

BOISE CASCADE CORP.
DEWEY L. ANNON
MARGARET L. ANNON

IBLA 88-278

Decided August 7, 1990

Appeal from a decision of the Idaho State Director, Bureau of Land Management, dismissing protests against dependent resurvey.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

Statements offered to show that a missing quarter section corner was not lost but obliterated lacked probative value where the witnesses had no knowledge of the original corner monument or its accessory.

2. Surveys of Public Lands: Dependent Resurveys

Where original topographic calls are ambiguous, location of an original corner may not be made in reliance on topography alone.

3. Surveys of Public Lands: Dependent Resurveys

Where location of a corner cannot be determined from evidence of original monument or accessory and original topographic calls are ambiguous, proportionate measurement is proper to determine corner location.

APPEARANCES: Dale G. Higer, Esq., Boise, Idaho, for Boise Cascade Corporation; Dewey L. Annon and Margaret L. Annon, Caldwell, Idaho, pro sese 1/; Pieter J. Van Zanden, Associate State Director, Idaho State Office, for the Bureau of Land Management.

1/ This case was delayed for over 5 years at the Idaho State Office. When the appeal by Boise Cascade was finally transmitted to this office it contained a protest by Dewey L. Annon and Margaret L. Annon made in 1983 together with a comment from BLM that it was believed the property affected by the 1982 dependent resurvey had been sold. The Annon appeals arise from the same 1982 dependent resurvey and concern the same issue arising from the same quarter corner as does the appeal by Boise Cascade.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Boise Cascade Corporation (Boise Cascade) has appealed a September 29, 1983, decision of the Idaho State Director, Bureau of Land Management (BLM), dismissing a protest against the dependent resurvey of sec. 13, T. 10 N., R. 4 E., Boise Meridian, Idaho. The protest was directed against a finding made by the survey establishing the location of the quarter corner between secs. 13 and 12. Boise Cascade owns property in the northwest quarter of sec. 13 that is affected by BLM's location of this section quarter corner.

The quarter corner between secs. 13 and 12 was initially established by U.S. Deputy Surveyor Herman D. Gradon in 1899. A dependent resurvey conducted in 1982 by Robert H. Thompson found that the 1899 quarter corner was lost and remonumented the corner using proportionate measurement from the corners common to secs. 12, 13, 14, and 11 and secs. 12, 13, 18, and 7. The 1982 surveyor's field notes predict the conflict giving rise to this appeal, which derives from a 1981 survey of the north section line of sec. 13 by James V. Potter. Thompson's field notes describe the resurvey, beginning at

the cor. of secs. 7, 12, 13 and 18, on the E. bdy. of the tp. S. 88° 52' W., bet. secs. 12 and 13. Over mountainous land, through heavy timber and dense undergrowth. 19.77 chains[:] Point for the E 1/16 sec. cor. of secs. 12 and 13. Set an aluminum post, 30 ins. long, 2½ ins. diam., 24 ins. in the ground, with aluminum cap * * *. 34.70 chains[:] left bank of the Middle Fork of the Payette River bears NE. and SW.; river flows SW. 36.25 chains[:] Right bank of the Middle Fork of the Payette River, bears N 35° E. and S. 35° W. 37.00 chains[:] Center of improved dirt road, 25 lks. wide, bears N. 35° E. and S. 35° W. 37.85 chains[:] An aluminum post, 2½ ins. diam. projecting 6 ins. above ground, set and recorded by James V. Potter, Registered land Surveyor No. 874, State of Idaho, in 1981, as the ¼ sec. cor. of secs. 12 and 13, with aluminum cap * * *.

A careful retracement of the orig. survey and analysis of the calls of the orig. field note record reveals insufficient evidence to establish this cor. by the method as described in

fn. 1 (continued)

Because of the 5-year delay and the failure of BLM to take timely action concerning their protest, we find that Dewey L. Annon and Margaret L. Annon are proper parties to the case before us, and that the case file relating to their appeal should have been acted on by BLM and sent to us in November 1983. Because Boise Cascade has supplied the principal arguments, briefs, and evidence in support of this appeal, references in this opinion are made for purposes of convenience, to Boise Cascade alone, it being assumed because of the delay in handling the Annon protests that the other two appellants join in their arguments. For proper administration of case files when an appeal has been taken from a decision, see Thana Conk, 114 IBLA 263 (1990). Cases on appeal to this Board should be forwarded within 10 days following appeal. Robert M. Perry, 114 IBLA 252 (1990).

the cor. perpetuation and filing record filed in the County Courthouse, Boise County, Idaho. This is not accepted as the cor. position in this survey.

39.54 chains[:] Point for the ¼ sec. cor. of secs 12 and 13, at proportionate dist.; there is no remaining evidence of the orig. cor. This point falls in a depression and is identical with the position for the ¼ sec. cor. of secs. 12 and 13, established in 1970 by John P. Ferguson, Registered land Surveyor No. 695, State of Idaho. The Ferguson monument marking this position has been removed. Set an aluminum post, 30 ins. long, 2½ ins. diam., 24 ins. in the ground, with aluminum cap * * * 42.50 chains[:] Top of spur, slopes SE.; desc. over SW. slope.

Boise Cascade relies on the Potter survey, which would establish the quarter corner at a distance of 37.85 chains from the point of beginning. The placement of the quarter corner by the resurvey at 39.54 chains west of the beginning point establishes a difference of 1.69 chains in the location of this point by the two conflicting surveys, the Potter survey locating the quarter corner closer to the river and the road than does the dependent resurvey. The resurvey agrees with the prior survey run by Ferguson for the U.S. Forest Service mentioned in the 1982 field notes.

A statement of reasons (SOR) filed with this appeal by Boise Cascade refers to the Ferguson survey in arguing that "[a] preliminary field reconnaissance [by Potter] revealed that the brass cap set by Mr. Ferguson in 1970 on behalf of the U.S. Forest Service was inconsistent with collateral calls for the true corner position in the [1899 field] notes" (SOR at 4). By "collateral calls," Boise Cascade is referring to topography described in the 1899 survey, a creek bed, a "spur" of land, a ravine, and the Payette River. Boise Cascade also argues that there is "collateral evidence" consisting of tree blazes and evidence of other surveys in the vicinity of what would become the north-south centerline of sec. 13 if the Potter location of the disputed quarter corner were to be accepted. Finally, Boise Cascade relies on the statements of two witnesses to establish the correctness of the Potter location of the quarter corner.

The dispute between the Potter survey and the 1982 resurvey concerns whether the quarter corner is "lost" or whether it is "obliterated." Potter contends that the corner is "obliterated," that is, in the language of the Manual of Surveying Instructions (1973) (Manual) that it is a point where "there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered * * * by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence." Id. at 130. A "lost" corner, on the other hand, is defined as "a point of a survey whose position cannot be determined, * * * either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners." Id. at 133. BLM contends that the corner here in question was "lost" and that it was therefore proper to locate it by reference to the section corners located to the east and west on the north boundary line of sec. 13. The parties agree

that, if proportionate measurement were correctly used in this case, the measurement was correctly placed by the 1982 dependent resurvey. The question before us is therefore whether it was proper to restore the quarter corner by measurement from known interdependent corners, or whether there was enough evidence of the original placement of the corner to establish the corner location as a known fact. It is axiomatic that missing corners must be reestablished in the identical positions they originally occupied, and that when original monuments and other evidence are lacking we must look to the original field notes to establish those points. *Id.* at 59-60. *See* 43 U.S.C. § 752 (1982).

The 1899 field notes prepared by Gradon recite, pertinently, that from the corner common to secs. 7, 12, 13, and 18:

I run S. 89° 45' W. on a true line bet. secs. 12 and 13[.] Descend over mountainous land through heavy timber and dense undergrowth 36.75 chains [to the] Left bank of Middle fork of Payette River flows S. 300 ft. below cor., leave dense undergrowth[.] 38.00 chains right bank of river[.] 39.78 chains[.] Set a granite stone. 15x12x4 ins. 10 ins. in the ground for ¼ sec. cor. marked ¼ on N. face, from which a pine 4 ins. diam. bears N. 36 E. 48 lks. dist. marked ¼ S 12 B.T. [and at] 39.82 chains [from point of beginning] A trail bears N.E. and S.W. Ascend 50 ft. to 44.00 chains [from point of beginning] top of spur bears S.E.

The original monument set by Gradon was, therefore, a stone 15 by 12 by 4 inches, set 10 inches into the ground and marked "¼" on the north face of the stone. It was located 39.78 chains west of the corner common to secs. 7, 12, 13, and 18. There was a single tree marked as a bearing tree 48 links from the corner. Our task is to determine whether there was enough evidence of this monument and accessory discovered by Potter to determine the location where it was deposited by Gradon in 1899. *See generally Stoddard Jacobsen v. BLM*, 97 IBLA 182 (1982), *reversed on other grounds*, *Stoddard Jacobsen v. BLM*, 103 IBLA 83 (1988), *aff'd*, *Downer v. Hodel*, CA No. 88-513-HDM (D. Nev. Oct. 12, 1989).

[1] Boise Cascade relies on the statements of T. F. Roark and David E. Reay to establish that the point selected by Potter for the quarter corner between secs. 12 and 13 is the original corner. Roark is a landowner affected by the location of the corner, who states that

concerning the position of the N.W. Corner and the N¼ Cor. of Section 13, T. 10 N., R. 4 E., B.M.: I have personally been to the NW Cor. twice before the U.S.F.S. monumented it and saw two corners there, with the witness tree lying face down in the creek at the bottom of the gully; I personally chained the north section line of Section 13 with a survey man from Boise Cascade Corporation to find the North quarter corner. We did not find a cor. monument at the North quarter cor., but our chaining came just beyond the old original trail on the river side. Based on this information, I have sold off several parcels of land, upon which there are several structures.

I was later contacted by the U.S. Forest Service after they replaced the N. Quarter corner in 1970. At that time, I disagreed with their monument. At first the ranger district personnel said my line (the N. Quarter corner) fell to east side of the river. Later I found a new monument on the west side, about two chains above the old trail. I was told by a party whose name I cannot remember that the Forest Service had checked the line two or three times and split the difference between the NW and NE corners, and that was where it would stay. I again said it was wrong.

Today, I visited the N. quarter corner with Mr. Jim Potter and saw his corner, which is downhill about two chains from the Forest Service Corner. To my personal knowledge this corner set by Potter is within six or eight feet of where the old original trail was by which the old corner was supposed to be. I believe that the Potter corner is very near to the old original position described in the old survey notes.

(Statement of T. F. Roark dated Dec. 4, 1981).

The second witness principally relied on by Boise Cascade to establish the correctness of the corner location chosen by the Potter survey is David E. Reay. Reay, a resident of Garden Valley, Idaho, since 1936, has provided several statements concerning the corner location. In pertinent part, he states that

the corner monument that I saw, in 1937, was a pipe with a brass cap on top. In my recollection, [a Forest Service engineer on the road project] called it a section corner and told me to protect it. He had painted it, and flagged it. It was not a construction stake. * * * As stated in my earlier affidavit, I observed the corner over a period of several years, while clearing an upslope slide that repeatedly occurred in the vicinity of said corner. I observed the corner moving with the slide. The last time I saw the corner monument, it had slipped downhill beyond the roadway ditch and into the roadway itself, and was still standing upright. As I recall, my last observation of said monument was in 1958 or 1959. During the period of time from 1937 to 1958 or 1959 the monument had moved probably fifty feet.

(Affidavit of David E. Reay dated Dec. 12, 1983, at 3).

Reay's statement establishes that he, like Roark, did not see the stone monument set by the Gradon survey in 1899. Roark states that he was unable to find the original monument, but that he established the corner location by himself "with a survey man from Boise Cascade." The "witness tree" reported by Roark is not mentioned by any other survey: it is not described, and we cannot tell to what location it may have been an accessory. Neither witness statement provides evidence of the actual location or existence of the original corner. Roark indicates that the corner is missing, but that he believes he correctly located it in about the same location as did Potter after him. Reay's evidence is problematic, assuming as it does that the monument set in 1899 had sometime before 1937

been perpetuated by a stake with a brass cap. There is no evidence that the corner was ever so perpetuated; therefore Reay's statement does not tend to establish that the stake he reported moving with the landslide marked the quarter corner between secs. 12 and 13.

[2] Boise Cascade also relies on topographic calls to establish that the corner location selected by Potter establishes the original location of the quarter corner between secs. 12 and 13. In doing so, Boise Cascade refers to calls to a creek bed, ravine, and spur in the original field notes quoted above. While it is admitted that neither the ravine nor the spur is well defined, Boise Cascade argues that the apparent stability of the river bank mentioned in the original survey notes permits the use of these imprecise landmarks to establish the corner. This position rests on an observation in the Potter survey report that:

While the intermediate topographic calls for the top of the spur and the large ravine are not well defined, and are subject to interpretation, the west bank of the Payette River and the center line of this two foot wide creek are well defined, and show no evidence of alteration. We note that between these two well defined topographic calls, there is but a two foot disparity between our measurement and the recorded distance in the [Gradon] notes. We also note that in using the record distance from the river to our temporary position, there is then but a two foot disparity between our record position and this well defined creek bed.

(Potter Report at 3).

BLM, however, challenges the basic premise of the Potter theory, arguing that:

The original topographical calls westward from the $\frac{1}{4}$ sec-tion corner call for a ravine at 9.22 chains and a creek at 18.22 chains as compared to 9.09 chains and 17.68 chains measured by the Bureau. This is excellent supporting evidence for the Bureau's position considering that the distances from James Potter's position to a ridge and creek were 4.64 chains and 19.37 chains as compared to the original 4.22 and 18.22 chains. These items of topography were measured by Mr. Potter, reported differently, and used to support his corner position established at record distance from the present right bank of the Middle Fork of the Payette River. The use of the river bank to establish the corner is suspect because of the frequency of slides in this area and [because] the direction of the river has changed from southerly to southwesterly since the original survey.

(Attachment C to BLM Answer at 1).

That topographic references usually provide only a general frame of reference for identification of a given point is, according to the Manual, a limitation of this means of orientation. The Manual provides this rule

concerning the use of topography when attempting to restore a missing corner:

Misapplication [of topographic calls] may be avoided by applying the following tests:

- (1) The determination should result in a definite locus within a small area.
- (2) The evidence should not be susceptible of more than one reasonable interpretation.
- (3) The corner locus should not be contradicted by evidence of a higher class or by other topographic notes.

The determination of the original corner point from even fragmentary evidence of the original accessories, generally substantiated by the original topographic calls, is much stronger than determination from topographic calls alone. In questionable cases it is better practice, in the absence of other collateral evidence, to turn to the suitable means of proportionate measurement.

Id. at 132.

Prior decisions of this Board have recognized and applied the rule stated by the Manual that topographic calls should focus on a definite, small area, such as an old fence, if they are to have utility in retracing a missing corner. See Alfred Steinhauer, 1 IBLA 167 (1970). Standing alone, the topographic calls from the original survey provide little support for Potter's corner position. We must consider, therefore, the remaining collateral evidence provided by Boise Cascade in support of the argument that the quarter corner is not lost but obliterated.

[3] Boise Cascade offers proof of other survey monuments and blazed trees in the vicinity of the north-south centerline in the northeast quarter of sec. 13 in support of an argument that other surveyors have used the Potter quarter corner or a nearly identical point to conduct land surveys. This evidence was discovered by Potter during his survey, and is described in his report by a drawing showing 13 markers and blazes left by a survey running parallel to, but east of the centerline determined by the 1982 BLM survey. Potter finds this evidence of survey activity to be significant to his location of the quarter corner east of the BLM position because it

appears to support a line in the near vicinity of that run by us. We note that the projection of the north/south mid-section line from the U.S. Forest Service monument has no such correlative evidence, and does in fact run thru an existing structure, some 800 foot south of said monument.

(Potter Report at 3).

BLM, however, puts a different construction on this evidence altogether. Replying to the Potter report, BLM observes that:

Most of the collateral evidence that the Potter survey claims to support the topographically positioned $\frac{1}{4}$ section corner, was actually placed as a result of surveys by John A. Fry * * * [Deeds and monuments found indicate] that Mr. Fry began his surveys at the 1970-1981 U.S.F.S. $\frac{1}{4}$ section corner position and intended to run a line south along the N. and S. center line of section 13. Mr. Fry actually ran his line about S. $5^{\circ} 39'$ E., on a N. and S. center line grossly in error. If anyone is in trespass on BLM land it is because Mr. Fry located them in error, not because the BLM has reestablished the $\frac{1}{4}$ section corner at proportionate position.

(Attachment E to BLM Answer at 3). 2/

Boise Cascade has not replied to this explanation of the evidence of survey activity south of the Potter quarter corner location. On the rec-ord before us, therefore, the explanation concerning the Fry survey tends to rebut the theory urged by Potter concerning the effect of the observed survey activity near his proposed position for the quarter corner. It also reveals that Potter's position is founded on the use of topographic calls alone because the only other evidence offered, the statements by Reay and Roark, do not directly support the Potter location. The information furnished concerning the Fry survey is also informative in another way as well, because it casts light on conflicting expert opinions concerning how the missing corner should be reestablished.

In further support of the Potter position for the quarter corner, Boise Cascade points out that John P. Ferguson, the surveyor who located the quarter section corner for the Forest Service in 1970, later agreed with Potter's survey, the report of which Potter had shown him. Ferguson's agreement, apparently, assumed the correctness of Potter's conclusions about the Fry survey, which BLM has now shown to be unfounded. Ferguson also apparently accepted Potter's reported evidence concerning topographic calls uncritically, assuming they were not ambiguous. The fact that his review was made of an incomplete record casts doubt on the value of his later opinion, since we do not know what evidence persuaded him to reconsider his own work.

Moreover, there is now evidence of another survey that has used the quarter section corner established by Ferguson and BLM. Boise Cascade refers to an opinion by Richard A. Johnson, another Idaho surveyor, said to support the Potter position (SOR at 8). Responding to this reference to authority, BLM has supplemented the record with a preliminary survey plat of a subdivision in the northwest quarter of sec. 13, prepared for recording

2/ The BLM plat of dependent resurvey approved in 1983 depicts the Fry survey in the northeast quarter of sec. 13, showing that the survey begins at the quarter section corner established by the dependent resurvey and runs south at approximately a 5-degree angle from the centerline.

by Johnson, that uses the BLM resurvey position for the quarter corner common to secs. 12 and 13 (Attachment D to BLM Answer). To the extent this expert evidence has any significance in our review of the question whether the original quarter corner is lost, it appears Johnson has also changed his mind concerning the location of the corner and now agrees with BLM. The foundation of his opinion, like the second opinion of Ferguson, however, is essentially unexplained. Our review of this appeal must therefore look to the evidence of record concerning the missing corner to determine whether it is lost or whether, as Boise Cascade contends, it was obliterated but perpetuated in some fashion. The conclusions of the experts offered to us for review are only helpful to the extent they are shown to have a firm foundation in fact. While both Ferguson and Johnson appear to have vacillated concerning the proper method for retracing the original survey, we have the full evidence of both the Potter and BLM surveys before us. The record is therefore sufficient to permit a decision on the issue presented.

In such cases as this, the burden is on the party challenging the BLM decision to show by a preponderance of evidence that there was error. Stoddard Jacobsen (On Reconsideration) v. BLM, supra at 85-86. In this case, this means that Boise Cascade was required to show that BLM erred in finding the missing quarter section corner was lost. Boise Cascade took on itself the task to show that the corner was not lost, but obliterated. Principal reliance to accomplish this showing was placed on statements from two witnesses, neither of whom, as it turned out, had direct knowledge concerning the original quarter corner monument or its accessory. The only other evidence offered by Boise Cascade to show that the corner had been obliterated consisted of topographic evidence which was ambiguous. Collateral evidence consisting of other surveys, offered to support the topographic calls from the 1899 survey, does support the quarter corner location proposed by Potter. We conclude, therefore, that the quarter section corner common to secs. 12 and 13 was correctly found by BLM to be lost, there being no evidence of the corner or its accessory found remaining from the 1899 survey, and that BLM properly used proportionate measurement to reestablish the corner in the dependent resurvey run in 1982.

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

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge