



STATE OF COLORADO, STATE BOARD OF LAND COMMISSIONERS

187 IBLA 376

Decided May 27, 2016



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

703-235-3750

703-235-8349 (fax)

STATE OF COLORADO, STATE BOARD OF LAND COMMISSIONERS

IBLA 2014-2

Decided May 27, 2016

Appeal from a decision of the State Director, Colorado State Office, Bureau of Land Management, dismissing a protest of the proposed official filing of the survey plat for a dependent resurvey. Group No. 1444, Colorado.

Affirmed.

1. Surveys of Public Lands: Challenges;  
Surveys of Public Lands: Dependent Resurveys

A dependent resurvey is designed to retrace and reestablish the lines of the original survey, fulfilling BLM's duty to protect the bona fide rights of private landowners whose property rights are tied to the original lines. In objecting to a dependent resurvey, an appellant bears the burden of establishing, by a preponderance of the evidence, that the resurvey is not an accurate retracement and reestablishment of the lines and corners of the original survey. The challenging party must establish error in the methodology used or the results obtained, or show that the resurvey was carried out in a manner that did not conform to the Survey Manual.

2. Surveys of Public Lands: Challenges;  
Surveys of Public Lands: Dependent Resurveys

BLM properly reestablished, in 2008, the missing corners along the north-south center line of a township by the method of proportionate measurement, in general agreement with a 1938 private resurvey approved by a State court and generally accepted by the General Land Office, where the private resurvey was performed without gross error, was officially recorded, and was relied upon by

the Forest Service and affected private landowners, even if BLM later determined, in 2013, that the line was never originally surveyed in 1881.

APPEARANCES: Virginia Sciabbarrasi, Esq., Denver, Colorado, and Andrew A. Mueller, Esq., Glenwood Springs, Colorado, for appellant; Kristen C. Guerriero, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE SOSIN

The State of Colorado, State Board of Land Commissioners (Colorado or appellant)<sup>1</sup> appeals from an August 29, 2013, decision of the State Director, Colorado State Office, Bureau of Land Management (BLM), dismissing a protest of the proposed official filing of a survey plat for a 2008 Dependent Resurvey (Group No. 1444, Colorado) of part of the east boundary and part of the subdivisional lines of T. 42 N., R. 13 W., New Mexico Principal Meridian (NMPM), San Miguel and Dolores Counties, Colorado.<sup>2</sup>

For the reasons explained below, we find that appellant has failed to meet its burden to establish, by a preponderance of the evidence, that the 2008 Dependent Resurvey is not an accurate retracement and reestablishment of the lines of the original survey. We therefore affirm.

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<sup>1</sup> This appeal was originally brought by The McCollum Family Limited Partnership Number One, L.L.P., and others (MFLP). In a filing received on Dec. 29, 2015, Colorado notified the Board that as of Dec. 18, 2014, it held title to the property previously owned by MFLP. Because MFLP filed the pleadings in this case, for ease of understanding, throughout this opinion we will identify the appellant as “appellant” or “MFLP.”

<sup>2</sup> MFLP had originally taken an appeal to the Board in IBLA 2009-112 from an earlier Dec. 22, 2008, acceptance by the Chief Cadastral Surveyor, Colorado, BLM, of the Dependent Resurvey, and the Dec. 31, 2008, official filing of the survey plat for the resurvey. Wayne A. Tibbitts and Steve Simpson, d/b/a Greenfield Investments, Inc. (collectively, Greenfield) also appealed the Dec. 22, 2008, acceptance in IBLA 2009-113, but does not now appeal to the Board.

### BACKGROUND

At issue in this appeal is the validity of BLM's 2008 Dependent Resurvey of the north-south center line of T. 42 N., R. 13 W., NMPM, Colorado (Township), which currently separates Federal land in the eastern half of the Township, title to which is owned by the United States and which is under the administrative jurisdiction of the Forest Service, U.S. Department of Agriculture, from private land in the western half of the Township, title to which is owned by various parties. The north-south center line runs through the entire Township, successively between secs. 3 and 4, secs. 9 and 10, secs. 15 and 16, secs. 21 and 22, secs. 27 and 28, and secs. 33 and 34. The east-west center line of the Township delineates the boundary generally between San Miguel County to the north and Dolores County to the south, and, in the eastern half of the Township, the boundary between the Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests to the north and the San Juan National Forest to the south.

Appellant is the owner of a large tract of private land, consisting of close to 3,660 acres, known as the "Gray Ranch," which shares a common boundary, approximately three miles long, with the San Juan and GMUG National Forests. See Letter to BLM from Andrew A. Mueller, Esq., and Mark T. Howe, Esq., dated Aug. 26, 2009, at 1. Greenfield is the owner of approximately 1,700 acres of private land, known as the "Tibbitts Ranch," which shares a common boundary, approximately two miles long, with the GMUG National Forests. See *id.*; Letter to BLM from Simpson, dated May 1, 2006, at unpaginated (unp.) 1. Both common boundaries run along the north-south center line of the Township.<sup>3</sup>

Appellant challenges the 2008 Dependent Resurvey, alleging that BLM improperly resurveyed the north-south center line of the Township by means of a dependent, rather than independent, resurvey. Appellant asserts, *inter alia*, that a

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<sup>3</sup> Appellant owns a large irregularly-shaped tract encompassing lands in secs. 5-8, 16-18, 20, 21, and 28 of the Township. See Ex. A (Exhibit and Preliminary Map for San Miguel County Road 40J, Project #04035, Sheet 1 of 1, David Foley, San Miguel County Surveyor) (County Road Preliminary Map) (attached to Notice of Appeal/Statement of Reasons/Petition for Stay (NA/Petition) (IBLA 2009-112)). The common boundary with the National Forests runs along the east boundary of secs. 16, 21, and 28 of the Township.

Greenfield owns a smaller irregularly-shaped tract, adjoining MFLP's tract to the north, encompassing lands in secs. 4, 5, 8, and 9 of the Township. See County Road Preliminary Map. The common boundary with the National Forest runs along the east boundary of secs. 4 and 9 of the Township.

dependent resurvey was not permissible under BLM's Survey Manual because the original survey that provided the basis for the resurvey was "wholly fictitious." Notice of Appeal/Preliminary Statement of Reasons (NA/SOR), dated Sept. 27, 2013, at 12.<sup>4</sup>

Before addressing appellant's arguments, we first set forth a brief history of the surveys that occurred in the Township and preceded BLM's challenged 2008 Dependent Resurvey.

*A. Original Surveys, 1938 State Court-Ordered Resurvey & Private Resurveys*

Federal lands in the Township were originally surveyed in 1881 by C.A. Wheeler, U.S. Deputy Surveyor, General Land Office (GLO), who surveyed the exterior boundaries of the Township, and by George D. Nickel, U.S. Deputy Surveyor, GLO, who, after retracing the north, east, and west exterior boundaries, surveyed the subdivisional lines of the Township. See Memorandum to Randy Bloom, Supervisory Cadastral Surveyor, Southwest Unit, from Gene R. Dollarhide, Cadastral Surveyor, dated Aug. 20, 2007 (Dollarhide Report), at unp. 1. The Wheeler and Nickel surveys were approved by the U.S. Surveyor General of the United States, GLO, respectively, on November 5, 1881, and July 31, 1882. See Dollarhide Field Notes for the 2008 BLM Resurvey (Field Notes) at 1. Thereafter, the United States patented lands in the Township based on these surveys.

To resolve a dispute between private landowners in part of the western half of the Township (*Greager v. McKee*), the District Court for the Seventh Judicial District, State of Colorado, directed a private resurvey of the area, which was completed in 1938 by C.L. Chatfield, Civil Engineer, Board of Land Commissioners, Colorado, and John Foster, Colorado Registered Land Surveyor. See Independent Resurvey in the West Half of Township 42 North, Range 13 West, NMPM, General Statement (Oct. 20, 1938) (1938 Report).<sup>5</sup>

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<sup>4</sup> Although MFLP characterized its combined notice of appeal and statement of reasons for appeal as a "preliminary" statement of its reasons for appeal, MFLP filed no other pleading with the Board.

<sup>5</sup> In citing to the 1938 Report, we cite to the "General Statement" by Chatfield and Foster, to which was appended, *inter alia*, transcripts of Wheeler's and Nickel's field notes for their surveys of the Township, and Foster's field notes, dated Sept. 30, 1937, for the 1938 resurvey of the west half of the Township, provided by BLM, as part of the administrative record.

Chatfield and Foster resurveyed the entirety of the north-south center line, in accordance with the 1930 Survey Manual, generally recording the bearings and distances between all of the section corners. *See* Map of Independent Resurvey in Township 42 North, Range 13 West, NMPM, dated Oct. 22, 1938 (1938 Plat). They found 26 of the original 48 corners established by Wheeler on the exterior boundaries of the Township.<sup>6</sup> They specifically reported finding the original corners at either end of the north-south center line, on the exterior boundary of the Township (NE corner of sec. 4 and SE corner of sec. 33). *See* 1938 Report at unp. 2, 38; 1938 Plat. They stated:

All corners extant on the exteriors are stones well marked and in reasonably proper relative location, except the northeast, southeast and southwest corners, which are squared pine posts, 4x4, with the identifying markings carved in said posts, and then set in a mound of rock. These markings, in spite of the fact that the surveys were executed in the years 1880 and 1881, were easily discernible, although the posts were badly rotted.

1938 Report at unp. 8.

Chatfield and Foster concluded, however, after having been unable to locate any of the subdivisional corners established by Nickel in the western half of the Township, following a diligent search and interviews with local landowners, that the Nickel survey of the subdivisional lines of the Township was “entirely fictitious and was never executed.” 1938 Report at unp. 5; *see* Foster Field Notes at 1 (“I find that there never was any interior sec. corners or 1/4 sec. corners set, or lines run and that therefore there is 121 sec. corners and quarter sec. corners and their out lines missing in this Twp. and 60 miles of interior lines were not run.”). They therefore noted that it was “absolutely mandatory that an independent resurvey be executed in the township, and that the corners be set by the double proportion method.” 1938 Report at unp. 6. They reestablished interior corners along much of the line, initially by the method of single proportionate measurement, given the reported bearings and distances from corners on the north and south exterior boundaries, which corners were later

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<sup>6</sup> Chatfield and Foster located and identified all of the original corners on the east boundary (except the E1/4 quarter corner of sec. 1). They also located the original NW and SW corners sec. 6, NW and SW corners sec. 30, and W1/4 and SW corners sec. 31 on the west boundary, the original NE and NW corners sec. 4 and NW corner sec. 5 on the north boundary, and the original SW corner sec. 32, SE and SW corners sec. 33, and SE corner sec. 34 on the south boundary of the Township. *See* 1938 Report at unp. 2, 9-10; 1938 Plat.

corrected, by the method of double proportionate measurement, also using the reported bearings and distances to the corners on the east and west exterior boundaries. See 1938 Report at unpaginated 2-3, 7, 8, 9-10.<sup>7</sup>

Chatfield and Foster also noted that a north-south “U.S. Forest Fence,” likely built around 1912, generally followed the resurveyed north-south center line, generally coinciding with, but at other times diverging from, the center line. See 1938 Plat; Foster Field Notes at 2 (“The Forest Reserve line and fence runs n. & s. between these corners [SE corner sec. 33 and NE corner sec. 4] and forms an enclosure for this survey on the east. This Forest fence has been established about 25 years.”). They indicated that the “Forest boundary line fence” was the “then recognized location” of the SE corner sec. 16, and possibly other corners along the north-south center line. 1938 Report at unpaginated 5.

In a June 3, 1939, letter to the Commissioner, GLO, the Supervisor of Surveys, Cadastral Engineering Service, GLO, concurred in the factual accuracy of the 1938 resurvey, stating that “the resurvey follows appropriate dependent procedure and that the results are substantially correct.” See Letter to Commissioner from Supervisor of Surveys, dated June 3, 1939, at 1. The letter acknowledged the uncertainty surrounding Chatfield’s and Foster’s assumption that the Nickel survey was fictitious, stating: “There is, of course, no way short of a field investigation for this office to determine whether the assumption on the part of the [Court] [C]ommissioners [Chatfield and Foster] that the original subdivision of the township is fictitious is true or that the control employed by them for the recovery of the township exteriors is complete.” *Id.* The letter concluded, however, that, “[t]aken as a whole, the conclusions reached by the Commissioners seem reasonable, the methods employed follow proper procedure and in view of the approval of the resurvey by the Court it is questionable whether further action on our part would materially change results or

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<sup>7</sup> Although Chatfield and Foster referred to an “independent resurvey,” the procedures they followed were those of a dependent resurvey. See NA/SOR at 21 (“Both the field notes of the resurvey . . . and the 1939 letter by the GLO[] demonstrate that the Chatfield-Foster Resurvey was a dependent resurvey.”); Answer at 15 (“BLM agrees that [the Chatfield-Foster Resurvey] is actually a dependent resurvey”); Foster Field Notes at 1 (“A DEPENDENT resurvey is necessary because the government corners are in place on the N. & S. sides of the Twp. which forms an enclosure to this land.”), 2 (“My accompanying plat of this resurvey[] delineates a retracement of the lines as accepted in 1881 in their true original position according to the best available evidence of the position of the original corners; all differences between the measurements of the original survey and those derived in the retracement have been distributed proportionally between accepted corners in accordance with surveying rules.”).

tend to improve the situation.” *Id.*; *see also* Letter to Monte Fitch from Administrative Cadastral Engineer, GLO, dated June 15, 1939, at 1 (“Based on the assumption that the findings of the [C]ourt [C]ommissioners were correct as to the condition of the original survey of this township, that is, that no interior corners are in existence and that they recovered all authentic existing corners on the township boundaries, the methods employed by them appear to be substantially correct.”).

The State court issued a Decree in *Greager v. McKee* on June 22, 1939, approving the private resurvey by Chatfield and Foster and concluding that the corners and boundaries in dispute had been correctly set and established.

The private landowners in the west half of the Township, at that time, objected to the Chatfield-Foster private resurvey based on their belief that there was a “discrepancy between the historically accepted line and the line drawn by that resurvey.” MFLP Protest, dated Aug. 26, 2009, at 5; *see also* Letter to U.S. Surveyor General from Helen Harmon, dated Aug. 6, 1939 (attached as Ex. G to MFLP Protest) (“As a result of the recent survey the Forest Line has been changed . . . . The result being a strip of land of some 600 acres for which there is no owner or entryman or nodescription of the land.”). These landowners thus sought an official Government resurvey of the north-south center line, stating: “We feel that a grave injustice has been done the land owners in this township as a result of the recent survey and that a Government Survey would correct this.” Letter to U.S. Surveyor General from Harmon, dated Aug. 6, 1939. While the GLO authorized a resurvey of the Federal lands in the Township in 1942, no resurvey was undertaken at that time. *See* MFLP Protest at 5.

Starting in 1990, William D. Wiley, Colorado Registered Land Surveyor, Mesa Surveying Co., undertook two private resurveys, generally on behalf of MFLP and Greenfield, in order to determine the boundary lines between MFLP’s and Greenfield’s private lands and National Forest land. Wiley allegedly found evidence of the original corners established by Wheeler and Nickel along the north-south center line. *See* Memorandum to Forest Service and BLM, from Chief Cadastral Surveyor for Colorado, BLM, dated July 20, 2006, at unp. 1-2 (“[Wiley] purports to have found evidence of the original monuments (mounds of stone) at all of the section corners controlling the Forest Service lands. Found monuments from the original survey would control the location of [F]ederal lands in this township. . . . If these mounds of stone are not evidence of the original survey, then the true boundary line would be the boundary as determined in the 1938 [Court] survey -- anywhere from 100 to 1,000 f[ee]t[] to the west.”). Based on the private resurveys, a fence was erected along the north-south center line, for the purpose of delineating the boundary between private lands to the west and National Forest lands to the east. *See* NA/Petition (IBLA 2009-112) at 3.

*B. BLM's 2008 Dependent Resurvey*

At the request of the San Juan and GMUG National Forests and San Miguel County, BLM undertook a dependent resurvey of part of the east boundary and part of the subdivisional lines of the Township, including the north-south center line. The resurvey was conducted by Dollarhide, Cadastral Surveyor, BLM, from June 11, 2007, to July 23, 2008, for the purpose of delineating all of the remaining public lands in the Township. See Special Instructions, dated Sept. 20, 2006, at unpaginated 2. The Special Instructions for the resurvey explained that “[t]he field work embraced in this authorization is limited to the necessary retracements, resurveys and surveys to define certain Public Domain Lands in T. 42 N., R. 13 W., [NMPPM].” *Id.*

During a preliminary search for all of the monuments and other calls of record for the relevant original corners of the Wheeler and Nickel surveys, Dollarhide located some of Wheeler’s actual or perpetuated original corners on the east boundary, but none of Nickel’s actual or perpetuated original corners on the north-south center line and other subdivisional lines of the Township. Dollarhide stated in his report:

We focused our work along the [National] [F]orest boundary as it runs through the center of the township from south to north, as well as the two tiers of subdivisional lines east and west from sections 13-18 and sections 19-24. We searched for the original corners as well as any court ordered corners along these lines. Evidence of the 1881 original Nickel survey has been proven to be hard to find.

Dollarhide Report at unpaginated 2. Dollarhide, however, did not conclude that the Nickel survey was fictitious. Despite not finding evidence of Nickel’s corners, Dollarhide noted that the Nickel survey “was completed in the usual 6 day time frame that seems to be the standard among the old contracts . . . . My experience in the past retracing Nickel townships ha[s] revealed no found corners in two other attempts in townships with dramatically less topographical relief.” *Id.* He thus determined that the corners along the north-south center line were lost, rather than existent or obliterated, and reestablished them by the method of proportionate measurement. See Field Notes at 1; see also *id.* at 8-26.<sup>8</sup>

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<sup>8</sup> During the course of the resurvey, Dollarhide attempted, but was unable, to find other original Nickel corners in the interior of the Township, for the purpose of finding closer (or “intervening”) controlling corners, to be used for proportionate measurement. See Field Notes at 12, 15, 19, 22, 25; Answer at 8-9 (“BLM did not find any evidence of the original 1881 Nickel survey of the subdivisional lines” (citing Decision, Background, at unpaginated 3)). Thus, he generally reestablished the section corners by relation to the exterior boundaries of the Township.

Dollarhide generally relied on the 1938 Chatfield-Foster resurvey to the extent it was deemed to have properly reestablished the interior corners by proportionate measurement:

The Chatfield-Foster resurvey found no evidence of the corners from the Nickel 1881 survey of the subdivisional lines after a search of the entire township. Chatfield-Foster retraced the exterior boundaries of the [T]ownship and, by proper application of proportionate measurement, according to the law, reestablished certain lost corners [in the interior of the Township] from the Nickel survey.

Preliminary to th[e] [2008] resurvey, the lines of the prior surveys were retraced and a diligent search was made for all corners and other calls of the record. Identified corners were remonumented in their original positions. Where possible, lost corners were reestablished and remonumented at proportionate positions based on the official record and the record of the Chatfield-Foster survey. . . . Corners recovered from the Chatfield-Foster survey, deemed to be located in their original position without gross error, were accepted as controlling the location of Federal lands.

Field Notes at 1; *see id.* at 8-26.

In the case of the north-south center line of the Township, Dollarhide generally found no evidence of the corners established by Nickel or reestablished by the 1938 Court resurvey, but relied on the proportionate distances either from the original survey or the 1938 Court resurvey. Dollarhide started from what he considered valid perpetuations of the original corners at either end of the line, on the exterior north and south boundaries of the Township.<sup>9</sup> He then reestablished all of the intervening interior corners by proportionate measurement. *See* Field Notes at 1, 8-26.

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<sup>9</sup> At the south end of the north-south center line (SE corner of sec. 33), Dollarhide found a BLM remonumentation of the original corner, set in 1969 and approved on May 15, 1973, which was tied to “the only remaining original bearing tree,” and, at the north end of the line (NE corner of sec. 4), he found a locally established monument, which was considered a valid perpetuation of the original corner. Field Notes at 8-9; *see id.* at 26. Wiley, the private surveyor employed by MFLP and Greenfield, appears to have accepted both of these corners. *See id.*; Plat of Survey, East Line of Sections 16, 21 & 28, Wiley, dated July 11, 2003 (“FOUND STANDARD BLM MONUMENT” (SE corner of sec. 33)); Plat of Survey, All of Sections 4 and 9, *Et Al.*, Wiley, dated Oct. 24, 2000 (“FOUND REBAR AND 3 1/4" SURVEY CAP L.S. 24954” (NE corner of sec. 4)).

Dollarhide remonumented all of the corners along the north-south center line. He also noted the existence of remnants of the north-south “U.S. Forest Fence,” which had generally followed the center line resurveyed by Chatfield and Foster, coinciding with, but at other times diverging from, the center line. *See* Dollarhide Report at unpaginated 4 (“Evidence of the [National] [F]orest boundary fence shown on the 1938 plat is still intact in several places and has been rebuilt over the years. All evidence seems to show the fence is relatively close to where the 1938 plat shows it to be from the south boundary of the township north to approximately E1/4 of section 16. At this point all evidence of any old fence line disappears.”).

Dollarhide generally concluded that there was no gross error in the 1938 Court resurvey of the north-south center line, “with the one exception being the 1/4 section corner of sections 27 and 28 [E1/4 corner of sec. 28], which was established 315 feet north and 312 feet west of the proper position.” Decision, Reasons for Dismissal, at unpaginated 1;<sup>10</sup> *see* Field Notes at 13 (“This monument was reestablished in the wrong location and is not utilized in the course of this survey”); Dollarhide Report at unpaginated 3, 5. In the case of this corner, he relied on the proportioning distances from the original record. *See* Field Notes at 13. He also rejected the proportioning distances from the 1938 Court resurvey for the NE corner of sec. 33, relying instead on the original record. *See id.* at 9.

The Chief Cadastral Surveyor, Colorado, BLM, accepted the Dependent Resurvey on December 22, 2008. Thereafter, on December 31, 2008, BLM officially filed the survey plat for the Resurvey. Notice of the official filing of the plat was published in the *Federal Register* on January 14, 2009. *See* 74 Fed. Reg. 2090 (Jan. 14, 2009).

### C. Original Appeals & June 2009 Board Order

In consolidated appeals, MFLP (IBLA 2009-112) and Greenfield (IBLA 2009-113) objected to BLM’s December 22, 2008, acceptance of the Dependent Resurvey and December 31, 2008, official filing of the survey plat for the Resurvey. They alleged that BLM improperly resurveyed the north-south center line, contrary to the Survey Manual, “significantly” deviating “from all historical private surveys” in a manner that substantially reduced the acreage of MFLP’s private landholdings and placed its private improvements within the National Forests. NA/Petition

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<sup>10</sup> Attached to BLM’s August 2013 decision were, *inter alia*, an unpaginated “Background and History” (Enclosure 3) (Background) and “Reasons for Dismissal of Protest” (Enclosure 4) (Reasons for Dismissal). We will separately cite to each of the attachments.

(IBLA 2009-112) at 2. They stated that the Resurvey moved the original north-south center line significantly further to the west, at times over 1,000 feet, away from the longstanding boundary between the private and National Forest lands reestablished by Wiley, which had long been demarcated by fences, thus resulting in the inclusion of over 450 acres of private land in the National Forests. See NA/Petition (2009-112) at 5 (citing County Road Preliminary Map).

MFLP asserted that Chatfield and Foster “expressly found that the 1881 Nickel survey was fictitious,” and that, “[d]espite that finding, the BLM Cadastral Surveyor failed to use the best evidence of the original survey, instead relying entirely on the 1938 Survey.” *Id.* at 6; see also *id.* at 5 (“[A]n independent resurvey is inappropriate where there is evidence of the original survey. In the field notes of the 1938 survey, the surveyors expressly stated that no evidence of the original survey had been located, and the commissioned surveyors made the 1938 survey adopting the premise that the original GLO survey had never actually been done.”) (emphasis in original). MFLP thus concluded that BLM inappropriately relied on the 1938 survey, which had dismissed the original 1881 survey as having never been performed: “[T]he intent of the Chatfield-Foster survey was not the dependent retracement of the 1882 survey, and it . . . thus cannot be relied upon as a faithful dependent perpetuation of corners located in that . . . survey.” *Id.* at 8.

By Order dated June 15, 2009, the Board set aside BLM’s December 31, 2008, official filing of the survey plat for the Dependent Resurvey, and remanded the matter to BLM. The Board’s decision was based on a procedural error: BLM’s failure to notify the public prior to the official filing of the plat for the Survey. Thus, on remand the Board directed BLM to “provide notice to interested parties, including landowners, that it will be officially filing the plat of Dependent Resurvey at a future date and offer the opportunity to file a protest within a time certain.” Order, *MFLP*, IBLA 2009-112 and 2009-113 (June 15, 2009) at 6, 8.

#### *D. Protest, BLM Decision, & Present Appeal*

BLM provided notice of the proposed official filing of the survey plat for the 2008 Dependent Resurvey by publication in the *Federal Register* on July 14, 2009, affording members of the public an opportunity, until August 28, 2009, to file protests thereto. 74 Fed. Reg. 34035 (July 14, 2009). On August 27, 2009, MFLP filed a protest, stating that “the Surveyor failed to follow the Bureau of Land Management’s Survey Manual . . . [by] failing to determine whether the original survey was in fact fictitious, and/or fail[ing] to use the best evidence of the original survey in the making of the dependent resurvey.” MFLP Protest at 1. MFLP stated that “[b]ecause the BLM does not find the 1882 survey to [be] fraudulent, the proper survey to be conducted is an actual Dependent Resurvey reconstructing the original 1882 survey,

not the 1938 state court survey.” *Id.* at 8. MFLP further stated that “[h]ad the BLM concluded that the 1882 survey was fraudulent, the special instructions to establish the USFS [U.S. Forest Service] boundary in this case would have had to have required an independent resurvey.” *Id.*

The State Director dismissed MFLP’s protest in his August 29, 2013, decision, concluding that MFLP had failed to establish, by a preponderance of the evidence, that the 2008 Dependent Resurvey was not an accurate retracement and reestablishment of the lines of the original survey. *See* Decision at 1-2; Decision, Reasons for Dismissal, at unpag. 7. The State Director acknowledged that the original 1881 Nickel Survey “was clearly fictitious,” but that BLM properly employed “dependent resurvey methods to restore the 1938 Chatfield-Foster survey, according to the best available evidence of that survey, because to reject that survey would be to disrupt property rights which have been in place for close to 70 years, thus violating bona fide rights protected in principle by 43 U.S.C. § 772 (2000).” Decision, Reasons for Dismissal, at unpag. 4. BLM concluded that:

The 1938 Chatfield-Foster survey, performed at the behest of the State Court, officially accepted by the State Court, duly relied upon by local [private] landowner[s] for title location and conveyances, and carefully reviewed by the GLO in 1939, fulfilling the requirements in [Section] 6-28, *Manual of Surveying Instructions, 1973*, and the good faith location rule, must be utilized to protect bona fide rights.

*Id.*; *see also* Decision, Background, at unpag. 3 (“Not finding any evidence of the original 1881 Nickel survey, the BLM utilized evidence of the 1938 Chatfield-Foster survey which appeared to have been established in good faith and without gross error.”); Decision, Reasons for Dismissal, at unpag. 4-5 (“In 1938, the GLO stated that the 1938 Chatfield-Foster survey followed proper procedures [under the Survey Manual]. In 2008, the BLM agreed.”).

MFLP filed a timely appeal from the State Director’s August 2013 decision, challenging BLM’s 2008 Dependent Resurvey on the basis that it “is not an accurate retracement and reestablishment of the original survey, contains gross error, and fails to conform to the [Survey Manual].” NA/SOR at 1-2. In support of its appeal, MFLP provided a report, prepared by John S. Parrish, a consultant who examined the location of the north-south center line of the Township. *See* Report on Findings, Analysis, Opinions and Recommendations, dated Apr. 26, 2013 (Ex. 2 to NA/SOR) (Parrish Report).<sup>11</sup> Based on this report, MFLP concludes that “the entirety of the interior

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<sup>11</sup> The Apr. 26, 2013, Parrish Report was submitted to, and reviewed by, BLM, in connection with issuance of the State Director’s August 2013 decision.

subdivision line survey made by Nickel was fraudulent.” NA/SOR at 2. MFLP thus alleges that BLM erred in not conducting an independent resurvey when the 1938 Chatfield-Foster Survey was a “grossly erroneous, dependent survey of an admittedly fraudulent original survey.” *Id.* at 12. MFLP asks the Board to order BLM to perform an independent resurvey of the Township; find that the Wiley Survey reflects MFLP’s bona fide rights; and order BLM to generate a metes-and-bounds surveyed description of the tract of land owned by MFLP. *Id.* at 28. MFLP also petitions this Board for discovery and a hearing and/or oral argument. *Id.* at 29-31.

#### LEGAL FRAMEWORK

BLM, as the delegate of the Secretary of the Interior, is authorized, pursuant to the Act of March 3, 1909, 43 U.S.C. § 772 (2012), to resurvey the public lands in order to reestablish the corners and lines established by earlier official surveys. *Howard Vagneur*, 159 IBLA 272, 277 (2003). Under the statute, “no . . . resurvey or retracement shall be so executed so as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.” 43 U.S.C. § 772 (2012); *see, e.g., Longview Fibre Co.*, 135 IBLA 170, 183 (1996) (“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 (1988) to take this into account.”).

[1] A dependent resurvey is designed to retrace and reestablish the lines of the original survey, marking the boundaries of the legal subdivisions of the public lands, in their “true original positions according to the best available evidence of the positions of the original corners.” Bureau of Land Management Cadastral Survey, U.S. Department of the Interior, Manual of Surveying Instructions for the Survey of the Public Lands of the United States (Survey Manual) (2009) § 5-10, at 130;<sup>12</sup> *see, e.g., Rudy Hillstrom*, 180 IBLA 388, 400 (2011); *Howard Vagneur*, 159 IBLA at 277, 278; *Theodore J. Vickman*, 132 IBLA 317, 321 (1995). A dependent resurvey places the lines in the same position on the earth’s surface that they have occupied since the date of the original survey, thus fulfilling BLM’s duty, under 43 U.S.C. § 772 (2012), to protect the bona fide rights of private landowners whose property rights are tied to the original lines. *See Rudy Hillstrom*, 180 IBLA at 400; *Howard Vagneur*, 159 IBLA at 277; Survey Manual §§ 5-10 and 5-24 to 5-26, at 130, 133. As stated more fully in *J.M. Beard (On Rehearing)*, 52 L.D. 451, 453 (1928):

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<sup>12</sup> Cites to Survey Manual refer to the current version of the Manual, which was published in 2009, unless otherwise noted.

[T]he section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of the lands patented on the basis of the plat of the original survey. . . . In legal contemplation, and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

*See also* Survey Manual § 5-10, at 130. Further, as we have explained, “[t]he proper execution of the dependent resurvey serves to protect the bona fide rights of the land owners, because a properly executed dependent resurvey traces the lines of the original survey.” *Rudy Hillstrom*, 180 IBLA at 400 (quoting *State of Missouri*, 142 IBLA 201, 213 (1998)) (emphasis omitted).

We have long recognized that original lines are to be reestablished under a dependent resurvey by recovering or restoring the original corners by any of three methods, in descending order of importance. *See Howard Vagneur*, 159 IBLA at 277. First, an “existent” corner can be identified by substantial evidence of the monument or its accessories. Survey Manual § 6-11, at 148. Second, an “obliterated” corner, where there are no remaining traces of the monument or its accessories, can be recovered where the corner’s position has been perpetuated, or where other substantial evidence establishes its location. *Id.* § 6-17, at 149. Third, where a corner cannot be considered existent or obliterated based on substantial evidence regarding its location, it will be regarded as a “lost corner” to be restored by reference to one or more interdependent corners, and thus by the method of proportionate measurement, in harmony with the record of the original survey. *Id.* §§ 7-1, 7-2, at 165; *see, e.g., Kendal Stewart*, 132 IBLA 190, 194-95 (1995); *James O. Steambarge*, 116 IBLA 185, 191 (1990); *Stoddard Jacobsen*, 85 IBLA 335, 336 (1985).

Where, however, BLM properly concludes that the original survey was not undertaken or is otherwise fictitious or fraudulent, and thus it cannot reestablish the corners and lines established by earlier official surveys, BLM is generally required to conduct an independent resurvey. The Survey Manual explains: “[T]he methods of the independent resurvey are employed if there are intolerable discrepancies in the original survey. This occurs where the early survey was not faithfully executed with the result that some lines were not established and therefore have no actual existence and cannot be reconstructed to conform to the fictitious record.” Survey Manual § 5-32, at 134; *see Theodore J. Vickman*, 132 IBLA at 329 (“It seems a matter of elementary logic that, where the original lines of survey were never run, it is impossible to ‘reestablish’ such lines ‘in their true original positions,’ since such positions never existed.”).

The independent resurvey will establish new section and township lines independent of and without reference to the corners of the original survey. See Survey Manual § 5-12, at 130; *J.M. Beard (On Rehearing)*, 52 L.D. at 454. In doing so, BLM preserves the boundaries of the lands patented in accordance with the original survey, determining their position on the ground according to the best available evidence of their true original position, thus fulfilling BLM's duty, under 43 U.S.C. § 772 (2012), to protect the bona fide rights of private landowners and their successors-in-interest, whose property rights are tied to the original lines. See Survey Manual § 5-52, at 138 ("An independent resurvey can include an official running and marking of new township and section boundary lines without regard for the location of the record lines and corner monuments or other marks of the prior official survey that the independent resurvey is designed to supersede. . . . The subdivisions . . . patented . . . are in no way affected as to location."). The boundaries of the tracts of patented lands are separately determined by a metes-and-bounds survey, and the resulting tracts are segregated from the newly-created section and other subdivisional lines of the independent resurvey. See *id.* §§ 5-12, 5-53, at 130, 138 ("The tract segregation merely shows where the lands of this description are located with respect to the new section lines of the independent resurvey"); *Tracy V. Rylee*, 174 IBLA 239, 247 (2008) ("[T]racts 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.'" (quoting *Leland Q. Phelps*, 134 IBLA 124, 128 (1995), citing 1973 Survey Manual § 6-5, at 145).

However, it is not always the case that an independent resurvey *must* occur when an original survey is determined to be fictitious. This Board has recognized that

[N]o hard and fast rules can be formulated which will fairly deal with [] myriad factual situations which might arise in the context of a fraudulent survey. Rather, each such case must, as suggested by the [*Survey*] *Manual* itself[,], . . . be approached with due attentiveness to the facts and equities as they appear in the record.

*Theodore J. Vickman*, 132 IBLA at 329. In *Theodore J. Vickman*, for example, we determined that the relevant exterior and subdivisional lines of the original survey had never been run, thus calling into question "the propriety and acceptability of utilizing dependent resurvey procedures," and concluded that the original survey could not be relied upon to protect the bona fide rights of the private landowner. *Id.* In that case, however, we recognized that a different result was reached in *J.M. Beard (On Rehearing)*, where the First Assistant Secretary affirmed a dependent resurvey of interior lines of a township where it was conceded that the lines were never run, because the bona fide rights of the Forest Service, vested in those lines, predated the appellant's bona fide rights. See *Theodore J. Vickman*, 132 IBLA at 329 n.8 ("[T]he

ultimate predicate for rejecting a challenge to the resurvey . . . was the fact that, at the time Beard acquired his asserted title to the land in question, the parcel was already occupied by a Forest Service Ranger station.”) (citing *J.M. Beard (On Rehearing)*, 52 L.D. at 451).

Ultimately, in order to overturn a dependent resurvey prior to the official filing of the survey plat, a party challenging the resurvey on appeal bears the burden of establishing, by a preponderance of the evidence, that the resurvey is not an accurate retracement and reestablishment of the lines and corners of the original survey. See *Howard Vagneur*, 159 IBLA at 278; *David Viers*, 143 IBLA 209, 218 (1998); *John W. Yeargan*, 126 IBLA 361, 363 (1993).

In objecting to a dependent resurvey, an appellant necessarily challenges the professional opinion of BLM’s Cadastral Survey experts. It is well established that BLM is entitled to rely on the professional opinion of its experts, where the decision at issue concerns matters within the realm of their expertise and is reasonable and supported by record evidence. *Fred E. Payne*, 159 IBLA 69, 77 (2003); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998). An appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert: “[An appellant must show that] BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different . . . interpretation is available and supported by the evidence.” *West Cow Creek Permittees v. BLM*, 142 IBLA at 238. A mere difference of professional opinion will not suffice to show that BLM erred. *Id.* The party “must show not just that the results of [BLM’s] study *could be* in error, but that they *are* erroneous.” *Id.* In general, a party challenging a dependent resurvey “must establish that there was error in the methodology used or the results obtained, or show that the resurvey was carried out in a manner that did not conform to the *[Survey] Manual*.” *Mark Einsele*, 147 IBLA 1, 12 (1998).

#### DISCUSSION

[2] The sole issue before the Board is whether BLM’s 2008 Dependent Resurvey properly reestablished the north-south center line of the Township, denoting the boundary line between appellant’s private property to the west and the National Forests to the east. In support of its appeal, appellant makes three basic arguments. First, appellant argues that because the Nickel survey was fictitious, BLM erred in performing a dependent resurvey and is obligated to perform an independent resurvey. Second, appellant argues that BLM erred in relying on the 1938 Court resurvey because

that resurvey was “grossly erroneous.” Third, appellant argues that BLM’s 2008 Resurvey did not protect bona fide rights.<sup>13</sup>

*A. The Nickel Survey of Subdivisional Lines*

Appellant contends, first and foremost, that BLM improperly resurveyed the north-south center line of the Township by the means of a dependent, rather than an independent, resurvey. Appellant asserts that a dependent resurvey was not permissible, under the Survey Manual, because Nickel’s original survey of the interior lines of the Township “was wholly fictitious.” NA/SOR at 12.

In support of its argument, Appellant relies on the field notes of the Chatfield-Foster 1938 resurvey performed on behalf of the State court, stating that “[n]o evidence of the original survey of the interior lines has been uncovered by any survey since the original survey was allegedly done.” NA/SOR at 12; *see also* 1938 Report at unp. 5 (evidence “prove[s] conclusively” that the subdivisional lines allegedly surveyed by Nickel were “entirely fictitious”). Appellant also relies on the

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<sup>13</sup> Appellant also alleges that BLM’s 2008 Dependent Resurvey was improperly motivated because it was conducted to confirm the survey work undertaken by San Miguel County in 2005 and for the purpose of assisting the County in its condemnation of a right-of-way across the Gray Ranch. Appellant states, for example, that BLM’s Dependent 2008 Resurvey “has created an inequitable result placing the political interests of San Miguel County to condemn an unnecessary road across private land over the bona fide rights of the Appellants.” NA/SOR at 12. Appellant also implies that BLM’s 2008 Resurvey was improperly funded by San Miguel County. *Id.* at 9. There is no evidence, however, that in resurveying the north-south center line, Dollarhide followed the 2005 County survey, which was confined to the right-of-way at issue. Nor is there anything that suggests that BLM had any interest in resurveying in such a way as to place the right-of-way mostly within San Miguel County, thus aiding the County in its condemnation efforts. *See* Information Memorandum/Briefing Paper of Jamie Sellar-Baker, Associate District Ranger, Forest Service, dated Sept. 3, 2008, at unp. 1 (“The survey was conducted to locate the legal public land boundaries, and maintain public access to those public lands. In addition, San Miguel County wished to know the location of the terminus of County Road 40J with the National Forest boundary to help resolve a dispute with private land owners regarding access.”). Nor does the fact that San Miguel County provided funding for BLM’s 2008 Dependent Resurvey, along with the Forest Service, somehow taint BLM’s resurvey. As BLM properly notes, funding by the County is permissible under section 307(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(c) (2012). *See* Answer at 5.

Parrish Report, which similarly concludes the Nickel survey “should be declared fraudulent.” Parrish Report at 15. Parrish’s conclusion is based on his view that Nickel could not have conducted the survey in the short period of time the survey was reported to have occurred, given the terrain and conditions on the ground. Parrish states that Nickel is reported to have surveyed 60 miles of subdivisional lines in the Township, establishing a total of 85 interior corners, over the course of 7 days in the winter (November 18-24, 1881), traversing at times steep or moderate terrain, when there was likely to have been several feet of snow on the ground. *See* Parrish Report at 2, 4. While Parrish acknowledges that there is “a remote possibility that Nickel may have set a few interior corners in the northwest portion of the Township” because the “area is gentle terrain,” he concludes that “[i]t is easy and logical to conclude that Nickel did not survey or monument the section lines within the Township thus perpetrating a total fraud against the government and future patentees.”<sup>14</sup> *Id.* at 4.

With respect to the Chatfield-Foster field notes, appellant fails to recognize that GLO, in reviewing the field notes, did not agree that the Nickel survey was fictitious. Rather, GLO stated that, absent a field investigation, it was not able to determine on its own that Chatfield and Foster were correct in concluding that “the original subdivision of the township is fictitious.”<sup>15</sup> Letter to Commissioner from Supervisor of Surveys, dated June 3, 1939, at 1. Moreover, when conducting the 2008 Dependent Resurvey, Dollarhide was well aware of Chatfield’s and Foster’s conclusion. *See* Field Notes at 1 (“The Chatfield-Foster resurvey found no evidence of the corners from the Nickel 1881 survey of the subdivisional lines after a search of the entire township.”); 24 (“The Court Commissioned surveyors gathered parole evidence from several of the original residents and other land owners in the township that confirmed that no original corners had ever been located inside the township.”). Dollarhide concluded,

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<sup>14</sup> Parrish also notes that, either because he had visited the general vicinity of the interior of the Township or was sufficiently apprised regarding its topographic features, Nickel was able to record calls to actual features in the Township in his field notes, lending credence to Nickel’s representation as having performed the survey. *See* Parrish Report at 2, 4. Parrish concludes, however, that the topographic calls were “blatantly fraudulent,” especially given the “gross disassociation” between topographic features called for in Nickel’s field notes and existing topographic features. *Id.* at 4.

<sup>15</sup> Appellant asserts that BLM, in its August 2013 decision, “appears” to conclude that GLO formally “accept[ed]” the Chatfield-Foster private resurvey, to which it objects, since “[n]o authority is cited supporting the ability of the GLO to ratify a private resurvey through a private letter with no procedural due process whatsoever.” NA/SOR at 14. We find nothing in BLM’s 2008 Dependent Resurvey, its August 2013 decision, or elsewhere in the record where BLM concluded that the GLO formally accepted the private resurvey.

however, that the survey had been conducted, and the corners along the north-south center line were simply lost, rather than existent or obliterated.<sup>16</sup> See Field Notes at 1. Dollarhide thus decided, in accordance with the Survey Manual, that such corners could be reestablished by the method of proportionate measurement, the appropriate method for reestablishing lost corners under a dependent resurvey, by reference to one or more interdependent corners. See Survey Manual §§ 7-1 and 7-2, at 165; e.g., *Kendal Stewart*, 132 IBLA at 194; *James O. Steambarge*, 116 IBLA at 185.

Given this, we do not conclude that Chatfield and Foster were, in 1938, correct in their determination that Nickel's survey of the north-south center line of the Township was fictitious. We are not persuaded by Parrish's assessment that the duration or timing of the Nickel survey establishes that the survey was, necessarily, fictitious. See Dollarhide Report at 2 ("Th[e] [original 1881 Nickel] survey was completed in the usual 6 day time frame that seems to be the standard among the old contracts"). While it is true that none of the Nickel interior corners has ever been recovered, see Parrish Report at 4-5, given the passage of over 50 and 100 years before any serious effort was made to look for monuments and bearing trees at the Nickel interior corners (by Chatfield/Foster in 1938; Wiley in 2000/2003; and BLM in 2007/2008), we do not conclude that the failure to find evidence of the Nickel interior corners is proof that they were never established.

Further, we do not agree with Parrish that the "gross disassociation" he refers to between topographic features called for in Nickel's field notes and existing topographic features necessitates a conclusion that Nickel did not actually survey the interior of the Township. See Parrish Report at 4; see also 1938 Report at unpag. 4-5, 10 (noting inaccuracies between the original Nickel survey and existing topographic features); Memorandum to Bloom from Dollarhide, dated Aug. 20, 2007, at 2 ("Topographical features in the original [1881 Nickel] survey have proven to be highly inaccurate within the township"); Decision, Background, at unpag. 3 ("Topographical features, cited in the original survey, were inaccurate, not matching what was found on the ground."). As the Department of the Interior stated in *J.M. Beard*, topographic features are merely

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<sup>16</sup> Dollarhide's conclusion is consistent with the conclusion reached by the Chief Cadastral Surveyor for Colorado, who stated that BLM's 2008 Dependent Resurvey of the subdivisional lines of the Township discovered "problems" symptomatic of surveys of the 1880s, including, *inter alia*, the fact that the original surveys of that time period "were, in general, poorly executed by the standards of that era," and "[n]atural and human caused disturbances have removed much of the corner evidence (rocks and stakes) of these surveys." Memorandum to Forest Service from Chief Cadastral Surveyor for Colorado, dated Jan. 14, 2009.

incidental in their relation to the lines of the public survey, and performed no function in the establishment of the position of the corners thereof. To attempt to locate legal subdivisions by reference to items of topography in the subdivision of the public lands is to reverse the regular procedure and to clothe these items with an importance to which they are not entitled and which they did not possess at any stage of the proceedings.

52 L.D. 444, 450-51 (1928); *see also J.M. Beard (On Rehearing)*, 52 L.D. at 457 (“Under the circumstances there appears little justification for counsel’s contention that items of topography . . . should thereafter be accorded the dignity of natural monuments to which both courses and distances must give way. No such importance has been attached to items of topography by the General Land Office, the [D]epartment, or the Federal courts.”).

We are therefore not persuaded that the Nickel survey was fictitious and we cannot conclude that BLM was in error in 2008 in conducting its dependent resurvey.<sup>17</sup> Moreover, we conclude that BLM properly exercised appropriate caution in deciding whether the original 1881 Nickel survey was fraudulent, given the proof required to establish the fraudulent nature of a survey, and given the fact that patents had long since been issued in reliance upon the original survey. *See Marshall Dental Manufacturing Co.*, 32 L.D. 550, 553 (1904) (“[T]he proper rule is to refuse to disturb the public surveys, except upon the clearest proof of accident, fraud or mistake, where a resurvey may affect the rights or claims of anyone resting upon the original survey.”); *George S. Whitaker*, 32 L.D. 329, 331 (1903) (“While the government may correct its surveys so as to extend them over lands improperly omitted therefrom, yet when such surveys have been approved, they should not be disturbed, especially after the lands surveyed have been disposed of and after a long lapse of time from the approval of the survey, except upon the clearest proof of an evident mistake or fraudulent conduct on the part of those charged with the execution of such surveys.”). Appellant has not met its burden to demonstrate otherwise.

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<sup>17</sup> It is true, as appellant points out, that BLM now appears to agree that the original Nickel survey was fictitious. *See NA/SOR* at 12-13; Decision, Reasons for Dismissal, at unpag. 4 (“[A]t issue in this case is whether the BLM erred in employing dependent resurvey methods in a township in which the original survey was clearly fictitious.”). However, this was not BLM’s view when it conducted the 2008 Dependent Resurvey.

*B. The 1938 Court Resurvey*

Appellant argues next that, in conducting its 2008 Dependent Resurvey of the north-south center line of the Township, BLM improperly relied on the 1938 court resurvey, which was “grossly erroneous.” NA/SOR at 22. Appellant relies on the Parrish Report, which concluded that the 1938 survey contained gross errors; in particular, appellant points to an Addendum to the Parrish Report (Addendum) (Ex. 3 to NA/SOR), which criticizes BLM’s analysis of the measurements made by Chatfield and Foster. Parrish’s conclusion that there was gross error in the 1938 Court resurvey is based on the considerable disparity between the reported locations of corners principally along the east boundary and north-south center line of the Township, as reported by Chatfield and Foster and accepted by Dollarhide. See Parrish Report at 7-8, 16 (“Chatfield and Foster . . . failed to establish corners at proper proportionate positions even using the exterior corners of the Township”), Attachment B; Addendum at 1 (“What is so obvious is the total lack of attention to the ‘really gross’ measurement errors, by the 1938 C-F survey, along the east boundary of the subject township”), 2, 3. Appellant also notes that BLM acknowledged, in its decision, that the 1938 Court resurvey “could have been measured to a higher standard,” thus admitting that it contained “significant error,” which BLM stated that it was willing to overlook in order to protect bona fide rights that had relied on the resurvey. NA/SOR at 23 (quoting Decision, Reasons for Dismissal, at unp. 2).

It is correct that BLM acknowledged there was some error in the 1938 Court resurvey, but BLM determined that the error did not rise to the level of gross error. In its Decision, BLM stated that “[t]he measurements of the 1938 Chatfield-Foster survey were acceptable, considering the technology of the era, the terrain and ground vegetation.” Decision, Reasons for Dismissal, at unp. 1; see also Dollarehide Report at 5 (“Overall, the corners we located from the 1938 survey[] appear to have been established in good faith and without gross error.”). BLM admitted that some of the error it detected exceeded an error of 10 feet per 1/2 mile, which Parrish had advanced as a suitable standard. See Decision, Reasons for Dismissal, at unp. 1. BLM noted, however, and Parrish agreed, that 10 feet per 1/2 mile “is not a known standard to evaluate prior official surveys,” or, as in this case, a private resurvey. *Id.*; see Answer at 16 (“That standard, however, is not recognized by any authority as constituting acceptable error.”); Addendum at 2 (“I recognize that there is no measurement standard, used by the BLM, for evaluating local surveys.”).

In determining whether any error in the 1938 resurvey made BLM’s reliance on it improper, we look only to the corners along the north-south center line, since that is all that is at issue, and note that there is very little discrepancy between the Chatfield-Foster and Dollarhide corners, both of which were established by

proportionate measurement.<sup>18</sup> See Parrish Report, Attachment B; Addendum at 3. Indeed, Parrish states that, in the case of 2 exterior corners and 5 interior corners along the center line and 2 other interior corners in the west half of the Township, the comparison of the Chatfield-Foster and Dollarhide corners “show[s] errors . . . ranging between 44 feet and 295 feet,” or a mean error of “approximately 115 feet (approximately 1.7 chains).” Parrish Report at 8. Although Parrish characterizes these differences as “gross error,” *id.*, we disagree. Further, our view that there was no gross error in the case of the center line is consistent with the GLO’s assessment that the Chatfield-Foster resurvey had “follow[ed] appropriate dependent procedure and . . . the results are substantially correct.” Letter to Commissioner from Supervisor of Surveys, dated June 3, 1939, at 1.

Moreover, Dollarhide’s approach in 2008 reflects that he did not simply accept the 1938 Court resurvey, as asserted by MFLP. See NA/SOR at 21 (“[T]he BLM dependent resurvey was dependent not on the original survey, but on the Chatfield-Foster Survey.”). In using the method of proportionate measurement, Dollarhide considered the efforts of the 1938 surveyors, who had already used the method of proportionate measurement. See 1938 Report at unp. 6 (“[T]he corners [will] be set by the double proportion method.”). But Dollarhide sought to confirm the accuracy of the 1938 resurvey, and discarded the results when they did not comport with a proper application of the method of proportionate measurement.<sup>19</sup> The Parrish Report acknowledged Dollarhide’s method, noting that the 2008 Resurvey “utilized a mix of original Wheeler-Nickel monuments and certain monuments they recovered from the 1938 Chatfield-Foster Court ordered resurvey to reestablish lost corners within the Township.” Parrish Report at 7; see *id.* at 14 (“*Mix & Match BLM Dependent Resurvey*”). Moreover, in generally accepting the corners reestablished by the 1938 resurvey, Dollarhide followed the Survey Manual’s directive that “[w]hen a

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<sup>18</sup> There were larger discrepancies on the east boundary of the Township, which BLM and Parrish recognized. See Decision, Reasons for Dismissal, at unp. 2; Answer at 16; Parrish Report, Attachment B. We also note that Dollarhide was well aware of the significant displacement of the boundary, as originally surveyed by Wheeler: “On the east boundary the NE corner of section 24 falls over 19 chains West of the NE corner of the Township.” Dollarhide Report at 3.

<sup>19</sup> For example, Dollarhide’s Field Notes state, at page 9: “Note: Proportion for this corner [NE corner of sec. 33] is based on the original plat due to an error discovered in the proportioning data from the 1938 Court resurvey for the proportioned position of this cor[ner].” This was not the only corner, reestablished by the 1938 resurvey, rejected by BLM. See *id.* at 12-13 (rejecting the E1/4 corner of sec. 28); Dollarhide Report at 3-4, 5, 6.

local reestablishment of a lost corner has been made by proper methods without gross error and has been officially recorded, it will ordinarily be acceptable.” Dollarhide Report at 5 (quoting 1973 Survey Manual § 6-28, at 150); *see also* Decision, Reasons for Dismissal, at unp. 1.

We therefore reject appellant’s assertion that BLM’s 2008 Resurvey was a “perpetuation of a private, grossly erroneous, dependent resurvey of an admittedly fraudulent original survey.” NA/SOR at 12. Rather, we are persuaded that BLM relied, to the extent justifiable, on the proportioning in the 1938 survey, tied to the original record of the 1881 survey of the exterior lines of the Township, and thus properly undertook to independently determine the location of the lost corners in the interior of the Township, along the north-south center line, by means of proportionate measurement in a dependent resurvey. *See, e.g., Alfred Steinhauer*, 1 IBLA 167, 172 (1970) (“In a township where the interior section corner monuments cannot be found, the proper method of determining what land passed from the Government by patent or grant is by proportionate measurement between existing and properly restored corners on the township boundaries without regard to incidental items of topography.”).

### C. *Bona Fide Rights*

Appellant last argues that BLM’s reliance on the 1938 Court resurvey did not properly protect bona fide rights, and instead upset longstanding bona fide rights acquired before that resurvey. *See* NA/SOR at 19-20. Appellant first argues that BLM’s reliance on the 1938 Court resurvey is misplaced because BLM’s jurisdiction is limited to determining property boundaries affecting the public lands, and the 1938 resurvey “determined the property boundaries as between the private landowners in the western half of the township,” and “did not resolve any boundaries as between the private land owners and the [F]ederal land, as that court lacked jurisdiction to do so.” *Id.* at 19. Appellant also takes issue with BLM’s statement in its Decision that the 1938 resurvey was “relied upon by affected landowners.” *Id.* at 18 (quoting Decision, Reasons for Dismissal, at unp. 1).<sup>20</sup> Appellant argues that the local landowners did not accept the survey, as evidenced by the record of correspondence between the

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<sup>20</sup> Appellant also states that the private resurvey was never properly recorded in the county records for San Miguel or Dolores County. *See* NA/SOR at 18, n.11. This is incorrect. The Field Notes of the 2008 Resurvey state, at page 1, that the 1938 resurvey was documented in the records of both counties. *See also* Decision, Background, at unp. 1 (“The [State court decree, which approved the private resurvey,] . . . can be found at San Miguel County Reception No. 80782, Book 179, Pg. 313, recorded on August 28, 1939, and Dolores County Reception No. 40150, Book 62, Pg. 471, recorded on August 30, 1939.”).

landowners and GLO at that time. See NA/SOR at 19-21. Appellant states: “As shown by the acknowledgement in the Denial that fences had to be moved to conform to the Chatfield-Foster Survey, it is clear that the surveyors did not take into account the good faith attempts of the owners along those boundaries to locate despite the fraudulent original survey.” *Id.* at 20; see also *id.* at 24-25 (“It is unclear from the BLM Denial why the BLM considers the Chatfield-Foster Survey, which clearly and explicitly did not give deference to the attempts of the existing landowners to locate their boundaries, to be better evidence of the bona fide rights than actual documented improvements along those boundaries.”).

Appellant further argues that BLM’s decision ignored the “good faith attempt to locate on the ground” in reliance on the “historic fence and/or the current fence between Appellant’s property and the public land.” NA/SOR at 24. Appellant asserts that the Forest Service and BLM “expressed collective consent and approval” of the Wiley private resurveys. *Id.* at 6. MFLP states: “The line on which the fence was constructed was agreed upon by the landowner, the Forest Service, and the BLM, after the landowner commissioned a private survey in cooperation with those agencies.” *Id.* at 24. Appellant therefore concludes that the Wiley resurveys better represent what was “acceptable to all parties involved including the Forest and BLM,” and that BLM’s dependent resurvey “upset[] these long understood locations in complete contravention to the bona fide rights reflected by those attempts to locate as indicated by the general acceptance of the lines and improvements constructed in reliance of those lines.” *Id.* at 26-27.

BLM argues in favor of its reliance on the 1938 Court resurvey, which BLM asserts had long been relied upon, if not accepted, by private landowners and the Forest Service. BLM acknowledges appellant’s statement that BLM’s jurisdiction is “limited” in that the agency “only determines [F]ederal interest boundaries.” Answer at 16. BLM, however, explains that while this is correct, “it does not mean that the BLM only looks to bona fide rights on the boundary line in question.” *Id.* BLM explains:

BLM agrees that the State Court does not have general jurisdiction to locate the boundary of [F]ederal land. However, if during an official (BLM) resurvey of a State Court decreed survey, the results are found to be compatible with the rules of the Manual of Surveying Instructions, with the overarching theme of stabilizing property lines and protecting bona fide rights, then such a [re]survey may be accepted.

*Id.* at 17.

In addition, BLM states that it neither officially nor unofficially accepted the Wiley resurveys, even though they may have also been relied upon by private landowners since they were not deemed to be compatible with the Survey Manual. Answer at 12 (“[S]tatements that the BLM assented to the survey work by Mr. Wiley . . . are not true. The BLM did not silently assent or concur in writing or by verbal communication.”) (quoting Decision, Reasons for Dismissal, at unpaginated 5). BLM states that while the agency “is sympathetic to the plight of the Appellants, their private survey was not endorsed by the BLM . . . and . . . did not meet proper standards.” *Id.* at 17; *see also* Decision, Background, at unpaginated 3 (“The corners established by Mr. Wiley on the Forest boundary were not utilized by the BLM because those corners . . . did not use acceptable methods to establish lost corners, according to the *Manual of Surveying Instructions*”); Answer at 13 (“The survey by Mr. Wiley . . . was rejected by the BLM because the survey was not a careful and faithful retracement of *any* prior survey and was not in conformance with the Survey Manual.”); Decision, Reasons for Dismissal, at unpaginated 5 (“[O]nly surveys duly accepted and approved by the Secretary of the Interior can identify public lands or the corner and lines thereof.”).

Further, we find no evidence in the record of official acceptance by BLM or the Forest Service of the Wiley private resurveys. Nor is such acceptance reflected in the Deposition Transcript of Dennis L. Valdovinos, Land Surveyor, GMUG National Forests, dated September 18, 2013 (Ex. 4 to NA/SOR), the February 5, 2009, Affidavit of Todd E. Gray (Ex. 5 to NA/SOR), or the September 24, 2013, Wiley Affidavit (Ex. 7 to NA/SOR), all of which are cited by MFLP.<sup>21</sup> Instead, the record supports BLM’s position. *See* Memorandum to Forest Service and BLM, from Chief Cadastral Surveyor for Colorado, dated July 20, 2006, at unpaginated 2 (“It is our opinion, based on an examination of the record, that the [Wiley] . . . survey is highly questionable. However, a cadastral survey is required to make the final determination.”); E-Mail to County Commissioner, San Miguel County, from San Miguel County Attorney, dated June 16, 2006, at 4 (“[At a September 2005 meeting,] Valdovinos . . . indicated that . . . while he had advised the landowner that he did not object to the [private] survey results, neither he, nor the USFS, had granted official acceptance or approval to the

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<sup>21</sup> These documents reflect assumptions made by Valdovinos and Gray that BLM’s surveyor, Randy Bloom, had approved the survey. *See, e.g.*, Deposition Transcript of Valdovinos at 33 (“[I]n my view, since Mr. Bloom did not voice his opinion against the Mesa [s]urvey . . . plat, it was – we would move forward with it.”); Gray Affidavit at ¶ 9 (“In response to questions from Dennis [Valdovinos, during a phone call placed by him, in the presence of Gray, following the private survey,] Randy [Bloom] indicated that he had some questions about the techniques used by Mr. Wiley, but that generally, he approved of the survey and said we should build our fence line based upon the survey.”).

Mesa survey or the location of the boundary fence in accordance with applicable [F]ederal laws and reg[ulation]s.”); E-mail to Robert Clark from San Miguel County Attorney, dated June 12, 2006, at 4-5 (“[At a September 2005 meeting,] Valdovinos stated that he advised the[] [private landowners] that, while the USFS was not officially accepting the survey, . . . it was their decision whether or not to rely upon it for building their fence.”).

Moreover, BLM states that landowners were required to move fences based on the 1938 Court resurvey, and “[t]o disturb that now, would wreak havoc on those established boundaries.” NA/SOR at 17. As BLM explained, in conducting its 2008 resurvey, the agency concluded that each of the Chatfield-Foster corners constituted “a local reestablishment of a lost corner . . . made by proper methods without gross error,” which was officially recorded and thereafter relied upon by affected landowners, and thus “will ordinarily be acceptable,” in accordance with the Survey Manual, since it constituted “the best remaining evidence of the position of the original corner” and thus protected the bona fide rights that relied upon these corners. Answer at 10 (quoting 1973 Survey Manual § 6-28, at 150); *see id.* at 11 (citing Decision, Reasons for Dismissal, at unp. 4).

In considering the issue of bona fide rights, we find instructive the Department’s early decision in *J.M. Beard (On Rehearing)*. In that case, a successor-in-interest to the original patentee held patented land adjacent to a National Forest, where an original survey of the subdivisional lines of the township was fictitious. In the original decision, *J.M. Beard*, 52 L.D. 444 (1928), the First Assistant Secretary upheld the GLO’s 1927 dependent resurvey of the relevant subdivisional lines of a township, which was deemed, even despite the absence of any original corners, to have been originally surveyed in the late 1800s, placing a Forest Service ranger station on Federal land, in the face of a later private resurvey that placed the station on adjacent private land. *See J.M. Beard*, 52 L.D. at 446-47. In dependently resurveying the subdivisional lines of the township, the GLO had worked off of the exterior boundaries of the township, which had been originally surveyed, and reestablished the lost interior corners by proportionate measurement from the original or reestablished exterior corners. *Id.* at 447.

On rehearing, the First Assistant Secretary recognized that the boundaries at issue had not actually been run, since the original surveys, to the extent they had delineated the subdivisional lines of the township, were fictitious. *See J.M. Beard (On Rehearing)*, 52 L.D. at 459 (stating that the reported surveys of the subdivisional lines were “purely fraudulent and entirely fictitious”). The First Assistant Secretary declined, however, to reestablish the relevant subdivisional lines by independent resurvey. He explained that since the dependent resurvey had properly reestablished the missing corners in the interior of the township by the method of proportionate

measurement, it thus protected the bona fide rights of the Forest Service and the appellant controlled by the corners and corresponding lines:

The fact that the original surveys of the subdivisional section lines of the township were fraudulent does not render inappropriate the reestablishment of original corners (or establishment of corners reported to have been set, for in fact no original corners were established in the interior of the township), by proportionate measurement based upon the recorded courses and distances shown upon the original township plats.

The proper method of determining what land in the township did pass from the Government by patent or grant is by determining, by proportionate measurement between the identified original or restored corners on the township boundaries, using the recorded bearings and lengths of the subdivisional lines of the township as the basis of proportion, the points which the interior section lines and corners would have occupied had such lines and corners in fact been surveyed and monumented as reported by [the original GLO surveyors].

*Id.* at 460. The First Assistant Secretary also explained that the appellant “did not and could not acquire bona fide rights in any lands except in those contained in [the surveyed lands], in its true original position, as defined by the corners of the original survey.” *Id.* at 458 (emphasis omitted).

At issue in the present case are the bona fide rights of MFLP, together with Greenfield and the other later successors-in-interest to the original patentees along the north-south center line.<sup>22</sup> We find nothing to suggest that MFLP, Greenfield, and the

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<sup>22</sup> Although Parrish refers in his report to the bona fide rights of the original patentees along the center line, these patentees acquired their private lands in the early to mid-1900s, and are no longer alive and do not own the private land at issue. See Parrish Report at 9-10; see also Memorandum to Forest Service and BLM, from Chief Cadastral Surveyor for Colorado, dated July 20, 2006, at unp. 1 (“The dates of patents in this township range from 1918 to 1945.”). Nor is there any evidence of the continued existence, or evidence of the former existence, of any improvements erected by those patentees in reliance on the original survey. See *Tracy V. Rylee*, 174 IBLA at 250 (“Where a[] [patentee] . . . has located improvements or taken other action in good faith reliance on evidence of the original survey[,] . . . bona fide rights are found to exist.”). Parrish, at best, refers to fences in existence at the time of the 1938 Court resurvey, but none follows the center line and, in any event, there is no evidence that any fence was erected by an original patentee in reliance on the original survey. See Parrish Report at 13, 16. Further, we find no evidence that the immediate

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other successors-in-interest, in undertaking land use or erecting improvements, relied on anything other than the recent Wiley private resurveys.<sup>23</sup> As such, none of their bona fide rights, assuming they exist, can be said to have been acquired “in good faith reliance on evidence of the original survey.” Survey Manual § 5-4, at 129. In this situation, we agree with BLM that the bona fide rights of the original patentees or their immediate successors-in-interest and the Forest Service vested in the north-south center line reestablished by the 1938 Chatfield-Foster private resurvey, approved by the State court in *Greager v. McKee*, generally concurred in by the GLO, and now replicated by the 2008 Dependent Resurvey, long predate, and thus take precedence over, any bona fide rights of MFLP, which vested much later based on the recent Wiley private resurveys of that line.

Just as in *J.M. Beard (On Rehearing)*, it is appropriate here to uphold the dependent resurvey of the missing corners on the north-south center line of the Township, where they were properly reestablished by proportionate measurement from valid locations of the original corners on the exterior boundaries of the Township, even though the original subdivisional survey is now considered fraudulent. Similarly, in *Theodore J. Vickman*, where we determined that the relevant exterior and subdivisional lines of the original survey had never been run, thus calling “into question the propriety and acceptability of utilizing dependent resurvey procedures,” we stated that “[m]ore problematic” was “the question how such a situation *should be* handled once it has manifested itself.” 132 IBLA at 329. We added:

It seems axiomatic that no hard and fast rules can be formulated which will fairly deal with [] myriad factual situations which might arise in the context of a fraudulent survey. Rather, each case must, as suggested by the [Survey] Manual itself[,] . . . be approached with due attentiveness to the facts and equities as they appear in the record.

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(...continued)

successors-in-interest of the original patentees relied on the same property boundary lines as their ancestors or that the land use undertaken or any improvements erected by the patentees and acquired by their successors-in-interest are in danger of being located on Federal land by reason of BLM’s 2008 Resurvey.

<sup>23</sup> Parrish only suggests that fences may have been recently located by private landowners along the center line, thus potentially giving rise to bona fide rights. See Parrish Report at 17 (“I believe that the series of resurveys, by Mesa Surveying, coupled with the locations of historic fences, needs to be more closely evaluated and considered as the basis for the location of the Section lines extending north and south through the center of this Township”).

*Id.*

BLM, in the 2008 Dependent Resurvey, used the reported bearings and distances of the original survey, running from the exterior boundaries of the Township, to reestablish, by proportionate measurement, “the points which the interior section lines and corners would have occupied had such lines and corners in fact been surveyed and monumented as reported by [the original GLO surveyors].” *J.M. Beard (On Rehearing)*, 52 L.D. at 460; *see also R.J. Gilmore*, 46 L.D. 288, 289 (1918) (“The object of [43 U.S.C. § 772] is to provide merely for restoration of the old survey . . . . The fact that a senior entryman may have innocently located the lines of his claim at variance with the Government survey, as determined on resurvey, does not entitle him to a metes and bounds survey of his claim to the detriment of a junior entryman claiming according to the true lines.”). By now upholding BLM’s resurvey, we preserve those lines and corners, and thus protect the bona fide rights of the original patentees or their immediate successors-in-interest and the Forest Service, even though doing so is at the expense of MFLP.

Moreover, since we find that BLM’s 2008 Resurvey was properly performed in accordance with the requirements of a dependent resurvey, the Resurvey must, by its nature, be protective of appellant’s bona fide rights. As BLM explains: “The 1938 Chatfield-Foster [re]survey attempted to restore the condition of the original survey location, thus protecting bona fide rights, by proportionate measure[ment] related to the measurements and found existing monuments from the original survey of the subdivisional lines and exterior boundary lines.” Answer at 17-18. Thus, to the extent MFLP’s private lands are determined by the north-south center line, and that line has been placed in the same position on the earth’s surface that it has been in since the lands were patented by the United States to MFLP’s predecessors-in-interest, appellant’s bona fide rights are fully protected. In saying this, we do not deny that appellant will have to move the fence that it has long believed to demarcate the boundary of its lands, and will be prevented from using lands it has long believed were privately-owned.

We therefore conclude that appellant has not met its burden to demonstrate, by a preponderance of the evidence, that BLM’s 2008 Dependent Resurvey was not an accurate retracement and reestablishment of the north-south center line of the Township.

Before finally resolving the appeal, we address several pending motions.

*PENDING MOTIONS*

In our August 26, 2014, Order, we took under advisement MFLP's request for a hearing before an administrative law judge, who would issue proposed findings of fact regarding whether the 1881 Nickel survey was fictitious, which would require BLM to conduct an independent resurvey, or whether BLM adequately protected MFLP's bona fide rights. See NA/SOR at 30-31. We now deny the request, pursuant to 43 C.F.R. § 4.415. Appellant has failed to establish that there exists any issue of material fact that, once proved, would alter the final disposition of the appeal, or even any significant factual issue that could not be resolved without a hearing. See, e.g., *El Rancho Pistachio*, 152 IBLA 87, 96 (2000).

We also deny MFLP's request to conduct discovery by asking the Board to subpoena the testimony of Bloom and Dollarhide, and the field tablets underlying the 2008 Dependent Resurvey.<sup>24</sup> See NA/SOR at 29, 30. The Board lacks the authority to order any form of discovery. See *Firstland Offshore Exploration Co.*, 149 IBLA 117, 127 (1999); *United States v. Collord*, 128 IBLA 266, 366 (1994), *aff'd in part, rev'd in part on other grounds*, No. 94-0432-S-BLW (D. Idaho Aug. 27, 1996), *aff'd*, 154 F.3d 933 (9th Cir. 1998) (“[T]he Department may not . . . issue subpoenas *duces tecum* or subpoenas for depositions for discovery purposes.”). While discovery may take place in connection with a hearing before an administrative law judge, we are not persuaded that the evidence sought is necessary to resolve any issue of material fact, and thus will not order a hearing in order to permit MFLP to pursue discovery. Nor, in any case, will we require BLM to supplement the present record before the Board with the field tablets.

Finally, we deny MFLP's request for oral argument, pursuant to 43 C.F.R. § 4.25, since the written pleadings adequately illuminate the positions of BLM and MFLP regarding the relevant legal and factual issues, and thus no purpose would be served by oral argument. See NA/SOR at 30-31; *Wyoming Independent Producers Association*, 133 IBLA 65, 89 (1995).

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<sup>24</sup> BLM describes the field tablets as follows: “The field tablets are the raw notes of the field surveyor. They are later summarized in[] a more coherent manner and incorporated into the Field Notes that are included []in the administrative record.” Answer at 20.

*CONCLUSION*

We conclude that appellant has failed to establish any error of fact or law in the State Director's August 2013 decision. We therefore conclude that BLM properly dismissed MFLP's protest of BLM's 2008 Dependent Resurvey, to the extent it adopted the north-south center line of T. 42 N., R. 13 W., NMPM, San Miguel and Dolores Counties, Colorado.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR § 4.1, we affirm BLM's decision.

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/s/  
Amy B. Sosin  
Administrative Judge

I concur:

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/s/  
James F. Roberts  
Deputy Chief Administrative Judge