<u>Editor's note</u>: Petition for Clarification Dismissed by Order dated Oct. 17, 1988

PETER PAUL GROTH

IBLA 86-138 Decided September 22, 1987

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying protest of dependent resurvey Group No. 451 (Colorado).

Vacated and remanded.

1. Contests and Protests: Generally -- Rules of Practice: Appeals: Timely Filing -- Rules of Practice: Protests -- Surveys of Public Lands: Generally

   Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

2. Rules of Practice: Appeals: Burden of Proof -- Surveys of Public Lands: Generally -- Surveys of Public Lands: Dependent Resurveys

   A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

3. Surveys of Public Lands: Dependent Resurveys

   Where one protests a 1966 dependent resurvey in 1984 on the basis that BLM improperly established a lost corner within a township by one-point control, BLM's decision denying that protest will be vacated where the person establishes by a preponderance of the evidence that BLM's determination to use one-point control constitutes gross error because there is not sufficient justification in the record for departing from the 1947 Survey Manual requirement to use two-point control.

APPEARANCES: Bruce M. Kirkpatrick, Esq., Durango, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Peter Paul Groth has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated September 10, 1985, denying his protest of a dependent resurvey of the subdivisional lines of T. 36 N., R. 7 W., New Mexico Principal Meridian, Colorado, specifically with respect to reestablishment of the northeast corner of sec. 34, i.e., the corner common to secs. 26, 27, 34, and 35 of the township.

The record indicates that the exterior lines of T. 36 N., R. 7 W., New Mexico Principal Meridian, Colorado, were originally surveyed between 1875 and 1882 by various surveyors 1/ and that the subdivisional lines of the township were originally surveyed in 1882 by Gardner and Cleghorn, neither of whom had performed the surveys of the exterior lines of the township. The 1882 subdivisional survey was approved May 29, 1883, by the Surveyor General for Colorado. Between July 24, 1961, and September 14, 1962, pursuant to Special Instructions, dated May 16, 1961, Richard D. Snider conducted a dependent resurvey of the exterior and subdivisional lines of the township. That dependent resurvey was accepted February 18, 1966, by the Chief, Division of Engineering. The resurvey plat was considered officially filed when received in the Colorado State Office in March 1966 (Memorandum to the State Director, Colorado, from Chief, Division of Engineering, dated Mar. 3, 1966).

Appellant is the successor-in-interest to a homestead patent (No. 187525) issued April 3, 1911, to the heirs of Jasper N. Glover for 160 acres of land, described in the patent as the NE 1/4 sec. 34, T. 36 N., R. 7 W., New Mexico Principal Meridian, Colorado. Appellant's immediate predecessor-in-interest was Glen Glover, the grandson of Jasper N. Glover, from whom appellant conditionally purchased the land under a December 11, 1979, contract.

Prior to appellant's purchase of the NE 1/4 sec. 34, a dispute had surfaced between Glover and BLM regarding the location of a cabin claimed by Glover. In a July 30, 1969, memorandum, the Area Manager, San Juan Resource Area, notified the District Manager, Montrose District, that the cabin had been determined to be in trespass on BLM land; that a note had been left on the cabin requesting that the owner contact BLM; and that Glover had responded, disputing BLM's assertion of trespass. The memorandum stated:

> [Glover] explained to me that in 1927 a flood during the month of September had taken the original rock corner out. Surveyors from the county replaced the corner with an iron stack soon after the flood. In 1933, his father built the cabin right next to his property line.

1/ In particular, the south and east boundaries of the township were originally surveyed by G. D. Nickel in 1882.

> The area was resurveyed by a cadastral survey team in 1962. They first stacked the corner in the original location according to Glover and then came back a few days later and moved the corner approximately 180 feet inside of Section 34.
>
> Mr. Glover doesn't seem too concerned over the situation. He seems to regard the brass cap common to Sections 26, 27, 34 and 35 as not having much meaning and being placed in error by the cadastral survey crew.

Id. at 1. Thereafter, the Colorado State Office recommended selling the tract to Glover and action was taken to classify the land for sale under the Small Tract Act. Subsequently,

> [o]n October 12, 1976 Mr. Glover came into the Durango Office to talk about the tract. He was trying to sell the cabin and land and was having problems with the title. Bud Curtis talked to him, offering him five different solutions to the problem: small tract sale, lease, RS2455 sale, private exchange, or removal of the improvement. Mr. Glover would not accept any of them. He felt the land was his and a mistake had been made by BLM. It was then mutually agreed that the BLM would take no further action until Mr. Glover had a chance to present evidence that showed the survey to be in error.

(BLM Memorandum to File, Oct. 8, 1982, at 1).

On July 27, 1982, following appellant's conditional purchase of the NE 1/4 sec. 34, and in response to private allegations of trespass, the Chief, Multi-Resource Staff, San Juan Resource Area, and another BLM employee met with appellant, who had apparently taken up occupancy in the Glover cabin:

> We found the cabin to be well improved and in much better shape than it was back in 1969. Mr. Groth was not home when we first arrived but came later. The road into the cabin through the subdivision was well traveled. We inspected his other road and found the bridge across the river to be in poor shape. When Mr. Groth arrived home, we told him our purpose in making the visit. Peter Groth appeared to be a man of means. He felt he had a right to the land and the cabin. He knew the survey was in error and was or is prepared to go to court over the issue. I pointed out the 1962 line to Mr. Groth which was a little ways from his cabin and told him it would be a simple matter to move the cabin across the line. It is flat with no grade or trees that would be in the way. Mr. Groth said no he wanted the land that the cabin was on. He felt he had a good case against the survey.

(BLM Memorandum to File, dated Oct. 8, 1982, at 2).

Appellant's objections to BLM's resurvey were formally contained in a July 30, 1982, letter to the San Juan Resource Area Office. In that letter, appellant argued that the resurvey had, in locating the NE corner of sec. 34, erroneously excluded approximately 11 acres of land, including the site of his cabin, from the originally patented NE 1/4 sec. 34. He stated that a private surveyor, Fred Reed, had agreed to survey the disputed land. Reed's assessment of BLM's location of the NE corner of sec. 34 is set forth in a December 30, 1982, letter to appellant, which appellant then submitted to the San Juan Resource Area Office. Appellant's July 1982 letter and Reed's December 1982 letter were forwarded to the Division of Cadastral Survey, Colorado State Office, for review. See letter to appellant, dated February 24, 1984, from Area Manager, San Juan Resource Area. Following this review, the Area Manager, by letter dated June 29, 1984, notified appellant that BLM could not find fault with the resurvey's location of the NE corner of sec. 34 and stated that appellant had a right to protest the resurvey.

In a July 24, 1984, letter, appellant responded to the Area Manager's June 1984 letter, detailing the various actions both he and Glover had taken to challenge the resurvey:

> Glen Glover has advised me that the first time he knew of the change of corner was in 1969. A notice was tacked on the door of the cabin that the cabin was on BLM land. * * * Glen Glover immediately thereafter, personally contacted Jerry Kendrick with your Durango BLM office and protested the BLM claim.
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> * * * * * * *
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> * * * Mr. Kendrick told Glen that he (BLM) considered him a trespasser and that he would be charged in court with trespassing. I owned an interest in the land to the west since 1964 and Glen talked to me about his problem. I was not only interested because Glen is a friend of mine, but I contemplated eventually buying the land from him; which was done in December 11, 1979. (Subject to perfecting title).
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> * * * * * * *
>
> * * * I entered into a contract for conveyance with Glen Glover on December 11, 1979 and have been in communication with your office since that time. During July 1982 Mr. Jerry Kendrick came out to the cabin to see me and on both occasions I clearly stated that I claim the land in question. On July 30, 1982 I wrote Mr. Kendrick a letter outlining the basis for my claim. I visited your office on three different occasions, once accompanied by Frederick Reed, surveyor, and presented Ms. Lent with his investigative letter dated December 30, 1982. I don't know what more Glen and I could have done, (and still doing) to officially protest the resurvey and subsequent attempted confiscation.

Appellant apparently never received a reply to his July 1984 letter but was verbally advised by the San Juan Resource Area Office that a formal protest should be filed with the Colorado State Office. That protest is contained in a December 18, 1984, letter to the BLM State Office, which incorporates previous correspondence, including appellant's July 1982 letter and Reed's December 1982 letter. BLM denied appellant's protest on substantive grounds in its September 1985 decision. This appeal followed.

[1] Before addressing any substantive issues raised in this appeal, we must deal with a procedural matter. The Office of the Regional Solicitor, on behalf of BLM, has filed a motion to dismiss appellant's appeal on the basis that both appellant's December 1984 protest and subsequent appeal were untimely. BLM argues that the protest was untimely under 43 CFR 4.450-2 because it was filed after approval of the resurvey. BLM argues that the appeal was untimely under 43 CFR 4.411(a) because it was not filed within 30 days either after BLM's approval of the resurvey on February 18, 1966, or after Glover, appellant's predecessor-in-interest, admitted in 1969 to knowing of the resurvey.

Appellant opposes BLM's motion to dismiss, arguing that, just as BLM has the authority to correct a resurvey long after its approval, a party challenging that resurvey has a right to protest the resurvey long after its approval. With respect to his appeal, appellant notes that the decision appealed from is the September 1985 BLM decision, from which an appeal was taken timely.

In support of his assertion that he had the right to protest the resurvey long after its approval, appellant refers to language in Crow Indian Agency, 78 IBLA 7, 11 n.5 (1983), which states that the burden of proof of one challenging a resurvey is greater "where a protest is lodged some time after the approval of the * * * resurvey." Appellant argues that there is implicit in that language a right to protest an accepted resurvey. To the contrary, BLM argues that this language is "dictum," but that, in any case, it runs counter to 43 CFR 4.450-2. That regulation provides that "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest." 43 CFR 4.450-2 (emphasis added).

In accordance with 43 CFR 4.450-2, we have held that only an objection to an action proposed to be taken by BLM is cognizable as a protest under that section. George Schultz, 94 IBLA 173, 177 (1986), and cases cited therein. An objection filed after BLM has taken action has been considered an untimely protest. Everett J. Johnson, 95 IBLA 136 (1987).

The first question presented by BLM's motion is whether the objections filed by appellant to BLM's resurvey are properly characterized as a 43 CFR 4.450-2 protest, and thus subject to dismissal as having been untimely filed. We think not.

Clearly, 43 CFR 4.450-2 contemplates that those persons to be affected by an action "proposed to be taken" will in some way be put on notice of that proposed action whether it be by public notice, such as publication in the Federal Register (e.g., Steinheimer Trust, 87 IBLA 308, 309 (1985); California

Association of Four Wheel Drive Clubs, 30 IBLA 383, 384 (1977)), or by an official BLM record (e.g., Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 318 (1985)), or by personal notification. In the present case, however, there is no evidence that affected persons, such as Glover, were alerted in 1966 to the "action proposed to be taken," i.e., the official filing of the plat of resurvey. 2/ The purpose of notice of action proposed to be taken is so that BLM may resolve objections to the resurvey prior to the official filing of the plat.

Absent notification of the proposed action, a strict interpretation of 43 CFR 4.450-2 to preclude an affected landowner from objecting to a resurvey seems patently unfair. Moreover, in survey cases this Board has not followed a practice that an objection filed with BLM after the filing of a plat of resurvey constitutes an untimely protest which must automatically result in dismissal thereof. 3/ To the contrary, in numerous cases BLM has adjudicated such objections and the Board has entertained appeals from those decisions. State of Oregon, supra; Mr. & Mrs. John Koopmans, 70 IBLA 75 (1983); George C. Matthews, 19 IBLA 215 (1975).

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to this Board. 4/

2/ BLM may now be engaging in a procedure of providing interested parties, including landowners, with notice of a survey (see Lawyers Title Insurance Co., 92 IBLA 162, 164 (1986)) and publishing notice in the Federal Register that official filing of a plat of resurvey will take place on a date certain (Id. at 165), thereby affording interested persons an opportunity to protest. However, in Lawyers Title, BLM failed to adjudicate a protest by Lawyers Title prior to official filing of the plat.

3/ In State of Oregon, 78 IBLA 13, 14 (1983), aff'd, State of Oregon v. Bureau of Land Management, No. 85-646 LE (July 9, 1987), the Board stated at footnote 1:

"We would point out that the protest might have been dismissed at the outset by BLM because it was filed July 14, 1982, almost 20 years after the survey in question had been approved and accepted by BLM. However, as BLM did review the protest very carefully and issued an appealable decision, we will accept the appeal and consider it on its merits."

Under our analysis in the present case, dismissal would have been proper in State of Oregon only if the record showed that BLM provided notice such that the State was aware or should have been aware of the proposed action to file the survey plat.

4/ An objection to the official filing of a plat of resurvey which is filed with BLM within 30 days of such filing might be considered to be an appeal, if the filing of the plat of the resurvey were considered a decision. Cf. Howard H. Vinson, 90 IBLA 280, 282 (1986) ("protests" by assignees of oil and gas lease to denial of approval of assignments should have been treated

In this case there is no evidence that there was any public notice in 1966 that BLM intended to file the plat of the resurvey in question. The record indicates Glover's first notice concerning the results of the resurvey was the trespass notice tacked on his door in 1969. He then registered an objection with BLM to the location of the NE corner of sec. 34. Thereafter, BLM investigated a direct sale of the tract to him and, after further discussions with Glover, agreed on October 12, 1976, that it "would take no further action until Mr. Glover had a chance to present evidence that showed the survey to be in error" (BLM Memorandum to the File, Oct. 8, 1982, at 2).

In a July 30, 1982, letter, appellant set forth his objections to the resurvey. BLM did not inform appellant that his objections were untimely. Rather, in a letter dated February 24, 1984, BLM notified appellant that the Division of Cadastral Survey in Denver, Colorado, was reviewing the information submitted. BLM, by letter dated June 29, 1984, informed appellant that the resurvey was not in error and that the cabin was in trespass. However, BLM stated "[t]he BLM resurvey has never been officially protested. Should you wish to avail yourself of this right, you may do so by writing to" the Chief, Branch of Cadastral Survey, Denver, Colorado. It is this protest, which BLM informed Groth he had the right to file, that counsel for BLM now claims was untimely.

Under the circumstances of this case, appellant's objections cannot be considered an untimely protest under 43 CFR 4.450-2.

The second question raised by the motion to dismiss is whether Groth's appeal was timely. Counsel for BLM asserts that it was not, because it was not filed within 30 days of the February 18, 1966, acceptance of the resurvey or within 30 days of when Glover admitted to gaining knowledge of the resurvey.

Regardless of whether either of those events may have triggered the running of an appeal period, 5/ we cannot ignore the fact that BLM entertained Groth's objections and on September 10, 1985, issued a decision informing Groth of his right to appeal to this Board. Groth filed a timely appeal of that decision. BLM's motion to dismiss must be denied. 6/

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fn. 4 (continued)
as appeals); Santa Fe Pacific Railroad Co., 90 IBLA 200, 205 (1986) ("protest" by mineral interest owner to BLM's denial of the owner's request that BLM acquire its interest should have been treated as an appeal).

5/ The regulation at 43 CFR 4.411 provides that a person who wishes to appeal to the Board must file a notice in the office of the officer who made the decision. Further, the regulation states that "[a] person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." Counsel for BLM's assertions ignore issues concerning whether BLM's acceptance of the resurvey in February 1966 was an appealable "decision;" whether the official filing of the plat in March 1966 was an appealable "decision;" and whether there was ever "service" of such "decisions." We need not decide those issues, however, for the reasons stated in the text of our decision.

6/ Counsel for BLM filed no substantive response to appellant's statement of reasons.

[2] We turn, therefore, to the sole substantive question presented in this case -- whether BLM, in its subdivisional dependent resurvey, properly located the NE corner of sec. 34, T. 36 N., R. 7 W., New Mexico Principal Meridian, Colorado.

In reviewing a resurvey after the official filing of the plat, the Board has followed the rule that the party challenging the resurvey must establish by clear and convincing evidence that the resurvey was fraudulent or grossly erroneous. Sarah & Magie Calvin, 94 IBLA 162, 166 (1986); Nina R. B. Levinson, 1 IBLA 252, 256 (1971), and cases cited therein. Thus, the standard has been to require the necessary showing, i.e., fraud or gross error, by clear and convincing evidence. We hereby change that standard to the preponderance of the evidence standard. The shift from a clear and convincing evidence standard to a preponderance of the evidence standard was initially reflected in survey cases in Stoddard Jacobsen, 85 IBLA 335, 342 (1985), which involved objections raised to a resurvey prior to the filing of the plat. However, Jacobsen also represented a trend by the Board of establishing the preponderance of the evidence standard as the applicable standard generally in cases involving disputed factual issues. The Board's action has been based on the court's opinion in Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). 7/ See United States v. Estate of George D. Estabrook, 94 IBLA 38, 52 (1986); Woods Petroleum Co., 86 IBLA 46 (1985). Thus, the preponderance of the evidence standard is applicable in this case.

As originally surveyed on June 25, 1882, the NE corner of sec. 34 was described as a granite rock, 16 x 12 x 8 inches in size, set into the ground with a mound of stones alongside, which was situated on a north bearing 80 chains from the SE corner of sec. 34, i.e., the corner common to secs. 34 and 35, and secs. 2 and 3, T. 35 N., R. 7 W., New Mexico Principal Meridian, Colorado, on the south boundary of T. 36 N., R. 7 W. In preparing for a resurvey of the latter township, including the NE corner of sec. 34, William H. Teller, a BLM cadastral engineer, conducted a field investigation of "survey conditions," which investigation is described in a March 6, 1961, report (Teller Report). The principal finding of this report was that there were two partially monumented survey lines along the east and south boundaries of the township. Teller noted the difficulty of resolving the problem presented by the two south boundary lines. He stated that the northerly set of corners appeared to be the one upon which the subdivision of T. 36 N., R. 7 W., was based, but that the southerly set of corners was "unquestionably" used as the north boundary of T. 35 N., R. 6 W., and for the subdivision of that township (Teller Report at 15-16). The report concluded that "any dependent resurvey procedure" in the resurvey of the eastern and southern tier of sections "will result in widespread alteration of existing property boundaries" (Teller Report at 16).

7/ The court, in reversing the Board's decision in Jack J. Bender, 54 IBLA 375, 88 I.D. 550 (1981), concluded that an appellant challenging a determination that land was situated within a known geologic structure, must only establish error by a preponderance of the evidence, rather than by a clear and definite showing.

In Special Instructions approved May 16, 1961, by the Area Administrator, Division of Cadastral Engineering, BLM, Colorado (Special Instructions), at page 4, BLM described the original subdivisional survey by Gardner and Cleghorn as "highly erratic" and noted that they had tied into the westerly and northerly of the two survey lines along the east and south boundaries of the township, respectively, both of which the resurvey was instructed to disregard. The Special Instructions initially provided that "[e]very effort will be made to reestablish all corners within this township by dependent resurvey methods, using double proportionate measurement wherever possible." Id. However, the Special Instructions also provided: "In those instances in the subdivision of the township where no identified control can be found in one or more directions from original corners, missing corners will be established at proportionate points determined by one way proportions." Id. at 5. The resurvey was subsequently assigned to Snider under Assignment Instructions, dated July 24, 1961, and executed in accordance with the May 1961 Special Instructions and the 1947 edition of the Manual of Instructions for the Survey of the Public Lands of the United States (1947 Survey Manual). 8/

The record indicates that, during the course of the resurvey, an effort was made to locate the monument at the NE corner of sec. 34. 9/ However, no monument was found, i.e., neither the original monument, which was apparently lost in a flood, nor any perpetuation of that monument. The approved field notes of the resurvey indicate that the NE corner of sec. 34 was set "at record bearing and distance" from the NE corner of sec. 27, i.e., the corner common to secs. 22, 23, 26, and 27 of the township. 10/ The bearing and distance given in the resurvey field notes is south 80 chains, which matches the record bearing and distance given in the 1882 field notes.

8/ References will be to the 1947 Survey Manual, unless otherwise indicated, since that was the manual in existence at the time of execution of the resurvey in question.

9/ The record contains an Aug. 2, 1982, letter to appellant in which Glover states that he assisted BLM in looking for the corner monument:

"In 1962 the B.L.M. Surveyor came along this section line. In our discussion of lines and corners he asked me if I knew anything about the stone marking the northeast corner of section 34. I told him I had never seen that marker.

"The corner is in the flood plain of Pine River. My Father told me all signs of the corner had been obliterated by the flood of 1911.

"We searched a while for the stone but could find no trace of it."

We note that, while Glover at one time apparently asserted that the corner in question had been destroyed by a flood in 1927, this letter indicates the flood of 1911 obliterated all evidence of the original monument.

10/ On appeal, appellant makes much of the fact that the resurvey field notes do not actually reflect what Snider did in the field in locating the NE corner of sec. 34. Indeed, the notes indicate that Snider began at the SE corner of sec. 34 along the south boundary of the township and then proceeded on a bearing of N. 7 degrees 19' W., 47.33 chains to the east quarter corner of sec. 34 and then north an additional 40 chains to the NE corner of sec. 34, both of which corners were set at record bearing and distance from the NE corner of sec. 27. It is quite apparent that Snider actually located the NE corner of

In his December 30, 1982, letter to appellant, which was forwarded to BLM, Frederick H. Reed, a registered land surveyor, objected to BLM's method of locating the NE corner of sec. 34 "by using the intersection of a line run south from the northeast corner of section 27 and a line run east from the southwest corner of the same section." Id. at 1. Reed argued that this method was contrary to the "rule" set forth in section 371 of the 1947 Survey Manual, which states:

> Where the intersecting lines have been established in only two of the directions, the record distances to the nearest identified corners on these two lines will control the position of the temporary points; then from the latter the cardinal offsets will be made to fix the desired point of intersection.

(1947 Survey Manual at 294). Reed contended that, applying this rule, the NE corner of sec. 34 would be located 0.26 feet north and 195.87 feet east of the position accepted by BLM. Attached to the December 1982 letter is a handdrawn sketch which depicts the BLM and Reed locations of the corner. Reed's location incorporates the Glover cabin into the NE 1/4 sec. 34; BLM's does not.

In a June 15, 1984, memorandum to the District Manager, Montrose District, the Chief, Branch of Cadastral Survey, Colorado, provided an analysis of the information submitted by Groth, including the Reed letter. He stated that BLM had decided that the NE corner of sec. 34 could not be established by proportionate measurement because of the "lack of an actual relationship between it and the south and east boundaries of the township." Id. at 2. He further explained:

> After considering the relationship of many found original corners set by the original township subdivider and the related topographic calls, particularly to the Los Pinos River, it was decided that due to the special circumstances involved, the best way to reestablish the section corner in its original location was to survey record bearing and distance from the section corner of sections 22, 23, 26, and 27.

Id. Reed's December 1982 letter and BLM's June 1984 response are substantially incorporated, respectively, into appellant's statement of reasons (SOR) for his appeal and BLM's September 1985 decision.

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fn. 10 (continued)
sec. 34 by record bearing and distance from the NE corner of sec. 27 before running the section line and then tied that corner into his previously established SE corner of sec. 34. While there is considerable dispute regarding Snider's location of the NE corner of sec. 34 (see discussion infra), we can find no fault with correlating the resurveyed corners in this fashion in the field notes. It parallels the work of the original survey and, thus, provides a basis for comparison.

It is clear from the record that BLM regarded the NE corner of sec. 34 as a lost corner. Appellant does not substantially disagree with this. 11/ Rather, the dispute centers on whether this corner was properly restored by the method of one-point control, utilized by BLM, or whether two-point control, as appellant contends, should have been the method used.

[3] The primary method for the restoration of lost corners is by proportionate measurement. See 1947 Survey Manual at 292; Paul N. Scherbel, 58 IBLA 52 (1981); Bethel C. Vernon, 47 IBLA 315 (1980). The preferred method for the restoration of a corner common to four sections within a township is double proportionate measurement, i.e., by reference to four known interdependent corners. 1947 Survey Manual at 291-94; Stanley A. Phillips, 31 IBLA 342, 347-48 (1977). BLM eschewed this approach because, as it stated in its September 1985 decision, this method was considered "patently unfeasible" due to the "fictitious ties to the township boundaries." As the Chief, Branch of Cadastral Survey, Colorado, stated in his June 15, 1984, memorandum at page 2, there was no "actual relationship between [the NE corner of sec. 34] and the south and east boundaries of the township." Indeed, it was BLM's general opinion, as expressed in its September 1985 decision at page 1, that there was no "relationship" between the original subdivisional survey and the "surveys of the exteriors." 12/ Accordingly, for this reason, corners along the exterior lines could not be used to locate the NE corner of sec. 34 and, thus, in the absence of any intervening corners, the method of double proportionate measurement was not feasible or, in the words of the Special Instructions, at page 4, not "possible."

However, the resurvey did recover the original monuments for the NE corner of sec. 27 and the NE corner of sec. 33, north and west of the NE corner of sec. 34, respectively. These monuments are described in the resurvey field notes, respectively, as a sandstone 7 x 12 x 18 inches, firmly set, marked with two grooves on the south face and two grooves on the east face

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11/ Appellant does argue, however, that the resurvey was erroneous because it failed to take into account collateral evidence, specifically the location of the cabin. See SOR at 7, 11. This suggests that the NE corner of sec. 34 should be considered obliterated, rather than lost. However, the evidence is insufficient to establish that the cabin was located in relation to the originally surveyed east boundary of sec. 34, such that it provides a reliable method of relocating that line. See 1947 Survey Manual at 323. According to Glover, the cabin was built in 1933, after obliteration of the NE corner of sec. 34 by a flood.

12/ In an Oct. 20, 1965, memorandum from the Chief, Branch of Cadastral Survey, to the Director, BLM, concerning the resurvey, it was explained:

"The information obtained from actual field investigation of survey conditions has established beyond any reasonable doubt that the Gardner-Cleghorn surveys represent an entirely independent, wholly unrelated survey, at variance with any exterior line of the township. The well defined pattern that has been developed in the retracements of exterior and subdivisional lines, permits a rather consistent relocation of the points for corners in the subdivisional surveys."

and a sandstone 10 x 10 x 20 inches, firmly set, marked with three grooves on the east face and one groove on the south face. In the field notes of the original survey, the monuments are described, respectively, as a granite rock, 14 x 12 x 7 inches, marked with the appropriate grooves and a sandstone, 24 x 8 x 6 inches, marked with the appropriate grooves. Both of these corners, despite the discrepancies in the character and dimensions of the monuments, were accepted by the resurvey.

As noted supra, in its resurvey, BLM located the lost NE corner of sec. 34 by measuring record bearing and distance only from the NE corner of sec. 27. In so doing, BLM disregarded the NE corner of sec. 33. There is no explanation in either the field notes or the Special Instructions for the resurvey for BLM's decision to disregard this corner. The only explanation for BLM's decision to use one-point control is the following, as stated in the September 1985 BLM decision, at page 2:

> After considering the relationship of many found original corners set by the original township subdivider and the related topographic calls, particularly to the Los Pinos River, it was decided the best method to reestablish the section corner in its original location was to survey record bearing and distance from the corner of sections 22, 23, 26, and 27. From this position the original topographic calls correspond to the present topographic calls on the adjoining section lines and it reestablished the corner in a harmonious relationship with other found original monuments.

We find this explanation inadequate. It does not address the determination, at the time of the resurvey, to disregard the NE corner of sec. 33. Moreover, we do not agree that the resulting location of the NE corner of sec. 34 is "in a harmonious relationship" with other found monuments or that present topographic calls on adjoining section lines "correspond" to the original. In terms of the bearing and distance from the NE corner of sec. 34 to the found corner at the NE corner of sec. 33, the resurvey returned 77.09 chains, N. 89 degrees 58' W., versus a record 80.04 chains, W. The discrepancy is 2.95 chains or 194.7 feet. The case record also contains a diagram prepared by BLM of topographic calls along the four section lines originating from the NE corner of sec. 34 taken from the 1882 survey and the resurvey. Those calls are for the most part, however, too indefinite to permit comparison. 13/ The calls to the Los Pinos River in the original survey do not "correspond" with those in the resurvey. A comparison of the field notes of

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13/ The 1882 survey calls include references to "gulch," "ridge," "foot of hill" and "top of hill." In Frank Lujan, 40 IBLA 184, 190 (1979), appeal dismissed, Lujan v. U.S. Department of the Interior, No. 79-455 C (D.N.M. Feb. 11, 1980), appeal dismissed, 673 F.2d 1165 (10th Cir.) cert. denied, 459 U.S. 969 (1982), we stated the "foot of the bluff" is "not a precise point."

the 1882 survey and the 1966 resurvey indicates that the river has increased in width from 1.3 chains to 2.35 chains where it crosses the north line of sec. 34 and from 1.1 chains to 2.45 chains where it crosses the east line of sec. 27. The diagram also depicts a significant alteration in the course of the river. As appellant states, the "river bed has changed over the years," with "at least 2 major floods, one in 1911 and one in 1927 and another substantial flood in 1970" (SOR at 15).

We conclude that BLM's reliance on one-point control to reestablish the location of the NE corner of sec. 34, absent proper justification in the case record, is contrary to the 1947 Survey Manual. The May 1961 Special Instructions, at page 5, instructed the resurvey to use "one way proportions" where "no identified control can be found in one or more directions from original corners." In such circumstances, in the absence of the appropriate control, either east-west, north-south, or both, neither double nor single proportionate measurement was available as a method for restoring a lost corner. See 1947 Survey Manual at 291. However, while the Special Instructions expressly selected one-point control as the alternative to double or single proportionate measurement, they did not specify which known corner would be used for one-point control in the event a lost corner was controlled by two known corners. They merely stated that the resurvey should use the "last identified original corner" (Special Instructions at 5). It is unclear from the Special Instructions what is meant by that phrase.

In the field notes of the resurvey, BLM indicates that it interpreted the phrase to mean the last corner identified "north or south" along the meridional line from the lost corner. In accordance with section 177 of the 1947 Survey Manual at 194, meridional section lines are to be initiated at the regularly established section corners on the south boundary of the township and run south to north. In that case, the last identified corner would be the last original corner identified during the course of the resurvey before reaching the lost corner. Thus, the last identified corner would be the SE corner of sec. 34, where the resurvey started at that corner and then ran north along the east boundary of the section before setting the NE corner of sec. 34. In this case, however, the SE corner of sec. 34 was not a found corner.

We also note that, in describing one-point control, the 1947 Survey Manual at page 305, refers to restoring a lost corner by record bearing and distance "from the nearest regular corner." In the present case, that could be either the NE corner of sec. 27 or the NE corner of sec. 33. The Special Instructions did not expressly rule out the use of two-point control in such instances.

Generally speaking, in conducting a resurvey, BLM has the authority to employ three-point, two-point, or one-point control in reestablishing a lost corner, as an alternative to double or single proportionate measurement. See 1947 Survey Manual at 319-20. However, the circumstances for the use of any of these methods are carefully circumscribed. The 1947 Survey Manual at

page 320, makes clear that one-point control is "[o]rdinarily * * * inconsistent with the general plan of a dependent resurvey." 14/ Indeed, one-point control is described in section 382 of the 1947 Survey Manual, in the chapter entitled "Restoration of Lost Corners," under the subheading "Secondary Methods" (1947 Survey Manual at 301). This subheading is prefaced with the statement that secondary methods come into play where the rules of proportionate measurement "can not be applied" (Id. at 300).

Use of one-point control is expressly limited by section 382 of the 1947 Survey Manual to situations "[w]here a line has been terminated with measurement in one direction only" (Id.). The only examples given are "where lines have been discontinued at the intersection with large meanderable bodies of water, or at the border of what was classed as impassable ground." Neither situation obtains here. The 1947 Survey Manual also states at page 320, in more general terms, that one-point control "may be applicable, where the prior survey was discontinued, by record, or through the failure actually to run and establish the line called for." Again, neither circumstance is present in this case. 15/

The field notes of the 1882 survey indicate that all of the section lines adjoining the NE corner of sec. 34 were surveyed. There is no evidence that Gardner and Cleghorn failed to actually run and establish these lines. The Teller Report, at page 13, concluded that the found subdivisional corners were "in fair relative position." Also, in an October 20, 1965, memorandum to the Director, BLM, at page 6, Teller, in justifying the work of the resurvey, stated that the "surveys of Gardner and Cleghorn were reasonably related to each other." The only fault attributed by the record to the original subdivisional survey is that it did not tie into the exterior lines of the township as they were originally surveyed. In these circumstances, BLM was not faced with a situation where the NE corner of sec. 27 provided the only control point with respect to the NE corner of sec. 34. There was also the NE corner of sec. 33. There is no evidence that this corner was not properly related to the NE corner of sec. 34 on a basis equal to that of the NE corner of sec. 27.

The 1947 Survey Manual at page 294 further indicates that, in reestablishing lost section corners within a township, where it is not feasible to

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14/ The manual further states:

"The courts have frequently turned to this [one-point control] as the only apparent solution of a bad situation, and unfortunately this has been the method applied in many local surveys, thus minimizing the work to be done, and the cost. Almost without exception the method is given the support that 'it follows the record,' overlooking the fact that the record is equally applicable when reversing the direction of the control from other good corners, monuments or marks, if such can be recovered by careful retracement."
(1947 Survey Manual at 320).

15/ The 1973 Survey Manual is not as generous. It states in section 6-27 at page 150 that "[t]he use of one-point control is only applicable where the prior survey was discontinued at a recorded distance or where it can be shown conclusively that the line was never established."

use double proportionate measurement BLM should turn to three-point control and then, failing that, to two-point control. That principle is set forth in section 371 of the 1947 Survey Manual at page 294, which falls under the heading of "Double Proportionate Measurement." 16/ In this case, there is evidence that Gardner and Cleghorn actually ran the section lines running north and west from the NE corner of sec. 34, and that the NE corner of sec. 33 and the NE corner of sec. 27 are found corners. 17/ Section 371 of the 1947 Survey Manual is specifically applicable to the situation involved herein since "intersecting lines" can be established in "two of the directions [from the missing section corner]." Id. That section provides that, in such circumstances, temporary points will be established at a record distance on the two lines from the nearest identified corners and then cardinal offsets will be made from these temporary points. The intersection of these offsets is the reestablished corner. The chief advantage of this approach is that it provides at least some form of longitudinal, as well as latitudinal, control over the position of the lost corner and, thus, provides greater assurance that the reestablished corner is more closely in line with the position established in the original survey, which of course had placed the corner with reference to both points. It is clear that BLM did not employ this approach.

16/ In describing the procedure for the restoration of lost section corners under the heading of "Double Proportionate Measurement," the applicable rules are structured as follows:

"370. A lost interior corner of four sections will be restored by double proportionate measurement.

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"371. Where the line has not been established in one direction from the missing township or section corner, the record distance will be used to the nearest identified corner in the opposite direction. [three-point control]

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"Where the intersecting lines have been established in only two of the directions, the record distances to the nearest identified corners on these two lines will control the position of the temporary points; then from the latter the cardinal offsets will be made to fix the desired point of intersection [two-point control]."

(1947 Survey Manual at 294). (Emphasis in original.)

17/ We note that there is some suggestion in the record that the original surveyors confined their work to the areas along the "principal creek bottoms" and failed to set any other corners. (Resurvey Field Notes at 2; Memorandum from Chief, Branch of Cadastral Survey to Director, BLM, dated Oct. 20, 1965, at 6). However, there is no statement in the record that the original surveyors failed to set the NE corner of sec. 34. On the other hand, that corner was located not far from the Los Pinos River in what Glover regarded as the "flood plain." Letter to appellant from Glover, dated Jan. 29, 1980, at 2. In addition, Glover's Aug. 2, 1982, letter to appellant indicates that he informed BLM, at the time of the resurvey, that the original monument for the NE corner of sec. 34 had been washed away in a flood. The 1947 Survey Manual, at page 300, regards such a situation involving the "disappearance [of a monument] * * * resulting from natural causes" as governed by the general rules for restoring lost corners, i.e., double or single proportionate measurement and lesser included methods.

BLM failed to provide proper justification for not utilizing two-point control to reestablish the NE corner of sec. 34. In the absence of such justification, two-point control is mandated by the 1947 Survey Manual. This failure to conform the resurvey to the requirements of the Survey Manual constitutes gross error. Domenico A. Tussio, 37 IBLA 132, 133 (1978). We find that appellant has met his burden of proof. We, therefore, must cancel the dependent resurvey to the extent of its placement of the NE corner of sec. 34 and direct that BLM reestablish that corner in accordance with applicable 1973 Survey Manual provisions. BLM shall provide notice to appellant of the reestablished location of the NE corner of sec. 34 prior to the official filing of the plat of resurvey depicting the location of that corner.

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 vacated and the case is remanded to BLM for further action consistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge