



TRACY V. RYLEE

174 IBLA 239

Decided April 28, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

TRACY V. RYLEE

IBLA 2005-22

Decided April 28, 2008

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing protests against adoption of a cadastral survey. CA Group 1453.

Affirmed.

1. Surveys of Public Lands: Generally--Surveys of Public Lands: Authority to Make

Congress has authorized the Secretary of the Interior to consider what lands are public lands, what public lands have been or should be surveyed, and what surveys of public lands should be extended or corrected. BLM therefore has the authority to survey the boundaries of land owned by the United States, including the boundaries that separate the National Forest from a patented parcel.

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

In cases where an original survey is found to be fraudulent and corner recovery poor, BLM may conduct a metes and bounds survey of tracts to represent the position and form of the lands alienated on the basis of the original survey, utilizing the best available evidence of their true original positions to locate the tract on the ground. The tract must have a form agreeing with the original entry, approximately regular boundaries, an area not widely inconsistent with that shown on the plat, and a location as nearly correct as may be expected from the existing evidence of the original survey. The surveyor

cannot materially change the configuration of a tract as shown by its original description.

3. Surveys of Public Lands: Generally--Surveys of Public Lands: Dependent Resurveys

No resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement. Similarly, the bona fide rights of claimants, where entered or patented lands are involved, remain absolutely the same whether the resurvey is made upon the dependent or independent plan. Bona fide rights are those acquired in good faith under the law and are protected in a resurvey by showing the original position of entered or patented lands included in the original description. Where an entryman or claimant has located improvements or taken other action in good faith reliance on evidence of the original survey and thus bona fide rights are found to exist, a resurvey is required by 43 U.S.C. § 772 (2000) to take this into account.

4. Surveys of Public Lands: Generally--Surveys of Public Lands: Challenges

A party who objects to a survey of public land has the burden of establishing by a preponderance of the evidence that BLM's survey does not accurately portray the lands conveyed. An appellant can meet this burden by showing that BLM has failed to conform the survey to the requirements of the Survey Manual.

5. Surveys of Public Lands: Generally

A landowner's bona fide belief concerning the boundary between his land and public land is not necessarily the same as a bona fide right that must be protected in a survey under 43 U.S.C. § 772 (2000). A person's bona fide belief, based on an understanding with a predecessor in interest that a fence marks a boundary, does not constitute a bona fide *right* to a tract whose area or configuration materially differs from the tract's original description.

APPEARANCES: Tracy V. Rylee, Fort Leavenworth, Kansas, *pro se*, and for Janet Rylee; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Tracy V. Rylee (Rylee), on behalf of himself and Janet Rylee, has appealed from a December 13, 2004, decision of the California State Office, Bureau of Land Management (BLM), dismissing their protests against adoption of a cadastral survey of Tract 38, formerly described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 31, T. 32 N., R. 12 W., Mount Diablo Meridian. Rylee owns Tract 38; Vernon and Janet Rylee hold a life interest in it. The tract is surrounded by Federal land administered by the United States Forest Service within the Trinity-Shasta National Forest. As surveyed by BLM, Tract 38 is a 20-acre rectangle measuring 10 by 20 chains, or 660 feet by 1,320 feet.

As in their protest, appellants assert that BLM erred because Tract 38 as surveyed by BLM does not include features such as a barn, a fence, and a diversion dam that they believe to be within the tract they own. They argue that BLM lacks “territorial jurisdiction” to survey their land and assert that BLM’s failure to credit their evidence concerning the boundaries of the parcel deprives them of their bona fide rights that BLM is required to protect in a resurvey.

In its decision, BLM provided a careful and detailed response to each of the points that the Rylees raised in their protests. These same points are again offered in their appeal. Tract 38 as surveyed by BLM keeps the same form and acreage as the parcel for which the original patentee applied. Having reviewed the evidence and arguments of the parties, we affirm BLM’s decision for reasons explained below.

BLM’S AUTHORITY TO CONDUCT SURVEYS

Before we consider the merits of the Rylees’ arguments with respect to the survey itself, we turn to their argument that BLM has no “territorial jurisdiction” to request a survey of their land. Statement of Reasons (SOR) at 6-8. “Jurisdiction,” the Supreme Court has observed, “is a word of many, too many, meanings.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006), quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998). Although the “jurisdiction” that the Federal government now exercises may differ from that which it exercised during the territorial period before California became a State, this case involves BLM’s authority to survey the boundaries of land owned by the United States over which the United States “has continuing jurisdiction . . . until a patent issues.” *Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976). For example, in *Utah Power and Light Co. v. United States*, 243 U.S. 389, 404 (1917), the Court said:

True, for many purposes a State has Civil and Criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.

[1] Appellants' property was patented, but it is surrounded by land owned by the United States, and the Property Clause of the United States Constitution gives Congress the authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. Congress has authorized the Secretary of the Interior to consider what lands are public lands, what public lands have been or should be surveyed, and what surveys of public lands should be extended or corrected. *See* 43 U.S.C. §§ 2, 52, 751-53, 772 (2000); *Kirwan v. Murphy*, 189 U.S. 35, 54-55 (1903); *Timothy J. Bottoms*, 150 IBLA 200, 217 (1999), and cases cited therein. BLM therefore has the authority to survey the boundaries of land owned by the United States, including the boundaries that separate the National Forest from the parcel that was patented to appellants' predecessor in interest. *See, e.g., Robert W. Delzell*, 158 IBLA 238 (2003); *Theodore J. Vickman*, 132 IBLA 317 (1995).

BACKGROUND

It is important to bear in mind that the tract owned by Rylee is a placer mining claim, the patent for which was issued to Asa Drake in 1926. The mining law establishes a number of requirements for obtaining a patent for a placer mining claim, two of which have particular relevance to this appeal. First, placer claims on surveyed lands "shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys" 30 U.S.C. § 35 (2000). Second, "no such location shall include more than twenty acres for each individual claimant." *Id.* A patent issued to a single locator in conformity with these requirements normally will include two contiguous 10-acre legal subdivisions having boundaries in cardinal directions. The claim normally will measure approximately 660 feet (10 chains) on one side, 1,320 feet (20 chains) on the other, and embrace approximately 20 acres. The land description in Drake's patent appears to comport with these characteristics.

A plat of the township (and subdivisional lines) in which Rylee's mining claim is located was approved on September 13, 1883, based on field notes for a survey of the subdivisional (section) lines in June 1883 attributed to Charles Holcomb, a deputy surveyor.¹ On August 1, 1915, J. D. Peterson located the Little Creek Placer

¹ The township lines were established and corners monumented in earlier surveys
(continued...)

Mining Claim, and on the same day T. J. Montgomery made “a preliminary survey” of the claim for Peterson. Affidavit of T. J. Montgomery (May 14, 1926) (Montgomery Affidavit). Based on what he believed to be the original quarter section corner between secs. 30 and 31, Montgomery “surveyed and staked what he then supposed was the SW¹/₄ofNE¹/₄ofNE¹/₄, the W¹/₂ofSE¹/₄ of NE¹/₄ofNE¹/₄ and the E¹/₂ofSE¹/₄ofNW¹/₄ofNE¹/₄ of said Section 31” *Id.*

The claim was later acquired by Asa Drake, who applied for a patent in October 1925. Maps in the patent application file generally show the claim as a rectangle that includes the confluence of Little Creek and Hayfork Creek, with Little Creek entering the claim near the center of the northern boundary and Hayfork Creek entering the claim from the eastern boundary and exiting the claim at the northwest corner. The maps also show the western boundary as 660 feet and the southern boundary as 1,320 feet.

In a January 30, 1926, letter to the Register of the Land Office in Sacramento, the Acting District Forester protested issuance of the patent because the claim “was not located by ten acre subdivisions”² This protest appears to have been based on a survey by the Regional Forester who purportedly ran the section line between secs. 31 and 32 from the corner of secs. 31, 32, 5, and 6, and found that Drake’s claim included the entire SE¹/₄NE¹/₄NE¹/₄, SW¹/₄NE¹/₄NE¹/₄ sec. 31.³ See Montgomery Affidavit. In a letter dated April 16, 1926, the General Land Office (GLO) allowed Drake 30 days in which to show cause why the entry should not be canceled as to the W¹/₂SE¹/₄NE¹/₄NE¹/₄ and the E¹/₂SE¹/₄NW¹/₄NE¹/₄ of sec. 31, which were not 10-acre

¹ (...continued)

that are identified on the plat.

² Regulations governing placer mining claims at that time provided: “By section 2330 [30 U.S.C. § 35] authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acres tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.” Regulations, Nature and Extent of Mining Claims, ¶ 23, 49 L.D. 58, 62 (1922).

³ The surveys conducted by Montgomery and the Forest Service were not official surveys but only served to enable the claimant to identify the legal subdivisions in which the claim was located as required by 30 U.S.C. § 35. Because the power to officially survey and resurvey public lands is vested solely in the Secretary of the Interior, see 43 U.S.C. §§ 2, 752, 772 (2000), survey lines extended by the Forest Service upon lands under its jurisdiction do not constitute official surveys of the United States. *Benton C. Cavin*, 83 IBLA 107, 130 (1984).

subdivisions. On May 13, 1926, the Regional Forester returned to the claim with Drake and Montgomery, who had surveyed the claim in 1915. They concluded that the stakes for the eastern corners of the claim were approximately on that section line so that the claim should be properly described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 31. *See id.* Drake amended his application to conform to this description, and the GLO issued patent 989393 to him on November 18, 1926.

BLM'S INVESTIGATION OF SURVEY CONDITIONS

BLM initiated the survey leading to this appeal on behalf of the Federal Highway Administration (FHWA) in connection with the Hyampom Road project. On October 7, 2003, BLM issued Special Instruction for Group No. 1453 that called for a dependent resurvey of certain township boundary and subdivisional lines, and to subdivide secs. 30, 31, and 32 and identify the boundaries of privately-owned tracts to enable FHWA to describe road rights-of-ways.

Where a plat of survey of a township and its subdivisional lines has been previously approved, BLM will conduct a dependent resurvey of the pertinent lines.⁴ In this case, BLM developed a preliminary dependent resurvey diagram dated December 10, 2003, on the basis of proportionate measurement.⁵ That diagram

⁴ “A dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners.” *Manual of Instructions for the Survey of the Public Lands of the United States 1973 (Survey Manual)* at 145, § 6-4.

⁵ In describing proportionate measurement in *Volney Bursell*, 130 IBLA 55, 57 (1994), we stated:

Where location of a corner cannot be determined from evidence of original accessories, proportionate measurement has long been recognized [as] a suitable means to determine the location of a corner. [Survey] Manual 5-20 through 5-47; *John W. Yeargan*, 126 IBLA 361, 367-69 (1993); *James O. Steambarge*, 116 IBLA 185, 193 (1990); *Boise Cascade Corp.*, 115 IBLA 327 (1990). Proportionate measurement attempts to equitably distribute differences arising from such errors in record calls and distances when placing lost corners between found control points. To reestablish a lost corner common to four sections within a township, BLM uses the double proportionate method. [Survey] Manual, 5-28. This method relies on control from four known corners within the township, two each on the intersecting meridional and latitudinal lines. [*Id.* at] 5-25.

shows appellants' parcel as the S $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 31⁶ where the section lines were based on record maps and a field survey. As on the maps in the patent application file, Hayfork Creek exits the claim from the northwest corner. The parcel includes the Rylees' main house, but not a barn and most of the barbed wire fence to the north of the parcel. It also excludes a diversion dam in Little Creek to the east of the parcel.

Ordinarily, where a patent describes the land conveyed in terms of the rectangular survey system, the rights, title, or interest conveyed are defined by the corners of the Government survey upon which the description was based. *Timothy J. Bottoms*, 150 IBLA at 217. Because a dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners, the dependent resurvey usually represents the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey. See *Theodore J. Vickman*, 132 IBLA at 321. Although BLM had identified the corners controlling the description of appellants' tract by proportionate measurement from known corners, BLM decided against defining appellants' parcel with a dependent resurvey because BLM's land surveyor found Holcomb's 1883 survey "to be nonexistent within the Southwest Quarter of the township, due to fraudulent survey methods practiced at the time."⁷ Feb. 12, 2004, Memorandum at 3. The Memorandum stated that all of the known corners were found in the eastern half of the township,⁸ and that Holcomb's depiction of the land does not agree with the actual topography of the land. *Id.* at 4. Holcomb's plat shows Hayfork Creek (which goes through appellants' tract in sec. 31) to be about a mile north and a half-mile east of where it actually is, and "[t]here are many creeks and drainages depicted on []

⁶ This is simply a shorter way of describing the same parcel that is described in the patent as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 31.

⁷ Other surveys attributed to Holcomb at that time in northern California were found to be fraudulent. *E.g.*, *Leland Q. Phelps*, 134 IBLA 124, 125 (1995). Holcomb had been identified as a deputy of John A. Benson, who organized a syndicate to conduct fraudulent surveys in remote areas of California. See Francois D. Uzes, *Chaining the Land, A History of Surveying in California* 173-93 (1977); C. Albert White, *A History of the Rectangular System of Survey* 157-59 (1983).

⁸ Although BLM did not find internal corners in the southwest portion of the township, BLM found evidence of the corners on the township line that were placed in the surveys occurring before 1883. BLM found evidence of the corner on the township line common to secs. 30 and 31 and the corner common to secs. 31, 32, 5, and 6. See Attachment to Feb. 12 Memorandum. We note that the latter corner is the corner from which the Regional Forester was said to have run a line in determining that the eastern boundary of the claim was on the section line. See *Montgomery Affidavit*.

Holcomb's plat that do not exist, or drain the wrong direction, as well as spurs that do not exist, or bear the wrong directions." *Id.*; see Holcomb's Field notes at p. 59.⁹ The errors in Holcomb's plat and field notes impel the conclusion that Holcomb never ran the line or established corners between secs. 31 and 32, so there was no line to retrace or reestablish in a dependent resurvey.¹⁰ See *Theodore J. Vickman*, 132 IBLA at 323, 326.

[2] In other cases in which the field notes for a section line were found to be fictitious, the Board has referred to a provision in the *Survey Manual* involving special cases:

It is an axiom among experienced cadastral surveyors that the true location of the original lines and corners can be restored, if the original survey was made faithfully, and was supported by a reasonably good field-note record. That is the condition for which the basic principles have been outlined, and for which the rules have been laid down. *The rules cannot be elaborated to reconstruct a grossly erroneous survey or a survey having fictitious field notes.* [Emphasis added.]

Survey Manual at 143, § 5-46, quoted in *Paul Chabot*, 132 IBLA 371, 379 (1995); *Theodore J. Vickman*, 132 IBLA at 326. We have recognized that "no hard and fast rules can be formulated which will fairly deal with the myriad factual situations which might arise in the context of a fraudulent survey," but that attention must be paid to the facts and equities of each case. *Paul Chabot*, 132 IBLA at 382; *Theodore J. Vickman*, 132 IBLA at 329.

⁹ If the line between secs. 31 and 32 had actually been surveyed, the eastern boundary of appellants' claim as described in the patent would be along that section line between the corner common to secs. 29, 30, 31, and 32 and the corner common to secs. 31, 32, 5, and 6, with a quarter corner in between. In a dependent resurvey, BLM could reestablish the monuments of these corners, and establish the eastern boundary of appellants' claim, usually by proportionate distance.

¹⁰ BLM's conclusion that Holcomb did not survey the line between secs. 31 and 32 is consistent with the fact that the Regional Forester did not determine the location of Drake's claim by reference to the section corner common to secs. 29, 30, 31, and 32, which would have been only approximately 10 chains north of the northeast corner of the claim. BLM found no evidence of that corner in this case. Instead, the Regional Forester referred to the corner common to secs. 30, 31, 5, and 6, which was established before Holcomb's survey and would be approximately 60 chains south of the southeast corner of Drake's claim as described in the patent.

In another case in which an original survey attributed to Holcomb was found to be fraudulent and corner recovery poor, we found that tracts surveyed by metes and bounds “represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions.” *Leland Q. Phelps*, 134 IBLA at 128, quoting *Survey Manual* at 145, § 6-5;¹¹ see *Timothy J. Bottoms*, 150 IBLA at 217; *Survey Manual* at 152-55, §§ 6-39 through 6-49. Although obtaining such evidence may include asking the landowner to point out the boundaries of the claim, see *id.* at 153, §§ 6-42, 6-43, the landowner may not delineate his claim however he chooses. “[A]n acceptably located claim must have a form agreeing with the original entry, approximately regular boundaries, an area not widely inconsistent with that shown on the plat, and a location as nearly correct as may be expected from the existing evidence of the original survey.” *Id.* at 153, § 6-43. The *Survey Manual* further states:

The surveyor cannot change materially the configuration of a tract as shown by its original description in order to indemnify the owner against deficiencies in area, to eliminate conflicts between entries, or for any other purpose. If improvements have been located in good faith, the tract survey should be so executed, or the conformation to the lines of the survey so indicated, as to cover these improvements and at the same time maintain substantially the form of the entry as originally described. No departure from this rule is allowed.

Id. at 153, § 6-45. Accordingly, BLM’s February 12 Memorandum recommended suspension of Holcomb’s survey with respect to sections in the southwestern portion of the township, establishment of the three private tracts including appellants’, monumenting specified corners, and cancellation of Holcomb’s survey upon approval of the plat of the new survey.

¹¹ That section describes an “independent resurvey” as follows:

An *independent resurvey* is an establishment of new section lines, and often new township lines, independent of and without reference to the corners of the original survey. In an independent resurvey it is necessary to preserve the boundaries of those lands patented by legal subdivisions of the sections of the original survey which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey. This is done by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey.

BLM'S PROPOSALS FOR SURVEYING THE RYLEES' TRACT

BLM developed alternative proposals for surveying Tract 38 with a tie to the section corner on the township line between secs. 30 and 31. Proposals A and C keep the configuration of Drake's placer claim and measure 10 chains by 20 chains. Proposal C closely resembles the BLM's preliminary dependent resurvey diagram with respect to its placement of Hayfork Creek and the improvements.¹² Proposal C also resembles Drake's map of the claim with respect to its placement of the confluence of Hayfork Creek and Little Creek, as well as its placement of a dam on Little Creek *outside* of the claim to the east.¹³

Proposal A keeps the same configuration, but would shift the tract to the north and east so that it includes the diversion dam and a portion of the barn. However, Hayfork Creek runs only through the southwest corner of this proposal and its confluence with Little Creek lies outside it. It does not resemble Drake's map.

Unlike the other proposals, Proposal B is not a rectangle; it is an irregular 20-acre nonagon. It would include the house, diversion dam, barbed wire fence, and the barn, but would not include the county road and Hayfork Creek to the south. This proposal clearly "change[s] materially the configuration of a tract as shown by its original description" and does not comport with the requirement to "maintain substantially the form of the entry as originally described."¹⁴ *Survey Manual* at 153, § 6-45.

BLM met with Vernon and Janet Rylee to discuss the survey of their tract on March 18, 2004. In a memorandum dated March 19, BLM states that the Rylees would not agree to any proposal because the prior owner had led them to believe that they owned land to the north beyond where they had built their barn. Although the Rylees indicated that they preferred a solution based on Proposal C, they would not

¹² The dependent resurvey diagram, however, shows a slightly smaller parcel than BLM's Proposal C.

¹³ We note, however, that in a Mar. 19, 2004, memorandum, BLM states: "Proposal 'C' Tract 38 is *not* based on the application for mineral patent for Little Creek Placer Mine." We assume that BLM made this statement because it had not yet reviewed the patent application file. Although BLM had requested the patent file on March 15, it was not delivered to BLM until April.

¹⁴ Although Proposal B clearly fails to comport with the requirements of the *Survey Manual*, BLM recognized that implementing the proposal would require reformation of Drake's patent and, therefore, this 20-acre parcel apparently was suggested as a basis for resolving any occupancy issues that may arise between Rylee and the Forest Service after BLM's survey has become final. See Feb. 12, 2004, Memorandum at 5.

agree unless the Forest Service sold them land to include the barn and the diversion dam. BLM explained that no sale or exchange with the Forest Service could take place until after the survey was completed. In a May 10, 2004, letter, BLM sent the Rylees preliminary copies of the survey of the Rylees' tract, undertaken on the basis of Proposal C,¹⁵ and indicated that if the Rylees wished to protest the survey, they should do so before August 1, 2004, the date set for approval of the survey. Separate protests were filed by Tracy Rylee and by Vernon and Janet Rylee.

THE RYLEES' PROTESTS AND BLM'S DECISION

Tracy Rylee's protest contended that the survey did not preserve the intent of the original patentees and failed to protect his bona fide rights. He included a copy of a plat of BLM's Proposal C, but asserted that the actual boundaries go far beyond those on the proposal and include the barn and diversion dam. He supports his identification of the boundary by referring to blaze marks on trees, a barbed wire fence line, and other improvements. The protest filed by Vernon and Janet Rylee also asserted that the boundaries of their property extended beyond those described in BLM's Proposal C. They argued that BLM lacks jurisdiction to survey their land.

In its September 13, 2004, decision rejecting the protests, BLM provided a detailed response to each of the points and arguments put forward by the Rylees. Disagreeing with their argument that the proposal did not preserve the intent of the original patentees, BLM referred to the file for Drake's patent application and concluded that Proposal C was consistent with the evidence contained in the file concerning the placement of improvements. As for the blazed trees, fence line, and other features identified by the Rylees as evidence of the patentee's intent, BLM found that there was no evidence that these features were intended to identify the boundary of the mining claim that was patented to Drake. Decision at 3. BLM referred to the requirements of §§ 6-43 and 6-45 of the *Survey Manual*, stating that

¹⁵ The May 10, 2004, letter, at page 1, stated in part:

During the 2003 investigation, the original survey of the interior of the township, executed by Charles Holcomb in 1883, was found to be largely nonexistent, due to fraudulent survey methods practiced at that time.

Therefore, in order to best protect the bona fide rights of the patentees, we have made the decision to tract the patented land within Section 30, 31, and 32. Briefly stated, tracting (or independent resurvey) is a method used to survey a patent which does not rely on previously established section lines. The boundaries of the tracts to be surveyed will attempt to preserve the intent of the original patentees, and also protect the bona fide rights (rights accrued with good faith), of the current patentees.

the form of the tract must agree with the original entry and include an area not widely inconsistent with that shown on the plat. BLM found that the Rylees' proposal would double the size of the original patent and change its configuration in violation of these rules. Decision at 5.

ARGUMENTS OF THE PARTIES ON APPEAL

Appellants reiterate their arguments in their protests, asserting that Proposal C does not preserve the intent of the patentee, but reduces the property because the boundary does not encompass certain historic landmarks—the blazed trees, barbed wire fencing, and the diversion dam. SOR at 4-5. They assert that BLM did not attempt to protect the bona fide rights that they had accrued in good faith, stating that they were told the tract not only encompassed the land in Proposal C but also land to the north and west where they built a barn and water tank. SOR at 5.

In its Answer, BLM points out that its proposal does not reduce the area claimed by the patentee because the original patent was for only 20 acres, whereas appellants' desired parcel would be almost twice that size. Answer at 8. As for the historic landmarks that, according to appellants, mark their property line, BLM argues there is no evidence to suggest that any of these landmarks ever created any boundary, and that the improvements and markings are inconsistent with available evidence of the original patent and improvements at that time.

ANALYSIS

[3] Congress has directed that no “resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.” 30 U.S.C. § 772 (2000); *Survey Manual* at 147, § 6-12. BLM also recognizes that “the bona fide rights of claimants, where entered or patented lands are involved, remain absolutely the same whether the resurvey is made upon the dependent or independent plan.” *Survey Manual* at 153, § 6-42. Bona fide rights are those “acquired in good faith under the law.” *Id.* at 147, § 6-12. Bona fide rights are protected in a resurvey by showing “the original position of entered or patented lands included in the original description.” *Id.* at 147, § 6-14. Where an entryman or claimant has located improvements or taken other action in good faith reliance on evidence of the original survey and thus bona fide rights are found to exist, a resurvey is required by 43 U.S.C. § 772 (2000) to take this into account. *Longview Fibre Co.*, 135 IBLA 170, 183 (1996).

Although BLM properly asks the landowner to identify his boundaries, the form of the tract must agree with the original entry and have an area not widely inconsistent with that shown on the plat. *Survey Manual* at 153, § 6-43. BLM may not materially change the configuration of the tract as shown by its original

description in order to indemnify the owner against deficiencies in area, to eliminate conflicts between entries, or for any other purpose. Although a survey should be executed to cover improvements that have been located in good faith, BLM must “maintain substantially the form of the entry as originally described. No departure from this rule is allowed.” *Id.* at 153, § 6-45.

[4] As the parties objecting to the tract survey, the Rylees have the burden of establishing by the preponderance of the evidence that BLM’s survey does not accurately portray the lands conveyed. *Timothy J. Bottoms*, 150 IBLA at 219, and cases cited. An appellant can meet this burden by showing that BLM has failed to conform the resurvey to the requirements of the *Survey Manual*. See *Quinton Douglas*, 166 IBLA 257, 269 (2005); *Peter Paul Groth*, 99 IBLA 104, 119 (1987); *Domenico A. Tussio*, 37 IBLA 132, 133 (1978).

The Rylees have failed to meet this burden. The application file for Drake’s patent makes it clear that Drake applied for a 20-acre parcel measuring 660 by 1,320 feet that included the confluence of Little Creek and Hayfork Creek. It is clear that Drake did *not* intend for his patent to include the diversion dam that the Rylees now claim. BLM’s Proposal C for Tract 38 contains the same acreage as the parcel described in Drake’s patent and does not materially change its configuration. It would be improper for BLM to depart substantially from the form of Drake’s entry to accommodate Rylee’s improvements, even if they were made in good faith. *Survey Manual* at 153, § 6-43.

[5] A landowner’s bona fide *belief* concerning the boundary between his land and public land is not the same as a bona fide *right* that must be protected in a survey under 43 U.S.C. § 772 (2000). Although a person may have a bona fide *belief*, based on an understanding with a predecessor-in-interest that a fence marks a boundary, a bona fide *right* within the meaning of 43 U.S.C. § 772 (2000) is based on good faith reliance on evidence of the original survey. See *Longview Fibre Co.*, 135 IBLA at 183-84; see also *United States v. Reimann*, 504 F.2d 135, 139-40 (10th Cir. 1974). The Rylees’ bona fide *belief* that the fence, barn, and diversion dam are on their property is simply not a bona fide *right*. See *Robert W. Delzell*, 158 IBLA at 258-59.

The only evidence of the original survey upon which issuance of the patent was based was the corner common to secs. 5, 6, 31, and 32 from which the Regional Forester determined that the eastern boundary of the claim was on the section line between secs. 31 and 32. See *Montgomery Affidavit*. That boundary would have been 10 chains long and extended from 60 to 70 chains from the corner. The Rylees’ protest and appeal refer to Holcomb’s field notes describing his purported survey of 80 chains along the section line between secs. 31 and 32. See *Holcomb Field Notes* at 56-57. Appellants’ belief that this description justifies enlarging their claim does not constitute good faith reliance; even under that description, they could only claim a

10-chain segment in an area between 60 and 70 chains north of the corner of secs. 5, 6, 31, and 32, the point from which Holcomb purported to have run his line. The Rylees' bona fide *belief*, based on an understanding with a predecessor-in-interest that a fence marks a boundary, does not constitute a bona fide *right* to a tract whose area or configuration differs materially from the tract's original description.¹⁶

CONCLUSION

We agree with BLM that the independently resurveyed tract should be a 20-acre rectangle measuring 10 by 20 chains and that the best evidence of the intent of the original patentee is contained in the file of his application for patent. That file contains maps considered by the applicant and the Government that show the relationship of the corners and boundaries of his claim to Little Creek, Hayfork Creek, and other features important to an applicant for a patent for a placer mining claim.

It is not clear, however, that the placement of the corners of the tract have been positioned as required by the Supplemental Special Instructions issued on March 12, 2004. Those instructions call for surveying the tracts as described in BLM's February 12, 2004, report, which calls for each tract to be established "as shown on accompanying preliminary plat" and explained in an accompanying tract configuration. We note that Proposal C for Tract 38 that BLM had discussed with the Rylees appears to show the angle points in slightly different positions with respect to Hayfork Creek and Little Creek than what appears in the Field Notes for the survey prepared by Gregg Neitsch. The notes indicate that angle point 1 falls below the high water mark of Little Creek and angle points 2 and 4 fall below the high water mark of Hayfork Creek, whereas those angle points on the plat for Proposal C appear to be roughly one chain north and one chain west of those locations. Neitsch Field Notes at 15-18. While we affirm BLM's decision dismissing the Rylees' protests, BLM should ensure that the on-the-ground survey, plat, and field notes conform to the instructions before the survey is approved.

¹⁶ Many landowners have committed unintentional trespasses on Federal land that result from bona fide but mistaken beliefs about the boundaries of the parcels they own. See, e.g., *Kenneth Snow*, 153 IBLA 371 (2000); *Fred Wolske*, 137 IBLA 211 (1996); *Michael and Karen Rodgers*, 137 IBLA 131 (1996); *Longview Fibre Co.*, 135 IBLA 170; *T. E. Markham*, 24 IBLA 25 (1976); *Orion L. Fenton*, 1 IBLA 203, 78 I.D. 1 (1971). In *Clive Kincaid*, 111 IBLA 224 (1989), the purchaser of a 20-acre parcel of private land built a house that was found, after a cadastral survey, to be partly on Federal land. Kincaid had mistakenly identified the eastern boundary of his parcel on the basis of an existing fence, a stone monument, and a BLM sign which read "Leaving Public Lands." Kincaid's bona fide belief did not invalidate BLM's survey but established that his trespass was unintentional rather than willful. *Clive Kincaid*, 111 IBLA at 225.

Appellants are understandably upset by a survey that shows they own a smaller tract than they believed they purchased so that some improvements lie on land they do not own. And they are understandably frustrated at BLM's decision to approve a survey without resolving the issue of their occupancy. But as much as they believe that an exchange should have been considered in conjunction with BLM's survey, there can be no basis for an exchange until both the Government and the land owner know the correct boundary between their land. This Board has recognized that consideration of an exchange is a relevant factor in resolving trespasses or other unauthorized occupancies on land managed by BLM that have been revealed by a cadastral survey. *See, e.g., Clive Kincaid*, 111 IBLA at 231-34; *see also Carl G. Oberg*, 173 IBLA 143, 147-48 (2007); *Norman Reid*, 163 IBLA 324, 329 (2004). In this case, however, BLM only has authority to conduct a survey; consideration of an exchange is a matter for the Forest Service which manages the public land at issue here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge