

JOHN W. AND OVADA YEARGAN

IBLA 91-116

Decided June 29, 1993

Appeal from a decision by the Acting State Director, Eastern States Office, Bureau of Land Management, dismissing a protest of dependent resurvey ES-041965 (Group No. 83, Arkansas).

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners. Where a party challenging the filing of a plat for a dependent resurvey fails to meet his burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing a protest of the dependent resurvey will be affirmed.

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

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. Where rights to land are based on patents grounded on the original survey, the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

APPEARANCES: John W. and Ovada Yeargan, Norman, Arkansas, pro sese; Mark D. Etchart, Esq., U.S. Department of the Interior, Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

John W. and Ovada Yeargan have appealed from a November 28, 1990, decision of the Acting State Director, Eastern States Office, Bureau of Land

Management (BLM), dismissing their protest of the dependent resurvey of the exterior boundaries and subdivisional lines of T. 3 S., R. 26 W., fifth principal meridian, situated in Montgomery County, Arkansas.

The exterior boundaries of the township in question were officially surveyed in 1837 and the subdivisional lines were surveyed in 1846. The south and west boundaries and a portion of the east boundary of the township were dependently resurveyed in 1937. Pursuant to a request by the United States Forest Service (USFS) for a dependent resurvey of this township, Special Instructions for Group No. 83, Arkansas, were approved on November 2, 1987. A BLM Cadastral Survey crew, headed by Michael W. Young, performed the field work for the dependent resurvey between December 7, 1987, and July 10, 1989. The Field Notes were approved, and an official plat of survey accepted for the Director, BLM, on January 22, 1990. BLM published notice of the official filing of the plat in the Federal Register, 55 FR 3776, on February 5, 1990, stating that anyone desiring to protest the filing of the plat should do so prior to March 12, 1990. Following receipt of numerous protests, BLM stayed the filing of the plat by notice dated March 7, 1990, pending consideration of all the protests. 55 FR 9779 (Mar. 15, 1990). Thereafter, at the invitation of BLM, the Yeargans filed supplementary information in support of their earlier protest.

In his decision dated November 28, 1990, the Acting State Director, dismissed the Yeargans' protest after considering the information submitted by them as it related to 10 protested corner positions. The Yeargans filed a timely appeal. <sup>1/</sup>

In their statement of reasons (SOR), the Yeargans generally contend that the dependent resurvey is void because it is not a retracement of the original survey, and they present specific arguments and information relating to 7 of the 10 protested corners. They conclude their arguments with an assertion that the resurvey is void because it impairs bona fide rights established under the original survey.

[1] The Secretary of the Interior is authorized to consider what lands are public lands, what public lands have been or should be surveyed, and has the authority to extend or correct the surveys of public lands and make resurveys to reestablish corners and lines of earlier official surveys. Elmer A. Swan, 77 IBLA 99 (1983); see 43 U.S.C. §§ 2, 52, 751-53 (1988).

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

<sup>1/</sup> The BLM decisions dismissing the other protests challenging the dependent resurvey were not appealed.

section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical. Manual of Instructions for the Survey of the Public Lands of the United States (1973) (Manual), 6-4 at 145; Crow Indian Agency, 78 IBLA 7, 10 (1983); Mr. and Mrs. John Koopmans, 70 IBLA 75, 76-77 (1983).

In a resurvey, a corner is categorized in one of three ways. An existent corner is one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplementary survey record, some physical evidence, or testimony. Manual, 5-5 at 130. An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated or may be recovered beyond reasonable doubt based on the acts or testimony of the interested landowners, competent surveyors, or other qualified local authorities, or witnesses, or by some acceptable record evidence. Manual, 5-9 at 130.

A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony which bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners. Manual, 5-20 at 133.

A dependent resurvey seeks to restore what purports to be the original conditions of the official survey according to the record, based, first, upon identified existing corners of the original survey and other recognized acceptable points of control, and second, upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey. Titles, areas, and descriptions should remain unchanged in a typical dependent resurvey. Jean Eli, 78 IBLA 374, 376 (1984). Therefore, the cadastral surveyor's primary responsibility when conducting a dependent resurvey is to act as a "detective" who gathers all available information and uses his best effort to determine the location of all the original corners.

In an appeal from a protest against acceptance of the filing of a plat of a dependent resurvey, the appellant has the burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Peter Paul Groth, 99 IBLA 104, 111 (1987); Stoddard Jacobsen, 85 IBLA 335, 342 (1985).

In this case, appellants allege error in BLM's determinations regarding seven corners of the resurvey. Of those seven, one was determined to be existent, three obliterated, and three lost. Appellants, in their protest, presented arguments regarding these corners which were thoroughly reviewed by BLM in its decision. On appeal, they elaborated somewhat on those arguments. BLM has responded in detail. Accordingly, we will proceed to address individually each corner in question in the order raised by appellants. As a detailed history of each corner may be found in the BLM decision, we will not set forth all of those particulars here.

1/4 Section Corner of Sections 1 and 12

BLM determined this corner to be existent. The 1989 resurvey recovered the aluminum monument and bearing trees set in 1979 by John M. Thorton, a State of Arkansas registered land surveyor, to perpetuate the corner, evidence of both of the original bearing trees, and bearing trees marked in 1958 by Doyce Ward, a surveyor for Dierk's Lumber Company, to perpetuate the corner. BLM concluded that, under the rules of the Manual, this evidence was conclusive of the corner position and that appellants did not submit any evidence or information which would challenge the validity of the corner (Decision at 6).

On appeal, appellants merely point out an inconsistency in the measurement from the 1/4 section corner of sections 1 and 12 to the southeast corner of section 1. They state that the original survey showed this distance as 2609.64 feet, the resurvey as 2598.42 feet, and Thorton as 2600.44 feet.

Such an inconsistency does not establish that this corner was located in error in the resurvey. As discrepancies between measurements in old and more recent surveys are not uncommon, the fact that the measured distances differ is insufficient standing alone to disprove the reestablishment of the corner. Frank Lujan, 40 IBLA 184, 186-187 (1979). Thus, appellants have failed to establish that BLM's determination regarding this corner is in error.

1/4 Section Corner of Sections 11 and 12

BLM determined this corner to be lost and reestablished it by proportionate measurement. Appellants allege that BLM's resurvey of this point is incorrect because it does not match physical evidence on the ground or information included in deeds. They assert that the proportionate position as established by the resurvey is south of the original corner position.

In their protest, they relied upon various deed descriptions which make calls to a road, a railroad dump, and an iron stake. They also relied on an affidavit of W. R. and M. C. Warren, which they asserted "places the 1/4 Section without question."

In its decision, BLM concluded that this corner "cannot be reestablished beyond reasonable doubt on the basis of these deed descriptions and, without conclusive evidence of the monument or accessories, must therefore be considered lost" (Decision at 18). BLM also considered the Warren affidavit and held that it was a "recitation of the 1959 deed description" and did not attest to direct knowledge of the original survey monuments or accessories (Decision at 16).

Appellants contend on appeal that the deeds and affidavit "show the survey being moved south." However, BLM in its decision carefully reviewed appellants' documents and demonstrated the proportioned corner is in harmony with that evidence. BLM made measurements from the proportioned position of this corner point to the road and railroad dump referenced by appellants and favorably compared them with the distances cited in the deeds.

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Where location of a corner cannot be determined from evidence of original accessories, proportionate measurement is a suitable means to determine the corner. James O. Steambarge, 116 IBLA 185, 193 (1990).

BLM held that "[w]hile these deed descriptions were fully employed in searching for evidence of the original corner, no additional physical evidence, or conclusive corroborative evidence, of the original survey monument or accessories was recovered as a result of these measurements" (Decision at 18). Appellants only offer a contradictory opinion and have provided no evidence that could be utilized to determine the location of the original corner.

Corner of Sections 3, 4, 9, and 10

In its resurvey BLM considered this corner to be obliterated. As explained in the decision:

The 1989 dependent resurvey recovered an iron pipe of unknown origin in a collar of stone, and a local bearing tree. A diligent search failed to recover any evidence of the original monument or accessories, or any evidence of conflicting local monuments.

\* \* \* \* \*

The iron pipe monument was reasonably well correlated to other identified corners of the original survey, and was determined to be the best available evidence of the original corner position.

(Decision at 11).

Appellants provide nothing on appeal to dispute BLM's conclusion other than the single sentence that "[t]he branch (creek) seems to be in different places on the 1847 and 1989 surveys."

In its decision, BLM stated: "The original survey made a topographic call to a branch (creek) 35.50 chains south of this corner. The dependent resurvey calls a dry creek bed on the line between sections 9 and 10, at a distance of 35.39 chains from the section corner of sections 3, 4, 9, and 10" (Decision at 11).

In its answer, BLM explained, citing Manual, 5-16 at 131: "While an incidental item of topography such as this is often useful in corroborating other evidence of the position of an original corner, it rarely can be used solely to reestablish an original corner, particularly in view of the somewhat ambulatory nature of water courses" (Answer at 8). Moreover, the call to the creek in the original survey reasonably agrees with the call to the dry creek bed in the dependent resurvey.

Appellants have failed to establish any error in BLM's determination regarding this corner.

Corner of Sections 2, 3, 10, and 11

BLM treated this corner as obliterated since the original monument or accessories were not recovered but other evidence was available to ascertain the corner position. BLM explained that in 1963, J. D. Robbins, Montgomery County Surveyor, perpetuated the position of a corner "which he reported as having been in existence for approximately 50 years at the time of his recovery" by placing a galvanized iron pipe at the corner and marking four new bearing trees (Decision at 8). BLM stated that he recounted that the adjacent landowners at that time accepted the position. In 1982, John R. Archer, a State of Arkansas registered surveyor, recovered the perpetuated corner and replaced the monument with an aluminum post and marked three new bearing trees. The resurvey recovered Archer's monument, two of his bearing trees, and the bearing trees marked by Robbins.

Although in their protest, appellants alleged that the corner was wrong and that Ovada Yeargan had seen a rock pile waist high with a pine knot in it, appellants were unable to locate that monument, stating further on appeal that "[t]he land has been cleared and the mound of stone was destroyed and, of course, I can't say exactly where it was" (SOR at 3). They further questioned Robbins' objectivity and reliability in the matter.

BLM determined the perpetuation to be proper:

Mr. Robbins properly recorded his perpetuation of the position of the local corner 27 years ago, and at that time he approximated the age of the local corner to be 50 years. Mr. Robbins recordation certificate indicates that he confirmed the correlation of the local monument with locally accepted monuments to the north, south, and west, and that it was acknowledged as the proper corner position by the "Blacks, Warrens, Dierks Lbr. Co. and the U.S. Forest Service - all adjacent landowners."

Due to the fact that this monumented position has been recognized as the corner of sections 2, 3, 10, and 11, for approximately 77 years, is reasonably well correlated with other identified corners in the township, had been properly recorded by both Mr. Robbins and Mr. Archer, and was not in conflict with any other monument representing this corner, it was determined to be the best available evidence of the original corner position in the 1989 dependent resurvey.

(Decision at 9).

Although no evidence of the original monument or accessories was recovered, acceptable available evidence was relied upon to establish the corner in question. The Manual, 5-9 at 130, provides that a position is acceptable where the location has been perpetuated or the point is recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, witnesses, or by some acceptable record evidence. Further, such position established by collateral evidence is

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acceptable where it is duly supported through proper relation to known corners. We find the treatment of the subject corner as an obliterated corner to be proper as the resurvey successfully conformed with the survey requirements and the evidence produced was substantial. While appellants disagree with the determined location of the corner position and contend that other evidence is available, none has been produced.

Corner of Sections 1 and 12, Only

BLM considered this corner to be obliterated. Although neither the original monumentation nor bearing trees were located, BLM relied on evidence perpetuating the original corner. In its dependent resurvey, BLM

recovered the remains of the concrete post [set by W. J. Bates, USFS Project Surveyor, in 1934], the aluminum post set by Mr. [Ed] Lazar [State of Arkansas Registered Surveyor] in 1984, the remains of one of Mr. [Theo] Rosenaur's [Polk County Surveyor] bearing trees [marked in 1961], and the 1984 Lazar bearing trees.

(Decision at 7).

Appellants challenge the accuracy of the resurvey by asserting that during his survey in 1961 Rosenaur failed to report recovering the concrete post set by Bates in 1934. They also allege that after Rosenaur marked the corner with an iron pipe the corner position was destroyed when it was bulldozed for a log-loading site. They state that after they complained to USFS about destruction of the site, Lazar found part of the concrete post and reset the monument. They question whether the concrete post "was in the right place, as a bulldozer could have moved the monument" (SOR at 4).

In its decision, BLM acknowledged that Rosenaur did not report recovery of the concrete monument set by Bates in 1934. However, it stated that both perpetuations of the corner were based on the recovery of the remains of the original bearing trees. Further, BLM noted that the whereabouts of the iron pipe set by Rosenaur was unknown, but it observed that "Rosenaur's bearing tree was recovered in the proper relative position to the remains of the concrete monument, and this position was determined to be a careful and faithful perpetuation of the original corner" (Decision at 8).

All available evidence firmly supports the resurvey's decision to locate the corner in question at the assigned position. While the area of the corner monument may have been disturbed, the calls to the found bearing trees from previous surveys perpetuating the corner demonstrate that the assigned position is correct. Appellants have failed to show any error in BLM determination regarding this corner.

Corner of Sections 1, 2, 11, and 12

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BLM reestablished the position of this corner by means of proportionate measurement after failing to recover any evidence of the original monument or accessories. Appellants allege that "Section 1 is not retraced as to the

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original survey" (SOR at 4). Citing the seventh rule of survey, 43 U.S.C. § 751 (1988), that every surveyor must note the true situation of "all watercourses over which the line he runs may pass," appellants explain that north of the subject corner is "a spring that forms a branch 4-5 feet wide and 2-3 feet deep" and that this spring branch "was not a topographic call on the 1847 survey nor is it on the 1989 survey" (SOR at 4). Appellants further contend that an "angle iron" was placed at the corner in 1958 by Doyce Ward, a surveyor for Dierk's Lumber Company, and replaced in 1983.

The origin of the "angle iron" monument cited by appellants has not been documented. BLM reported that Roy Black, a State of Arkansas registered land surveyor, set his corner position in 1983 at an "angle iron and rock pile" and perpetuated it with an aluminum post (Decision at 12). However, BLM explained that Black's monument bore no relation, by record or physical ties, to the corner established by Ward in 1958. The 1958 corner, positioned 69 links southwest of the resurvey corner, was not utilized "due to its poor relationship with other identified corners, and the fact that the 1989 retracement data indicates it was established at record measurement from one direction only" (Decision at 12). The 1983 corner, positioned 49 links northwest of the proportioned corner, was not utilized because "the 1989 retracement data indicates it was established at record measurement from two directions only" (Decision at 13).

The proportionate measurement was not employed until all collateral evidence had been reviewed. See Manual, 5-20, 5-21 at 133. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, from available evidence or testimony. The 1958 and 1983 corners did not afford such reliability. Appellants have provided no evidence that BLM's conclusions in this regard are in error.

The other matter, which was not raised in their protest, the failure of the surveyors to define a known watercourse on the survey and resurvey, does not impeach the integrity of the resurvey. The rule of survey noted by appellants obligates a surveyor of public land to record certain topographic features on his survey. Even assuming that a spring-fed creek does exist, as alleged by appellants, the failure to note it on the field notes of the dependent resurvey is not the type of error which would, in the absence of other evidence of error, call into question BLM's location of the corner. We find no error in BLM's establishment of this corner by proportionate measurement.

#### 1/4 Section Corner of Sections 2 and 3

BLM also established this corner by proportionate measurement. Appellants allege the corner position established by the resurvey is in error based on the statements of Marvin Black and M. L. Black, descendants of the original owner of adjacent private property. They argue that the original position is about 70 feet north of the resurvey corner.

BLM considered the statements of both M. L. and Marvin Black and determined that "based on the physical evidence or lack thereof" it was impossible to discern the location of the original monument or accessories

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(Decision at 14). Noting that a corner "is not considered as lost if its position can be recovered satisfactorily by means of the testimony and acts of witnesses having positive knowledge of the precise location of the original monument" (Decision at 14, citing with added emphasis Manual, 5-10 at 130), BLM held that "[n]one of the testimony or supporting documentation offered by protestants gives any indication of knowledge as to the precise location of the original corner" (Decision at 15).

Appellants have presented nothing that persuades us that BLM erred in establishing this 1/4 section corner.

Appellants have generally argued in this case discrepancies in the measurements of lines and certain topographic calls among the various surveys, conditions not uncommon between old and more recent surveys. See State of Oregon, 78 IBLA 13, 20 (1983), citing Alfred Steinhauer, 1 IBLA 167, 172-73 (1970). However, appellants have failed to produce any conclusive evidence that the challenged corners perpetuated or reestablished in the dependent resurvey are in positions other than those of the original survey. Further, they have failed to show error in the methodology used in the resurvey to locate the corner positions. They merely disagree with what has been done. However, a differing opinion is not substantial, conclusive evidence, and it is the appellants' obligation to identify specifically reversible error in a dependent survey. Frank Lujan, 40 IBLA at 187. As appellants have failed to establish by a preponderance of the evidence that the dependent resurvey in question is not an accurate retracement of the lines of the original survey, BLM's decision dismissing the protest against the survey must be affirmed.

[2] Appellants, relying on 43 U.S.C. § 772 (1988), contend that the subject dependent resurvey is void because it impairs their bona fide rights. <sup>2/</sup> The cited statute, 43 U.S.C. § 772 (1988), provides in pertinent part: "That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of land affected by such resurvey or retracement."

In the case before us the boundaries of the land owned by appellants are adjoined by both private and public lands. Disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located. James S. Mitchell, 104 IBLA 377, 380 (1988). Therefore, the results of a dependent resurvey will not alter or affect any boundaries between private tracts of land and an appeal will be

<sup>2/</sup> Appellants also cite the cases Keller v. United States, 6 Cl. Ct. 724 (1984), and Missouri Pac. R. Co. v. Sale, 127 S.W.2d 133 (1939), to support their contention that the dependent resurvey in question is void because it impairs bona fide rights. Apart from the general pronouncement that a resurvey may not be executed to impair the bona fide rights of private landowners as established under the original survey, these cases have no bearing on the merits of this case.

dismissed with respect to such boundaries for failure to demonstrate how the appellant has been adversely affected. Alice L. Alleson, 77 IBLA 106, 108 (1983).

With respect to appellants' lands which adjoin public lands, the issue is whether their rights have been impaired by the resurvey. The Secretary of the Interior is under a duty to consider and determine what lands are public lands and has the authority to correct the surveys of public lands as may be necessary. See 43 U.S.C. § 2 (1988); Kirwan v. Murphy, 189 U.S. 35 (1903); Mr. and Mrs. John Koopmans, 70 IBLA at 76. A resurvey, however, can affect bona fide rights only in the matter of position or location on the earth's surface. See Manual, 6-13 at 147. Bona fide rights are protected in a resurvey by showing "the original position of entered or patented lands included in the original description." Manual, 6-14 at 147. "The position of a tract of land, described by legal subdivisions, is absolutely fixed by the original corners and other evidences of the original survey and not by occupation or improvements, or by the lines of a resurvey which do not follow the original." Manual 6-15 at 147. If appellants' rights in the lands at issue are based on patents grounded on the original survey, then the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey. Manual, 6-25 at 149.

The proper execution of the dependent resurvey serves to protect the bona fide rights of appellants in this case because a dependent resurvey traces the lines of the original survey. In the absence of evidence from appellants to the contrary, it must be concluded that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey.

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

Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

Will A. Irwin  
Administrative Judge