

JOHN D. CARTER, SR.
VERNA R. CARTER

IBLA 84-823

Decided February 13, 1986

Appeal from decisions of the California State Office, Bureau of Land Management, denying a protest of the results of a resurvey conducted pursuant to special instructions, Group No. 722, California.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Surveys of Public Lands: Generally

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

APPEARANCES: John D. Cook, Esq., Eureka, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

John D. Carter, Sr. and Verna R. Carter appeal from decisions of the California State Office, Bureau of Land Management (BLM), dated June 19, 1984, denying their protest of a cadastral resurvey of Tract 53, T. 11 N., R. 6 E., Humboldt Meridian (HM), California, and accepting the resurvey. By letter dated March 15, 1984, the Carters and Retrac Timber Company had protested the location of the boundaries of the land represented as Patent No. 1008407 (dated Oct. 6, 1927) by BLM's metes-and-bounds survey conducted pursuant to Special Instructions, Group No. 722, California, March 21, 1979.

The purpose of the survey was explained in the BLM decision as follows:

The tract segregation surveys within this township were requested by the U.S. Forest Service due to the absence of evidence of the original subdivisional corners that controlled the boundaries of the National Forest Lands, and the resulting uncertainties of the exact locations of those boundaries. In order to protect your bona fide rights, as well as other claimants in this township, it is the intention of the tract segregation to show the original position of patented lands as described in the original patents.

A review of the history of this township (relevant to the tract in question) and its several surveys provides insight into the controversy between appellants and BLM.

The first survey of record was one conducted in 1882, when John Haughn allegedly surveyed the exterior boundary of T. 11 N., R. 6 E., HM, and established its subdivisions. Haughn's survey was officially approved on May 2, 1883. However, later Government investigations suggest Haughn's work in the area was fictitious or fraudulent. See Survey Report dated Nov. 22, 1939, Group 238, California.

In 1920, pursuant to special instructions, Francis E. Joy resurveyed parts of the 2nd Standard Parallel North and investigated survey conditions in T. 11 N., R. 6 E., HM. In the course of this work Joy found and renewed the quarter section corner between secs. 4 and 9. However, few of the other monuments which should have been placed in the original survey were found. 1/ The township's survey condition was also officially investigated in 1939 by Theodore Vander Meer and in 1930 through 1954 by Roger F. Wilson. The original corners found during those investigations were remonumented in 1975 by William D. Jensen. No corner monuments for secs. 8 and 9, other than the corner marker found by Joy, were mentioned in any of the investigation reports.

On October 6, 1927, Patent No. 1008407 was granted to Fred Brace pursuant to a homestead entry. 2/ In 1962, that portion of land in the patent lying east of the Ishi Pishi Road (a former Forest Service access road) was conveyed to another party. Between 1964 and 1968, the parcel east of the Ishi Pishi Road was subdivided into four lots and conveyed to separate owners. The grantees of the four lots proceeded to build houses and other improvements within the area considered to be part of the original homestead patent. The remainder of the homestead parcel, the lands west of the Ishi Pishi Road, was conveyed in 1971. Appellants acquired title to the west parcel in 1979.

Because survey inconsistencies were becoming increasingly evident and boundaries to private and public lands in the township were uncertain, Special Instructions, Group No. 722, California, were issued. The instructions for survey of T. 11 N., R. 6 E., HM, provided for "the dependent resurvey of the Second Standard Parallel North along the east 5 miles of the south boundary, the dependent resurvey of secs. 19, 20, 29, 30 and 32 [,] the dependent resurvey of all mining claims within this township [, and the] Metes-and-Bounds Surveys of Homestead Entry patents." The surveyors were instructed to "[e]xecute Metes-and-Bounds Surveys of all Homestead Entry patents that

1/ Approximately 2,450 corners should have been established. However, only about 60 were found after 75 years of search. (Memorandum from Chief, Division of Technical Services to Director, DSC, dated Nov. 3, 1980).

2/ The patent conveyed the following lands: S 1/2 NE 1/4 NW 1/4 SE 1/4, S 1/2 NW 1/4 SE 1/4, S 1/2 NE 1/4 SE 1/4, S 1/2 N 1/2 NE 1/4 SE 1/4, N 1/2 SE 1/4 SE 1/4, SW 1/4 SE 1/4 SE 1/4, E 1/2 SW 1/4 SE 1/4, E 1/2 W 1/2 SW 1/4 SE 1/4, NW 1/4 NW 1/4 SW 1/4 SE 1/4 sec. 8, W 1/2 NW 1/4 SW 1/4, W 1/2 E 1/2 NW 1/4 SW 1/4 sec. 9, T. 11 N., R. 6 E., HM (147.5 acres) and is described in the survey documents as Tract 53.

have been patented by aliquot parts as being in secs. 2, 3, 4, 8, 9, 17 and 18," and "[s]urvey connecting ties between these tracts of lands and existing iron post monuments."

Under these instructions, Douglas Jacobson began the survey of Patent No. 1008407 (identified in the survey notes and plats as Tract 53) by searching for additional subdivision corners and homestead boundary markers. Finding none, Jacobson established a temporary boundary for Tract 53 by an "anticipated" metes-and-bounds survey, based upon the distance from the known quarter corner between secs. 4 and 9. However, Jacobson found that use of the temporary boundary would lead to the following results: (1) The boundary would run through an old orchard and a shed, and exclude a house which had been described as primary improvements in the homestead entry documents; and (2) The tract as laid out excluded three homes built on the subdivided land originally considered to be a part of the homestead "lying easterly of the Ishi Pishi Road."

David Dukleth replaced Jacobson as the surveyor responsible for the conduct of the work to be performed under the special instructions in 1981. While in the process of locating Patent No. 896823 in sec. 17 (tract 55), the quarter corner for secs. 16 and 17 was recovered. BLM commented on the position of this quarter corner as follows:

This corner was found to be in reasonably good relationship to the original corners found in the dependent resurvey of sections 19 and 20, and in good latitudinal relationship with the randomly placed 1/4 section corner of sections 4 and 9. However, there is about a 4 chain (264 feet) deficiency in longitudinal positioning between these latter two 1/4 section corners when compared to the official record.

June 19, 1984, Decision at 3.

Following the discovery of this monument Dukleth reestablished the temporary boundaries for Tract 53, using the quarter corner of secs. 16 and 17 as the reference point, while maintaining the northern boundary contiguous with the southern boundary of adjacent Tract 52 to avoid a minor overlap. The basic effect was to shift the proposed boundaries of Tract 53 approximately 260 feet to the east of its preliminary location based on the quarter corner for secs. 4 and 9. As a result, all but one improvement constructed by the patentee and his successors fell within the exterior boundaries of Tract 53. Based upon these findings, a metes-and-bounds survey of the exterior boundaries of the homestead was completed.

The tract survey prepared by Dukleth was presented for approval. By letter dated March 15, 1984, counsel for the Carters and Retrac Timber 3/ _____
3/ Retrac Timber Company is a partnership between John D. Carter, Sr., and John D. Carter, Jr. Appellants no longer own any of the patented lands at issue here, but pursue this appeal because of an alleged trespass on national forest lands by logging activities in 1980 and 1981. The area in dispute was

filed a protest against acceptance on the grounds survey lines were adjusted as an attempt to accommodate other adversely affected landowners. In a supplemental statement counsel argued that the quarter section corner for secs. 4 and 9 is controlling because that corner was established to control latitudinal issues, the corner is closer to the tract, and other tracts which control the location of Tract 53 depend upon that corner.

In its June 19, 1984, decision denying the protest, BLM outlined the results of the survey conducted by Jacobson and Dukleth and explained the evidence weighed in concluding the quarter corner of secs. 16 and 17 should control, rather than the quarter corner of secs. 4 and 9 in the determination of the location of Tract 53. BLM also enclosed a copy of appropriate pages from the Manual of Surveying Instructions (1973 ed.) and quoted the following Manual sections as having been used as a basis for its decision:

In the resurvey process the surveyor will determine whether or not lands embraced within a claim as occupied have been correctly related in position to the original survey. Where the demonstration of this question may be one involving more or less uncertainty, as is often the case, the surveyor will examine and weigh the evidence relating strictly to the surveying problems. He will interpret the evidence with respect to its effect upon the manner in which the resurvey shall be executed to protect valid rights acquired under the original survey. (Section 6-11)

The surveyor should neither rigidly apply the rules for restoration of lost corners without regard to effect on location of improvements nor accept the position of improvements without question regardless of their relation or irrelation to existing evidence of the original survey. Between these extremes will be found the basis for determining whether improved lands have been located in good faith or not. No definite set of rules can be laid down in advance. The solution to the problem must be found on the ground by the surveyor. It is his responsibility to resolve the question of good faith as to location. (Section 6-15)

The relationship of the lands to the nearest corners existing at the time the lands were located is often defined by his fencing, culture, or other improvements. (Section 6-16)

Where the evidence of the original survey is so obliterated that lack of good faith in location cannot be charged against an entrymen, the available collateral evidence is to be regarded as the best indication of the original position of the claim. (Section 6-42)

If improvements have been located in good faith, the tract survey should be so executed, or the conformation to the lines of

east of the temporary western boundary line established by Jacobson, but is now west of the line established by Dukleth and is therefore outside of the approved boundaries of Tract 53.

the resurvey so indicated, as to cover these improvements and at the same time maintain substantially the form of the entry as originally described. (Section 6-45)

BLM concluded there was no factual evidence tendered by protestants to show the BLM tract survey was improperly executed or bona fide rights in the patented lands were impaired. ^{4/} The Carters challenge the decision denying their protest and the decision accepting the survey.

In their statement of reasons, the Carters advance the following arguments against officially adopting the Dukleth survey of Tract 53: (1) The quarter corner for secs. 4 and 9, used for latitude measurements, should control in determining the west boundary line of Tract 53; (2) Tract 53 is partially in sec. 9 and its boundaries should be located based upon the location of the quarter corner for secs. 4 and 9 since it is the closest known corner; (3) the location of Tract 53 is controlled by the location of Tract 52 which is dependent upon the quarter corner for secs. 4 and 9; and (4) the west boundary of the township has not been established with true certainty. Appellants also assert that Dukleth's "resurvey" was "based on a change of instructions" and request adoption of Jacobson's survey work because it was conducted "according to good survey practices."

[1] The Secretary of the Interior has the authority to determine what lands are public lands, what public lands have been or should be surveyed, and what surveys of the public lands should be extended or corrected. Stanley G. West, 14 IBLA 26, 27 (1973). In the instant case, the Department proceeded under Special Instructions, Group No. 722, California, to determine the extent of public lands in T. 11 N., R. 6 E., HM. Since the United States has no jurisdiction to interfere with lands conveyed out of Federal ownership, it was necessary for the surveying group to delineate those lands in the township patented pursuant to mineral or homestead entries.

As a general rule, where lands in a grant or patent from the United States are described in terms of the rectangular survey system, the rights, title, or interests conveyed are defined by the corners of the Government survey upon which the description was based. See Robert R. Perry, 87 IBLA 380, 384 (1985). In this case the original survey had been found to be fraudulent and evidence of controlling corners is nonexistent, and any land within the township conveyed by a homestead patent could not be accurately located through a dependent resurvey tied to the original survey. Because of this difficulty, the survey instructions were that these tracts "will be located on the ground in accordance with the best available evidence of their true original location." (Special Instructions, Group No. 722, California at 4). Therefore, private homestead lands within the township were resurveyed using a metes-and-bounds survey, in accordance with BLM's Manual of Surveying Instructions (Manual), §§ 6-39 through 6-49 (1973 ed.).

Unfortunately, the cadastral survey party was unable to find a boundary monument recognized as and used as a boundary marker for Homestead Patent

^{4/} In a companion decision BLM approved the survey of Tract 53.

No. 1008407. A lack of such evidence to delineate the boundary of a patented homestead will cause the surveyor to seek and consider the best available collateral evidence to locate the original position of the homestead claim. See Manual, at § 6-42. When reviewing collateral evidence, controlling factors include individual and neighborhood improvements such as buildings, wells, springs, cultivated lands, public roads, fences, corners of recognized surveys, etc., which would indicate the intention of the entryman or patentee as to the position of the land. Id. at § 6-47. Any tract survey made should include those improvements, while maintaining substantially the form of the entry as originally described. Id. at §§ 6-43, 6-45.

The record indicates that when Jacobson set the temporary subdivision boundary he had not taken into consideration any collateral evidence. It represented Jacobson's initial step in the location of the general area of the tract by referring to a known corner of the original cadastral survey. However, the quarter corner for secs. 4 and 9, was not a monument which defined a point on the exterior boundaries of the patent and, taking into consideration all other evidence, this quarter corner has little probative value when determining the true original location of Tract 53. The collateral evidence later identified by BLM clearly indicates the temporary boundary established by Jacobson did not reflect the intent of the original homestead entryman. That evidence, as previously noted, involved the location of improvements attributed to the original homestead entry and the location of later improvements constructed with a belief the underlying lands were within a subdivision of the land contained in the homestead patent. Moreover, if the Jacobson boundary were used as controlling for the location of the homestead, part of the eastern boundary of the homestead would run generally along the Ishi Pishi Road, rendering two of the subdivided lots meaningless because neither of these lots would fall within Tract 53. The surveyors' record also includes a map prepared for use by the county assessor, Humboldt County, California (denoted Assessor's Maps, Bk. 529 Pg. 03), which depicts the four lots east of the Ishi Pishi Road as embracing a substantial amount of land. Accordingly, the survey of Tract 53 was conformed to include to the fullest extent possible, those lands identified from the collateral evidence. BLM found the location of Tract 53 as later established to correspond more closely to a tie with another corner of the original survey discovered in the course of its investigation. Therefore that corner, not the quarter corner for secs. 4 and 9, was used as a tie to the survey of Tract 53.

The Carters' arguments against acceptance of the latter survey of Tract 53 as a true reflection of the location of the patented lands were considered in review of their protest. However, appellants have failed to demonstrate the collateral evidence reviewed by the surveyors was misconstrued or incorrect and did not show the survey was technically flawed. Moreover, appellants did not offer any evidence of boundary monuments or lines or of historical use or improvements to suggest the land the original grantee considered as having been conveyed under Patent No. 1008407 was located in a manner other than that shown on the survey plat as Tract 53. The location of the original improvements and subsequent conveyance of the four lots to the east of the Ishi Pishi Road clearly indicate otherwise. As previously noted, appellants submitted no evidence of boundary lines or corners in support of their contention, other than the location of the temporary survey made by the

cadastral surveyor in 1979. 5/ Where a protestant does not meet his burden of establishing by clear and convincing evidence the segregation of patented lands by survey is not an accurate expression of the area conveyed, the protest shall be denied. See Robert J. Wickenden, 73 IBLA 394 (1983).

We are unable to fault BLM's survey of Tract 53 on the basis of appellant's presentation. The collateral evidence relied upon to establish the position of the tract boundary is unrebutted by appellants and BLM appears to have satisfactorily complied with its special instructions and recognized survey techniques applicable to such circumstances. Since it is appellants' obligation to identify specifically reversible error and such burden has not been met by appellants with their protest or this appeal, we conclude BLM properly denied the protest and accepted the metes-and-bounds survey of Tract 53.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appealed decisions are affirmed.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

5/ The record indicates the survey points were marked as being temporary and, in correspondence with landowners in the vicinity, BLM advised the landowners that the line was temporary.

