

Editor's note: Reconsideration denied by Order dated Sept. 25, 1985.

ROBERT R. PERRY

IBLA 85-18

Decided June 28, 1985

Appeal a from decision of the Colorado State Office, Bureau of Land Management, rejecting an application for recordable disclaimer of interest.

Affirmed as modified.

1. Patents of Public Lands: Generally -- Surveys of Public Lands:
Generally

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system, the right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

2. Patents of Public Lands: Generally -- Surveys of Public Lands:
Generally

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the quantity of land stated.

3. Patents of Public Lands: Generally -- Surveys of Public Lands:
Generally

Where a plat of resurvey indicates that more land is included within the boundaries of a patented tract than was shown by the plat of original survey in accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent.

4. Federal Land Policy and Management Act of 1976: Disclaimers of Interest

Notwithstanding a finding that the United States has no right, title, or interest in or to the lands at issue, an application by the owner of record for a recordable disclaimer of interest by the United States pursuant to 43 U.S.C. § 1745 (1982) must be rejected where the record shows that more than 12 years have elapsed since the owner/applicant and his predecessors knew or should have known of the alleged claim attributed to the United States, because 43 CFR 1864.1-3 mandates rejection of such applications.

5. Regulations: Validity -- Regulations: Waiver

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived.

APPEARANCES: Robert R. Perry, Esq., pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Robert R. Perry appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated August 13, 1984, rejecting his application for recordable disclaimer pursuant to section 315 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2770, 43 U.S.C. § 1745 (1982). This section authorizes BLM, as delegate of the Secretary of the Interior, to issue recordable disclaimers of interest for lands in those situations where the disclaimer will help remove a cloud on the title of such lands upon a determination that a record interest of the United States in the lands has terminated by operation of law or is otherwise invalid. The application for disclaimer filed May 21, 1984, embraced lots 20, 21, 22, 23, 24, 25, 26, 27, and 28, sec. 36, T. 3 N., R. 83 W., sixth principal meridian, Colorado.

The plat of original survey of T. 3 N., R. 83 W., sixth principal meridian, Colorado, approved June 12, 1882, returned sec. 36 as containing 640 acres. On the same date, title to sec. 36 vested in the State of Colorado under the Colorado Statehood Enabling Act of March 3, 1875 (18 Stat. 475). On March 15, 1910, the State of Colorado conveyed sec. 36 to C. C. Cartney by Patent No. 2585, which patent purported to convey 640 acres, "more or less, according to United States survey."

In 1917, this township was the subject of an independent resurvey which tracted patented agricultural entries to conform as nearly as practicable with the original survey upon which the patents were based. The independent resurvey, approved June 30, 1917, showed sec. 36 as containing 826.54 acres, but overlooked tracting of original sec. 36 as granted to the State of Colorado. In 1925 a tract survey was directed for school sec. 36. Supplemental plat of December 11, 1926, amending the plat of resurvey approved June 30, 1917, assigned tract 52 to represent the position and form of school

sec. 36 under the original description as referred to in the original survey, located as such on the ground according to the best available evidence of its true position. Accurate establishment of original sec. 36 was facilitated by the resurvey having recovered the original survey corner at the southeast corner of T. 3 N., R. 83 W., the south 1/4-corner of original sec. 36, and the southwest corner of sec. 36. (By computation, tract 52 actually contains 666.74 acres). The lands remaining in the section were designated as lots 20 through 28. This supplemental plat was approved February 12, 1927.

In the years following the State's patent of sec. 36 to Cartney, title to sec. 36 vested in a number of persons as the result of several conveyances. By warranty deed of August 10, 1939, Cartney, as grantee, again acquired title to sec. 36. By letter of May 22, 1940, Cartney proposed an exchange of land (sec. 36) for an equal value of national forest timber, maintaining that he owned all of sec. 36 of the independent resurvey, or 826.54 acres. By letter of December 15, 1941, the Forest Supervisor, Routt National Forest, advised Cartney that he owned only tract 52, and that only an exchange based on the 640 acres of tract 52 would be given consideration.

Cartney conveyed title to tract 52 to the United States by warranty deed dated March 18, 1943, in exchange for an equal value of certain national forest timber, as provided by the Act of March 20, 1922, 42 Stat. 465, 16 U.S.C. § 485 (1982), under exchange application Denver 052436.

On December 8, 1943, Cartney issued a warranty deed to his wife, Grace W. Cartney, conveying title to lots 20 through 28 of sec. 36, containing 159.31 acres according to the independent resurvey. On January 18, 1963, Grace W. Cartney issued a deed conveying these lots to appellant. By letter of May 4, 1984, appellant applied for a disclaimer of interest from the United States as to the lots in issue.

In its decision denying the application for disclaimer BLM, found that tract 52, as shown on supplemental plat of February 12, 1927, represents the original sec. 36 as shown on the original plat of June 12, 1882; that since original sec. 36, containing 640 acres as shown on the original plat of 1882, passed to the State under the granting Act of March 3, 1875, the State's ownership would be limited specifically to what is now known as tract 52; that this represents the same 640 acres Cartney received by patent from the State dated March 15, 1910, and the same 640 acres Cartney later reconveyed to the United States in his deed of reconveyance dated March 18, 1943, in connection with his exchange application. BLM concluded that lots 20 to 28, inclusive, as shown on the plat of February 12, 1927, are vacant unappropriated public lands of the United States.

BLM noted that the parties to land title transactions involving sec. 36 have been on official notice from both the Forest Service and BLM for more than 40 years that title in the lots is in the United States and reserved for national forest purposes.

BLM pointed out that three documents from the Forest Exchange file are pertinent to the application for disclaimer of interest. These documents show that Cartney and others who had title to sec. 36 only paid tax on the original sec. 36 (tract 52) which was purportedly 640 acres.

In addition, BLM referred to the Forest Supervisor's letter of December 15, 1941, in which he informed Cartney that he owned only tract 52, and that an exchange based on the 640 acres of tract 52 would be given consideration. BLM also noted letters dated June 3 and July 27, 1960, to the law firm of which Perry was a partner, in which BLM advised that lots 20 through 28 of sec. 36 were vacant unappropriated public land withdrawn for national forest purposes. BLM held that there was no basis for issuance of a recordable disclaimer of interest.

In his statement of reasons, appellant refers to a notation on the official plat of the 1917 resurvey which reads:

All claimants agree to the lines of the independent resurvey thereby retaining their original description except those tracts of land for which metes and bounds surveys are given and which are designated as tracts 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51.

The resurvey reported sec. 36 as containing 826.54 acres. Appellant contends that the United States, as one of the claimants involved, gave up any right to rely upon the original 1882 survey with respect to the number of acres included in sec. 36 and concurred that sec. 36 contained 826.54 acres. Appellant asserts that since the survey of 1917 had been accepted by the United States and all private landholders as indicated by the statement on the 1917 plat, the supplemental resurvey of 1927 which divided sec. 36 into tract 52 (640 acres) and the lots in question, could not in any way change title to any portion of sec. 36 as shown on the 1917 plat.

Appellant cites United States v. Aikins, 84 F. Supp. 260 (1949), for the proposition that if, as a result of a resurvey, an original school section which had been granted to the State, were replatted and found to contain more than 640 acres, this additional acreage should pass to the State. In light of the holding in Aikins, appellant contends that even if the original survey of 1882 was intended to include only 640 acres in sec. 36, the United States by approving the independent resurvey of 1917 and by failing to account for the over-acres found in sec. 36 at the time of that approval, passed title to Grace L. Walker, later to be Cartney's wife, who at the time of the resurvey had title to sec. 36. Appellant emphasizes that acquiescence of the United States in the 1917 resurvey is clearly born out by the statement contained on the margin of the 1917 plat.

Finally, appellant notes that Cartney at all times maintained that he owned all of sec. 36, including the lots in question, as evidenced by correspondence contained in the case file.

[1] The question apparently presented for determination in this case is what amount of land did the State and appellant's predecessors in interest receive under the original 1882 survey. 1/

1/ However, as will be shown, infra, the resolution of this question is not the dispositive issue.

The chain of title in this case originated with a grant from the United States to the State of Colorado pursuant to section 7 of the Colorado Statehood Enabling Act of March 3, 1875, 18 Stat. 475. Section 7 provides "[t]hat sections numbered sixteen and thirty-six in every township * * * are hereby granted to said State for the support of common schools." This grant was effective on June 12, 1882, the date of approval of the survey plat for this particular township. The State was granted sec. 36 in accordance with the original survey of 1882. The Department has held that where lands in a grant or patent from the United States are described in terms of the rectangular surveying system the only right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based. J. M. Beard (On Rehearing), 52 L.D. 451, 458 (1928). When Cartney received his patent from the State in 1910, he acquired title to the same lands that the State had been granted in 1882.

[2] BLM states in its decision that Cartney received only 640 acres because the official plat of the original survey of 1882 returned sec. 36 as containing 640 acres and the patent from the State to Cartney conveyed 640 acres. BLM stresses the fact that "640 acres" also appears in tax documents relating to sec. 36 and to correspondence between Cartney and the Forest Service regarding the exchange of lands for timber. A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground or the patent description may be in error as to the course or distance or quantity of land stated to be conveyed. Elmer L. Lowe, 80 IBLA 101 (1984); United States v. Heyser, 75 I.D. 14, 18 (1968). Therefore, we find that the words "640 acres" in these documents is not controlling.

We also note that there is a long established order of importance ascribed to the various kinds of calls in determining an uncertain boundary line. Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary, or run beyond it. Calls of courses take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential. Internal Improvement Fund of State of Florida v. Nowak, 401 F.2d 708 (Cir. 1968); United States v. Leroy S. Johnson, 39 IBLA 337 (1979); The Coast Indian Community, 3 IBLA 285 (1971); 12 Am Jur. 2d, Boundaries, §§ 65, 75 (1964).

This Department has long recognized that the surveyor's return as to the quantity of land ceases to have any significance once the land passes from Federal ownership. In Mason v. Cornwell (On Review), 26 L.D. 369, 371 (1898), the Acting Secretary held:

For purposes of the disposal of the public lands the law makes the surveyor-general's return as to the quantity of land in a legal subdivision conclusive. See sections 2395 and 2396

Revised Statutes, especially paragraphs 5 and 3 respectively. Whether a section returned as a full section contains more or less than six hundred and forty acres of public land, according to actual computation from the field notes of survey, it must, under the provisions of the sections last above cited, be disposed of by the land department as containing just six hundred and forty acres, and each quarter thereof as containing one hundred and sixty acres. These provisions of law were enacted to facilitate the disposal of public land. Under their operation such a quarter section always contains, for the purposes of such disposition, exactly one hundred and sixty acres. In fact it rarely ever contains just that quantity, but usually contains either more or less. This law is conclusive of the quantity in a legal subdivision only while it remains public land. It has no such conclusive effect after the land has become private property. [Emphasis added.]

Another reason why the number "640" is not significant here is because of the wording of the Colorado Statehood Enabling Act, supra. Section 7 of the Act specifies that sections 16 and 36 are granted to the State for the support of common schools without any mention of the number of acres. See United States v. Aikins, supra at 263.

The language of the Enabling Act makes it clear that the United States intended to convey sec. 36 to the State. This is the same sec. 36 which the State conveyed to Cartney and his successors. The primary rule which the courts apply in construing and interpreting a conveyance where the location of a boundary line is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. United States v. Leroy S. Johnson, supra at 344; The Coast Indian Community, supra at 290, 291. A finding that the State received 826.54 acres which were conveyed to Cartney and a portion of which were conveyed eventually to appellant is consistent with this rule.

The independent resurvey of the township was conducted in 1917. An independent resurvey is a running of what are in fact new section or township lines independent of and without reference to the corners of the original survey. In an independent resurvey, it is necessary to preserve the boundaries of the lands patented by legal subdivisions of the sections of the original survey, which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey. This is accomplished by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey. These tracts represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions. J. M. Beard (On Rehearing), supra at 454.

This independent resurvey returned sec. 36 as containing 826.54, acres, approximately 186 acres in excess of that reported by the original 1882 survey. The supplemental survey of 1927 tracted the original sec. 36 as containing 640 acres and designated the remaining acreage as lots 20 through 28.

[3] By way of comparison, we note that the Department has held that where a plat of resurvey indicates that less land is included within the boundaries of a patented tract than was shown by the plat of original survey in accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent. Albert Freitag, A-26258 (Jan. 3, 1952). We find the same reasoning applicable in this case where the resurvey indicates that more land is included within the boundaries of sec. 36 than was shown by the plat of the original survey. The boundaries of the patented tract as established by the original survey control, rather than the acreage indicated on the plat of the original survey.

The right and power to conduct resurveys or retracements of surveys is vested in the Secretary of the Interior. 43 U.S.C. § 772 (1982); Knigh v. United States Land Association, 142 U.S. 161, 176 (1891). The provisions of 43 U.S.C. § 772 (1982) also clearly provide that no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement. Prior to passing title from the United States, the Government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. United States v. Reimann, 504 F.2d 135 (10th Cir. 1974); Alice L. Alleson, 77 IBLA 106 (1983). If, on resurvey, the Government establishes that sec. 36 contains 826.54 acres, the Government cannot impair appellant's right by conducting a supplemental survey which tracts the original sec. 36 as containing 640 acres, and thereby limit appellant to 640 acres, while reclaiming title to the overage in the name of the United States.

The Department alluded to the issue of excess acreage in State of New Mexico, 51 L.D. 409 (1926). This decision stated the rule that the extent of a state's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands), and where indemnity lands have been granted by the United States in lieu thereof, subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not afford a new basis for adjustment of the grant. That decision reads in pertinent part as follows:

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the Commissioner. The provisions of section 2396, Revised Statutes, recognize the fact taught by experience that measurements of lands cannot be performed with precise accuracy and that the work of no two surveyors would exactly agree. True, the alleged shortage in this case looms to a figure of impressive proportions, but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States, and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and

against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government cannot inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue. [Emphasis added.]

(Ibid. at 412).

The opinion in United States v. Aikins, supra, contains passages which are particularly instructive in this regard:

The land covered by the 1869 Reed Survey having passed to the State of California upon the approval of such survey, United States v. Morrison, 240 U.S. 192, 36 S.Ct. 326, 60 L.Ed. 599, and cases there cited, and having been sold and disposed of by the State prior to the Carpenter re-survey, as approved in 1894, could not be affected by such re-survey, as private rights had in the meanwhile intervened. The Reed Survey, even though declared "fraudulent" and "worthless" as a basis for disposal of the lands in the township, was sufficient to pass title to those depending on it. Cragin v. Powell, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566; United States v. State Investment Company, 264 U.S. 206, 44 S.Ct. 289, 68 L.Ed. 639, and cases there cited.

It should be noted at this point that no charge or suggestion of fraud or misdealing is involved in this case, and that the record shows complete arms-length dealing between the Government and all parties concerned. [At 262-63]

* * * * *

As heretofore indicated, the Government has the power to make surveys and re-surveys, but it cannot by a re-survey or corrective survey deprive anyone of title who has received it in dependence upon the previous survey, Cragin v. Powell, supra, United States v. State Investment Co., supra.⁵ Under the authority of those cases, the Government could not now, or on the date of filing the instant suit, have deprived the State, or its successors, of title by making a re-survey of the lands in question and designating them as other than being within the boundaries of Section 36, or throwing them into the northern and western tiers of the next township southerly and easterly. That would, however,

be the effect of conceding that their contention is correct. It would permit the Government to do in this action what it cannot do by a legally made resurvey.

The Government recognizes that intervening rights vest under erroneous or invalid surveys, and that changed or corrected surveys cannot affect such rights.
[At 265]

The Government cannot readjust the boundaries of sec. 36 by supplemental resurvey involving appellant's patented lands where the resurvey shows an excess of acreage over that taken with the survey returns at the time of disposal to the State and to appellant's predecessors in interest.

However, on the basis of the record now before us, it is impossible to conclude with absolute assurance that this is what the Government did in this case, although there is some evidence that it may have. If section 36 as defined by the 1917 survey embraces the same land actually embraced by section 36 as defined by the 1882 survey, then all of the land was privately owned, and it was improper to tract and lot the section in 1927 in an effort to force the grant to the State to conform to the recitation in the 1882 survey that section 36 contained 640 acres. On the other hand, if the 1882 survey of section 36 only defined the area now designated Tract 52, as the Government asserts, the lots along the north and west boundaries are indeed Federal land.

There is no way to resolve this question without a careful analysis of the instructions and field notes of both the 1882 and 1917 surveys, which are not part of the record before us.

[4] Nevertheless, we must affirm BLM's refusal to issue a recordable disclaimer of interest pursuant to 43 U.S.C. § 1745 (1982), albeit for an entirely different reason. 43 CFR 1864.1-3 plainly prohibits such relief. It provides: "(a) An application [for disclaimer] shall be denied by the authorized officer if: (1) More than 12 years have elapsed since the owner knew or should have known of the alleged claim attributed to the United States." This Board admits to considerable perplexity concerning the purpose of the regulation, which would compel denial of appellant's application even if the Government freely acknowledged that it had no interest in the land and that he was the undisputed owner. If the United States has wrongly contended that it is the owner of the land for more than 12 years, the regulation inexplicably bars the very relief that the statute was intended to afford.

[5] Regardless of the Board's reactive attitude concerning the regulation, however, we are obliged to apply it. We have held repeatedly that the Board of Land Appeals has no authority to declare duly promulgated regulations invalid and that such regulations have the force and effect of law, are binding on the Department, and may not be waived. Sierra Club, Alaska Chapter, 79 IBLA 112 (1984); Sam P. Jones, 71 IBLA 42 (1983); Mesa Petroleum Co., 37 IBLA 103 (1978).

The record in this case clearly documents the fact that the United States has been asserting its ownership of the subject lands for more than

40 years, and that it has communicated these assertions to appellant and his predecessors over that period. Therefore, there can be no doubt that 43 CFR 1864.1-3 is operative in these circumstances to require denial of appellant's application for a disclaimer regardless of whether it may be conclusively demonstrated that he is the true owner of the land.

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 as herein modified.

Edward W. Stuebing
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

I am in agreement with the ultimate conclusion in the majority decision that a disclaimer of interest may not issue in the instant matter as it is clearly barred by the applicable regulation, 43 CFR 1864.1-3(a). Moreover, I am in agreement with the majority that, on the present record, it is impossible to conclude whether the United States does own the land in sec. 36, T. 3 N., R. 83 W., sixth principal meridian, denominated as lots 20, 21, 22, 23, 24, 25, 26, 27, and 28. Appellant's reliance on the decision in United States v. Aikins, 84 F. Supp. 260 (S.D. Cal. 1949), aff'd sub nom. United States v. Livingston, 183 F.2d 192 (9th Cir. 1950), however, adds a degree of complexity which I feel may justify additional consideration even though it will not be dispositive of the immediate appeal.

Initially, I wish to reiterate various principles of law set forth in the text. First, a patentee or grantee of public land takes according to the actual survey on the ground. See Elmer L. Lowe, 80 IBLA 101 (1984). Thus, where there is a discrepancy between the survey plat and the land as it is actually located on the ground, either in situs or in the amount of acres thought to be embraced in the patent or grant, the discrepancy is resolved by reference to the actual location of the land in question as determined by the survey on the ground. Thus, acreage figures contained on the plat of survey do not control over the actual acreage contained in the land as surveyed. See generally United States v. Reimann, 504 F.2d 135 (10th Cir. 1974).

Second, a survey of unsurveyed public lands does not merely identify sections, it creates them. See Cox v. Hart, 260 U.S. 427, 436 (1922); United States v. Morrison, 240 U.S. 192 (1916); State of Oregon II, 80 IBLA 354, 91 I.D. 212 (1984). It is important, however, to distinguish between the independent and dependent resurvey in this respect. A dependent resurvey is designed to constitute "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." Mr. and Mrs. John Koopmans, 70 IBLA 75, 77 (1983). See also Elmer A. Swan, 77 IBLA 99, 101 (1983) and cases cited. As we have noted, "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 are identical." Mr. and Mrs. John Koopmans, *supra*.

In contradistinction, an independent resurvey is "a running of what are in fact new section or township lines independent of and without reference to the corners of the original survey." J. M. Beard (On Rehearing), 52 L.D. 451, 545 (1928). Thus, just as the original survey, an independent survey acts to create the sections of land being surveyed. Essential to the running of a proper independent resurvey, however, is the preservation of the rights of those who may have acquired land under the earlier survey. In order to accomplish this, such entered lands are tractted out where they cannot be conformed to the new survey.

Third, there is no warrant in law for the assertion that the grant of school sections to a State is limited to 640 acres per section. With respect to the instant appeal, if, in fact, sec. 36 as originally surveyed in 1882 contained 826.54 acres, the State's title to all 826.54 acres vested upon final approval of the survey. In State of Oregon II, *supra*, we quoted from the Department's earlier decision styled State of New Mexico, 51 L.D. 409 (1926), concerning acreage computations for lieu land selections, where it was noted that "the Government cannot inquire into the contents of the school sections and subdivisions assigned by the State as a basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return." 80 IBLA at 363, 91 I.D. at 218. Implicit in such a rule is recognition that the State takes the acreage surveyed as sec. 36 regardless of whether or not it is more or less than 640 acres.

In addition to these survey principles of general applicability, the fact that we are involved with a State school section brings an additional consideration into focus. Appellant places considerable reliance on the decision of the California District Court in United States v. Aikins, *supra*. That case involved the situation wherein sec. 36 was identified in one location in an original survey in 1869 and in substantially different location in a subsequent survey approved in 1894. Both parties to the Aikins litigation agreed that title to the original sec. 36 passed to the State upon approval of the 1869 survey. The issue before the court was whether the State also acquired the additional land denominated as sec. 36 in the 1894 resurvey. The court, in essence, held that under the State's Enabling Act it was entitled to all land in sec. 36, and when the resurvey identified additional land as being within sec. 36, that land passed to the State upon the approval of the resurvey, provided that it was then available.

The effect of the Aikins decision, however, is limited not only by the fact that it relates specifically to school land grants, but also by the subsequent decisions of the Wyoming District Court and the Tenth Circuit Court of Appeals in United States v. Wyoming, 195 F. Supp 692 (1961), *aff'd* 310 F.2d 566 (1962). That case involved resurveys of various townships within Wyoming wherein the original secs. 16 and 36 were segregated into tracts and those remaining lands in resurveyed secs. 16 and 36, which were still in Federal ownership, were lotted out. The State of Wyoming, relying on the Aikins decision, argued that it obtained title to these lotted lands upon the acceptance of the resurveys in addition to the lands originally returned as within sec. 36. This claim was rejected and the Tenth Circuit Court of Appeals expressly held that:

[W]hen the boundary lines of original school sections were reestablished by resurveys thereof and such sections were identified by tract or lot numbers and the words "School Section" inscribed on such tracts or lots, on the official plats of such resurveys, the State is entitled, under the grant to it of such school sections, only to the lands within such original school sections, unless it elected to waive its claim to such original school sections and to select in lieu thereof lands embraced in resurveyed school sections and in such case, it is only entitled to the lands embraced within the resurveyed school sections.

Id. at 580-81.

In attempting to distinguish the Wyoming appeal from the earlier Aikins case, the court emphasized that, in Aikins, the second surveyor was instructed to obliterate the original lines and corners, whereas in the Wyoming case the United States relocated the original corners of the school sections and identified them as tracts on the plat of resurvey and designated them as school sections. Moreover, the United States had consistently asserted its claim of ownership to the lotted lands in the resurveyed secs. 16 and 36, assertions which had not, apparently, been made in the Aikins litigation until the passage of nearly 40 years after the resurvey. Thus, under the Tenth Circuit's analysis, the Aikins principle would seem to apply only where the subsequent resurvey did not tract out the original school section and lot out the remaining Federal land.

Before analyzing whether the Aikins principle is operable in the instant case, it is important to recognize that the majority analysis does not proceed on this theory. The majority analysis is directed to the question whether the 1882 survey contained the same land returned as sec. 36 in the 1917 survey. There is support for the interpretation that it did embrace the same land in the plat of the 1917 survey, where it is noted that "all claimants agree to the lines of the independent resurvey thereby retaining their original description [except for certain exceptions not relevant herein]." Such a theory, however, is contradicted by the statement in the Special Instructions for the 1926 survey that the 1917 survey recovered the three original corners along the southern boundary of sec. 36. The Special Instructions directed that these recovered corners be used to establish the southern boundary of the tract. Assuming both that the original corners were recovered and that the 1926 survey conformed thereto, it is clear that, at least insofar as the southern boundary of sec. 36 was concerned, it did not extend the full distance of the resurveyed southern boundary. However, absent an examination of the field notes for both the 1882 and 1917 surveys, which are not included in the instant record, I agree with the majority's conclusion that it is impossible to determine whether all of the land shown within sec. 36 on the 1917 survey was included in sec. 36 as originally surveyed.

Appellant's contention is slightly different. Without conceding that sec. 36 as surveyed in 1917 differed from the original 1882 survey, appellant argues that, even if it did, the acceptance of the 1917 survey returns by the General Land Office is conclusive as a determination of the limits of the 1882 grant to the State, his remote predecessor-in-interest. The problem with this theory is that the 1917 survey did not purport to reestablish the boundaries of the 1882 survey, as it was an independent resurvey and not a dependent resurvey, save for the determination of the exterior boundaries of the entire township. An independent resurvey, however, can neither diminish nor increase a grant of land under a prior survey. Thus, if the 1917 survey resulted in a change either in the situs or acreage of sec. 36 as established by the 1882 survey, such alteration could not affect rights already granted under the 1882 survey, regardless of whether or not the General Land Office was aware of the true facts at the time of the acceptance of the survey.

In essence, the position of BLM today is similar to that of the General Land Office in 1925 when it ordered the segregation survey, viz., that the

1917 survey erroneously failed to tract out the State school section already granted. If it can be shown that the original sec. 36 was not coterminous to sec. 36 as returned in the 1917 survey, an issue which I am not willing to definitively determine without first reviewing the field notes of the original and 1917 survey, I think the Government's position is correct. However, granting this fact, I am also forced to conclude that the Aikins rule would then seem to apply in the instant case.

Considering the original Aikins rule in light of its modification by the Tenth Circuit's decision in United States v. Wyoming, *supra*, it is my view that when the survey was approved without tracting out the original grant to the State of Colorado, the Government, in effect, determined that the additional acreage was part of sec. 36 subject to the State school grant. The attempt in 1927 to segregate the original sec. 36 would come too late, as by the time the State's rights would already have vested.

Appellant, however, could make no claim to this additional acreage as the original grant from the State of Colorado which initiated his chain of title was made in 1910, 7 years prior to the 1917 survey. Moreover, title to the specific land added to sec. 36 would not have vested in the State upon approval of the 1917 survey as the land was not then available, having been included in the Routt National Forest on March 1, 1907. Such additional acreage as was included might serve as a basis for a lieu selection by the State. Further consideration of these points, absent access to the relevant records, however, would be purely speculative.

For the reasons set forth above, and in view of the uncertainties generated by the present record, I, too, am reluctant to definitively rule on any of the substantive questions presented by this case. I therefore concur with the majority decision.

James L. Burski
Administrative Judge

