with line cuts running north from the NW corner of sec. 9, and within 30 feet of the record distance to the SW corner of sec. 9.

Appellants have called into question BLM's location of the W 1/4 corner of sec. 4. We are troubled by the apparent fact that the monument accepted by BLM does not approximate, either in composition or size, the stone described in the 1881 survey, while appellants' stone apparently does.

In light of the apparent discrepancies with respect to the location of the NW corner, sec. 9 and the W 1/4 corner sec. 4 in the 1881 survey and the 1982 resurvey, we seriously question whether BLM has heeded the Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1973, which states:

After due allowance has been made for natural changes, there may still be material disagreement between the particular evidence in question and the record calls. The following considerations will prove useful in determining which features to eliminate as doubtful:

- (1) The character and dimensions of the monument in evidence should not be widely different from the record.
- (2) The markings in evidence should not be inconsistent with the record.
- (3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

Id. 5-7 at 170.

See also Frank Lujan, 40 IBLA 184 (1979), appeal dismissed, Lujan v. U.S. Department of the Interior, Civ. No. 79-455c (D.N.M. Feb. 11, 1980), appeal dismissed, 673 F.2d 1165 (10th Cir.), cert. denied, 459 U.S. 969 (1982).

BLM challenges appellants' location of the NW corner of sec. 9, which was based on the proportionate distances, taken from the 1881 survey, to the section corners to the north, south, east, and west. BLM states that the method of double proportionate measurement, used by appellants, was "improper" and did not follow the guidelines set forth in the Survey Manual. That method, however, is accepted in the Survey Manual, 5-25 at 134, as a proper technique for determining the location of lost corners, which appellants maintain is the character of the NW corner of sec. 9. See Alfred Steinhauer, supra at 172. We note that BLM does not explain how appellants failed to follow the Survey Manual guidelines. It may be that appellants did not correctly

apply this method of measurement because they did not identify a known corner to the west of the NW corner of sec. 9 and use the single proportionate measurement method. See Survey Manual, 5-30 at 136. In any case, if it is determined that BLM did not find the NW corner of sec. 9, and there is no other collateral evidence supporting that corner, the corner should be treated as lost and its location determined accordingly. See Paul N. Scherbel, 58 IBLA 52 (1981).

After carefully reviewing the evidence submitted by appellants, we conclude that appellants have raised a substantial question of fact whether the section line between secs. 4 and 9, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada, is where the 1982 BLM dependent resurvey places the line. This question should be resolved after a hearing by an Administrative Law Judge.

Therefore, in order to resolve this factual question, we hereby order, pursuant to 43 CFR 4.415, that a hearing be held before an Administrative Law Judge, who will accept evidence and testimony and issue a decision which will be final for the Department, absent a timely appeal to the Board. See Elmer A. Swan, supra; Frank Lujan, supra; Domenico A. Tussio, 30 IBLA 92 (1977). At the evidentiary hearing appellants will have the burden of proving by a preponderance of the evidence that the lines and corners as determined by BLM in its 1982 dependent resurvey, do not depict the original survey lines (1881). See Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); California Energy Co. (On Reconsideration), 85 IBLA 254, 257 (1984). If appellants establish that BLM's line is inaccurate, the Administrative Law Judge should remand the case to BLM so that the lines can be resurveyed.

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 and the case is referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before and decision by an Administrative Law Judge.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

