

## **J. M. Beard (On Rehearing), 52 L.D. 451**

This 1928 Land Decision identifies several basic principles of a dependent resurvey and what rights must be protected:

- ⇒ "A dependent resurvey consists of 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 . . ."
- ⇒ "In legal contemplation, and in fact, lands contained in a certain section of the original survey and those contained in the corresponding section of a dependent resurvey are identical."
- ⇒ "Items of topography in the interior of sections are based upon estimates by the surveyor rather than upon actual measurements . . ."
- ⇒ "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 corner on the township boundaries without regard to incidental items of topography."
- ⇒ "Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system the only right, title or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based."
- ⇒ "In the execution of resurveys the Government is bound to protect only bona fide rights acquired through the exercise of good faith . . ."

The following documents are provided before the case:

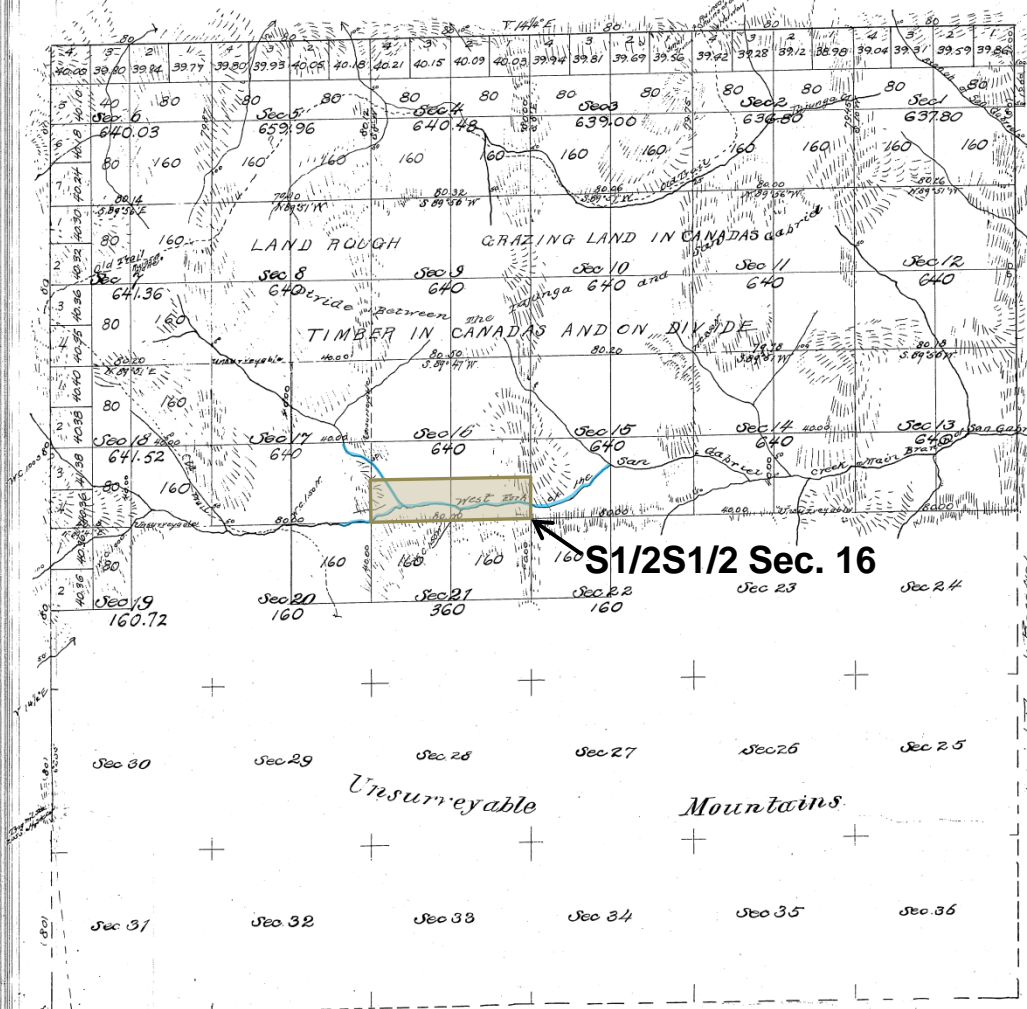
- The Original 1875 Survey by Norway
- The 1884 Completion Survey By Pearson
- The 1926 Dependent Resurvey by Averill and Wilson

# Original 1875 Survey By Norway

T 2 N  
R 11 W

(2)

Township N<sup>o</sup> 2 North. Range N<sup>o</sup> 11 West. San Bernardino Meridian.



For report on lines in Sec 15, 20, 21, see C.S. 9424.  
Twp. Bdy. & par. interior-section lines - C.S. 9370  
Gov't. Field Notes in Secs 15 to 18 - C.S. 9017  
Part of W. Bdy. of Twp. C.S. 9191  
Port of Interior Lines C.S. 9262  
Port of W. bdy C.S. 9266

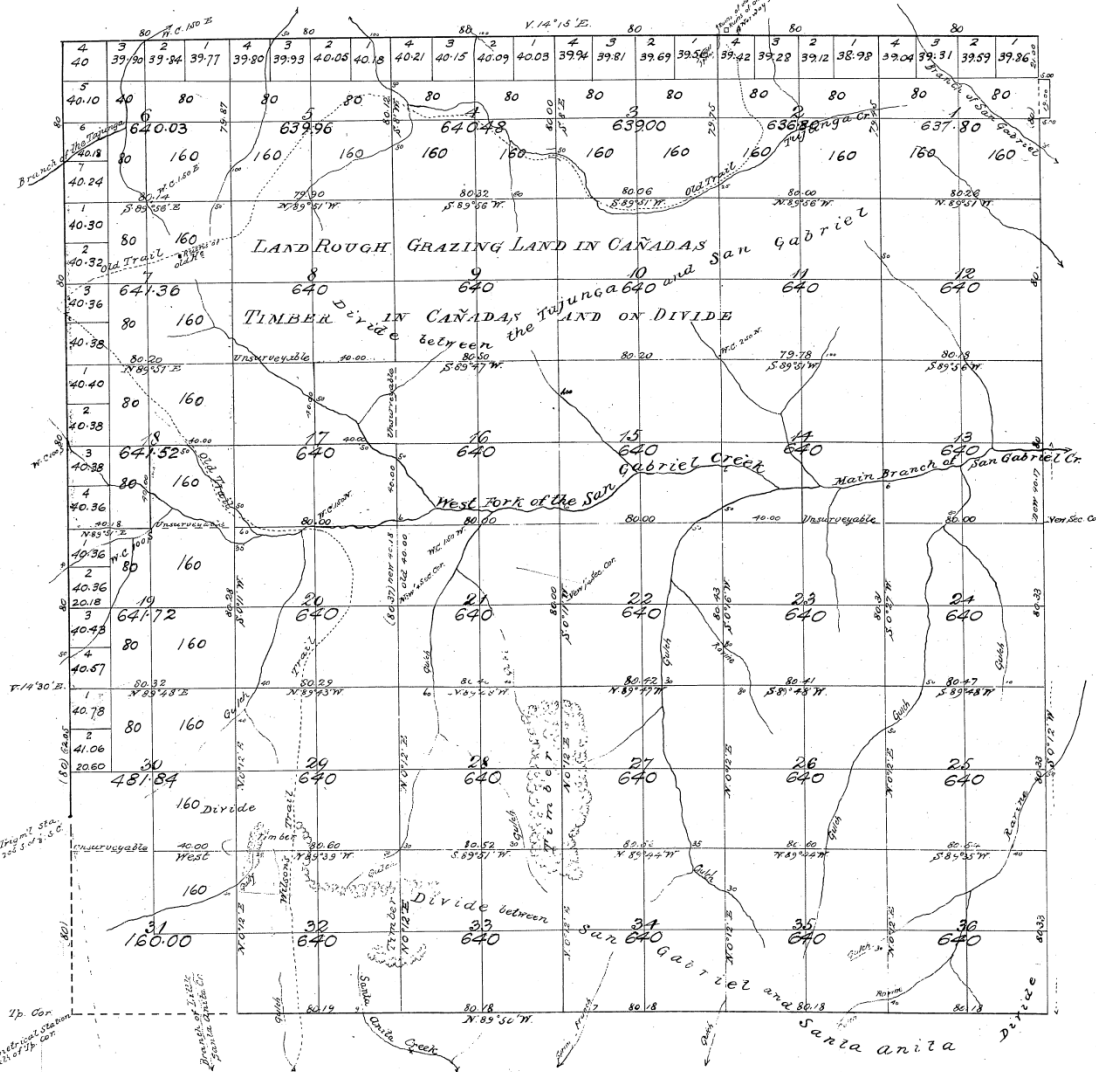
14, 317.67 Acres  
Public Lands Surveyed  
Estimated Area of Unsurveyed Mountain Tract, 762.88  
Aggregate 238440.55

Survey Designated	By whom Surveyed	Date of Contract	Amount for Survey	When Surveyed
Township Lines	W. H. Norway	July 31 <sup>st</sup> 1875	15 mi. 00. 00. 00	1875
Section Lines			35. 00. 91.	October 27 <sup>th</sup> 1876

# 1884 Completion Survey By Pearson

Township N<sup>o</sup> 2 North, Range N<sup>o</sup> 11 West, San Bernardino Meridian.

T 2 N  
R 11 W  
①



Original area of Public Land surveyed by Norway in 1865  
 12,217.67 acres  
 10,624.64  
 1,592.99  
 1,604.04  
 640.04  
 23,040.45  
 Estimated " " Unserved Mountain Land  
 Approved  
 Variation reported by Norway not otherwise noted 1874-75

Surveys Designated	By whom surveyed	Date of Contract	Amount of Surveys	When surveyed	Acres Def <sup>d</sup>
Lines previously surveyed colored brown	Excluded on Map of this Township	approved April 3 <sup>rd</sup> 1876	3 miles odd	1884	
Part of head city of Tp. not colored	G. W. Pearson	December 10 <sup>th</sup> 1883	3 miles odd	1884	
Col'd blue, resurvey	"	"	0 - 40 - 17	1884	
South boundary of Township	"	"	5 - 0 - 91	1884	14,291.68
Section lines not colored	"	"	25 - 46 - 33	1884	
colored blue, resurveyed	"	"	1 - 0 - 18	April 23 <sup>rd</sup> 1884	

Signed:  
W. H. Brown  
U.S. Survey Gen'l Colo

(All of this Township is in the San Gabriel Forest Reserve)

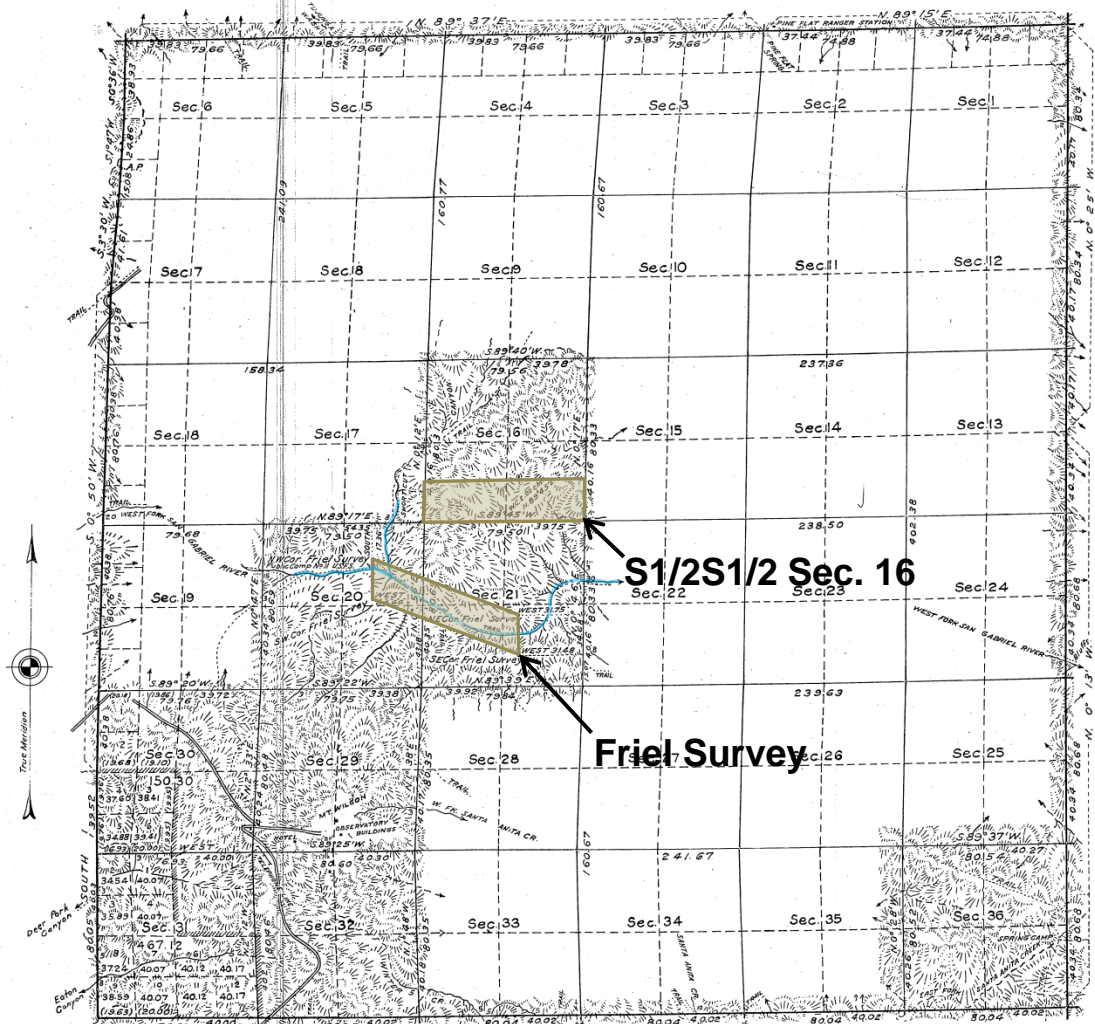
Gov't Field Notes in Secs 13 to 18 - C.S. 9017  
 For report on lines in Sec. 16, 20, 21, see C.S. 9424.

# 1926 Dependent Resurvey by Averill and Wilson

TRIPPLICATE

T2N  
R11W  
③

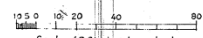
TOWNSHIP N° 2 NORTH . RANGE N° 11 WEST , SAN BERNARDINO MERIDIAN , CALIFORNIA .



The resurvey represented upon this plat of T. 2 N., R. 11 W., S. B. M., delineates a retracement and reestablishment of the lines of the original survey as shown upon the plats approved April 3, 1876 and September 15, 1884, in their true original position according to the best available evidence of the position of the original corners; all differences between the measurements shown on the original plats and those derived in the retracement have been distributed proportionally between accepted corners in accordance with surveying rules; reference will be made to the original plats for the showing of the areas and more detailed descriptions of the various smaller subdivisions, of Secs. 16, 20, 21, 29, 32, 36, NE and SE 1/4 Sec. 30 and NE 1/4 Sec. 31. The SW 1/4 Sec. 30, W 1/4 and SE 1/4 Sec. 31 were not previously surveyed. Disposal therein will be made on the basis of this plat

Twp. bdy. and par. of interior section lines - C.S. 9370  
For report on Lines in Sec. 16, 20, 21, see C.S. 9424

Lat. 34° 14' N  
Long. 118° 04' W  
in SW 1/4 Sec. 29.



Mean Magnetic Declination, Area Surveyed, 617.42 Acres.

LINES DESIGNATED	BY WHOM SURVEYED	GROUP NO	DATE	MILEAGE		WHEN SURVEYED	
				MLS.	CHS.	BEGUN	COMPLETED
Exterior	Dupree R. Averill	165	Nov. 13, 1926	23	73.80	Nov. 10, 1926	Sept. 24, 1927
Subdivisional	U.S. Surveyor			19	0.49		
Meander	Roger F. Wilson						
Miscellaneous	U.S. Transitman.			1	25.25		

Office of U.S. Supervisor of Surveys  
resurvey Denver, Colorado, Nov. 28, 1927.  
The above plat of Township No. 2 North Range No. 11 West of the San Bernardino Meridian, California, is strictly conformable to the field notes of the survey thereof which have been examined and approved.

*Wm. B. Johnson*  
U.S. Supervisor of Surveys.

Filed in U. S. Land Office,  
Los Angeles, Cal.  
*[Signature]*  
Register.  
12-19-14  
DEPARTMENT OF THE INTERIOR  
GENERAL LAND OFFICE  
Washington, D. C., Dec. 14, 1927.  
The survey represented by this plat having been correctly executed in accordance with the requirements of law and the regulations of this office, is hereby accepted.

*Thos. Staveland*  
Assistant Commissioner.

Orig. O.S.T. Exam. N.S.P.

Traced by Gus Fl. 2-27-29  
Checked by Booth. 2-27-29

*aw*  
*16*  
*29*

## J. M. BEARD (ON REHEARING)

*Decided July 25, 1928*

### SURVEY—RESURVEY—PUBLIC LANDS.

In the resurvey of public lands two distinct types have been adopted, namely the dependent resurvey, and the independent resurvey, each of which is dissimilar from the other.

### SURVEY—RESURVEY—BOUNDARIES.

A dependent resurvey consists of 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, without reference to tract segregations of alienated lands entered or patented by legal subdivisions of the original survey.

**SURVEY—RESURVEY.**

In legal contemplation, and in fact, lands contained in a certain section of the original survey and those contained in the corresponding section of a dependent resurvey are identical.

**SURVEY—RESURVEY—BOUNDARIES.**

An independent resurvey consists of the running of what are in fact new section or township lines without reference to the corners of the original survey and of the designating by metes and bounds of the lands entered or patented by legal subdivisions of the sections of the original survey which are not identical with the corresponding legal subdivisions of the independent survey.

**SURVEY—RESURVEY—BOUNDARIES.**

The fact that in the resurvey of a township the boundaries of all the original sections were not remonumented in nowise affects the position of the section lines which were resurveyed and the corners which were reestablished.

**SURVEY—RESURVEY—NATURAL MONUMENTS—BOUNDARIES.**

Items of topography in the interior of sections are based upon estimates by the surveyor rather than upon actual measurements, and represent only an approximation of the actual positions of natural monuments and are not to prevail over courses and distances.

**SURVEY—RESURVEY—BOUNDARIES—PATENT.**

In a township where the interior section corner monuments can not 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.

**SURVEY—RESURVEY—PATENT.**

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system the only right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

**SURVEY—RESURVEY—BONA FIDES.**

In the execution of resurveys the Government is bound to protect only *bona fide* rights acquired through the exercise of good faith, and a claimant who fails to exercise that degree of good faith cognizable in law or equity is not entitled to protection.

**COURT DECISION CITED AND APPLIED:**

Case of *Security Land and Exploration Company v. Burns* (193 U. S. 167), cited and applied.

**FINNEY, First Assistant Secretary:**

A motion for rehearing has been filed on behalf of J. M. Beard in the matter of his protest against the acceptance of the dependent resurvey of T. 2 N., R. 11 W., S. B. M., California, wherein the department, by decision of May 17, 1928 (52 L. D. 444), affirmed a decision of the Commissioner of the General Land Office dated December 14, 1927, dismissing the protest.

Counsel contends that the decision complained of was based on a misapprehension as to the facts and on errors of law.

It appears that in 1905 A. G. Strain purchased the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16, said township, from the State of California, and that on January 20, 1922, Strain transferred the said tract to Beard, who, on June 4, 1925, instituted a suit in ejectment in the Superior Court of Los Angeles County, California, against George H. Cecil, a forest supervisor, who was occupying the West Fork Ranger Station, alleging that the tract occupied as a ranger station is the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  said Sec. 16. In support of the suit a map prepared by LeGrand Friel was filed, and the court held that Friel had correctly relocated the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  said Sec. 16, and that Beard was entitled to judgment against defendant for possession of the tract.

The plat of dependent resurvey shows the tract surveyed by Friel as located approximately half a mile south and more than a quarter of a mile west of the true position of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 as determined by reference to the corner of the original survey.

There appears to be a misapprehension on the part of counsel as to the nomenclature commonly used by the General Land Office in connection with resurveys. There are in general two types of resurveys used: The dependent resurvey and the independent resurvey. The procedure followed in the execution of the two types of resurveys is entirely dissimilar, and it appears that counsel has confused the dependent resurvey procedure adopted in the reestablishment of the lost section corners in T. 2 N., R. 11 W., S. B. M., with the independent resurvey procedure used in the resurvey of the township under consideration in the case of *Cow v. Hart* (260 U. S. 427).

A dependent resurvey consists of 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. A statement to this effect appears in the form of a marginal notation on the plats of all dependent resurveys recently executed by the General Land Office. No tract segregations of alienated lands entered or patented by legal subdivisions of the original survey are made in a dependently resurveyed township, for the reason that 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 the lands patented on the basis of the plat of the original survey. In the vast majority of cases no new areas are shown on the plat of the dependently resurveyed sections, or subdivisions of sections, and where disposals are afterwards made in a dependently resurveyed township reference is made to the plat of the original survey for areas and more detailed descriptions of the lands resurveyed. 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.

An independent resurvey is, as the name implies, a running of what are in fact new section or township lines independent of and without reference to the corners of the original survey. In an independent resurvey it is, of course, necessary to preserve the boundaries of the lands patented by legal subdivisions of the sections of the original survey, which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey, and this is accomplished by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey. These tracts 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.

If the General Land Office were to make a tract survey of the lands of the appellant, the boundaries of that tract would be coincident and identical with the boundaries of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  of the dependently resurveyed Sec. 16, as shown upon the plat of T. 2 N., R. 11 W., S. B. M., accepted December 14, 1927, and would not be in the position indicated by the private survey executed for the appellant by LeGrand Friel, licensed surveyor of California. Having by the dependent resurvey identified the position of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  of original Sec. 16 according to its true original position, as shown by the corners of the original survey, it makes no difference whether the lands thus identified are designated in the returns of the resurvey as legal subdivisions, by a tract number, or what not. Their position on the earth's surface is the same, and a second identification of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 as a tract would not change its position with regard to the corners of the original survey in the least.

The impression also seems to exist that inasmuch as all of the interior section and quarter-section corners of the township were not re-monumented, the retracement of subdivisional lines in the township was confined to the boundaries of those sections shown as resurveyed upon the plat accepted December 14, 1927, and that no search was made for corners of the original survey throughout the remainder of the township. This impression is erroneous. Every subdivisional section line in the township was retraced in connection with the resurvey, but after careful and diligent search no original corners in the interior of the township could be found, and the reestablished subdivisional section and quarter-section corners are, therefore, necessarily referred to and based upon the identified or properly restored original corners on the boundaries of the township. Inasmuch as the lands in the sections not shown as resurveyed upon the plat accepted December 14, 1927, are all reserved public lands within the Angeles National Forest, and are not subject to disposal, no present necessity



for the remonumenting of the corners on the boundaries of the sections other than those shown as resurveyed upon the plat exists. The fact that the boundaries of all of the original sections in the township were not remonumented in no wise affects the position of the section lines which were resurveyed and the corners which were reestablished.

Counsel contends that items of topography noted in the returns of an original survey constitute natural monuments, which, in the absence of original corners, govern the section lines and subdivision of section lines in the township. Undoubtedly this contention finds some support in the decisions of the Supreme Court of California.

An analysis of the survey question involved in the case of *Chapman v. Polack* (70 Cal. 487; 11 Pac. 764), one of the California decisions cited in the appeal brief, reveals the following conditions: A portion of T. 11 N., R. 9 W., M. D. M., including Sec. 13, was surveyed in 1867, the plat being approved December 2, 1867. The northwest and southwest corners of Sec. 13, as well as the quarter-section corners on the south and west boundaries thereof, were properly monumented in accordance with the provisions of the Manual of Surveying Instructions. The positions of the northeast and southeast corners of the section were fixed by witness corners thereto properly established. The quarter-section corners on the east and north boundaries of the section were not monumented, nor the points therefor fixed by witness corners. In the general description in the field notes of the survey is the following statement:

There is a hotel for the accommodation of visitors on the south bank of the creek in the NE.  $\frac{1}{4}$  Sec. 13.

There is no measured tie to this hotel of record in the field notes. Its position as shown upon the plat therefore apparently is based entirely upon its estimated position, as set forth in the general description in the field notes of the survey. In 1854 defendants located school-land warrants on the NE.  $\frac{1}{4}$  Sec. 13, then unsurveyed, and subsequently received patent. The defendants acquired title in the belief that the hotel was located on the NE.  $\frac{1}{4}$ , but without having the subdivisional lines of the section surveyed in order to determine the exact position thereof. The grantor of the plaintiff received patent to the SE.  $\frac{1}{4}$  of Sec. 13 in 1877 under the preemption laws, also without having the subdivisional lines of the section surveyed. Subsequently, the point for the quarter-section corner on the east boundary of Sec. 13, not marked in the original survey, was established by a private survey at midpoint and on a direct line between the northeast and southeast corners of the section, as fixed by the established witness corner thereto, in accordance with the provisions of the act of February 11, 1805. (2 Stat. 313; section 2396

U. S. R. S.) The east and west center line of the section then appears to have been run as a straight line between the quarter-section corner on the east boundary of the section, as thus established, and the original quarter-section corner on the west boundary of the section, as provided by the act of February 11, 1805, *supra*, and it was found that the hotel was not located in the NE.  $\frac{1}{4}$  of the section as estimated by the deputy surveyor, but was actually in the SE.  $\frac{1}{4}$  thereof. In rendering its decision in the case, the court held that the position of the east and west center line of Sec. 13, as thus established according to the plain provisions of law as above stated, was incompetent, and that the position of the east and west center line of the section would be governed by the position of the hotel as shown upon the plat of the original survey, and cited section 2396 of the Revised Statutes as authority for its decision. It thus appears that, in the opinion of the court, the position of the subdivisational center line of a section is to be governed not by the opposite corresponding quarter-section corners properly established in accordance with the plain provisions of the act of February 11, 1805, but in accordance with the position of an incidental item of topography shown upon the original plat, the position of which is derived by no direct measurement but is based solely upon an estimated location mentioned in the general description in the field notes of survey as a matter of information only. Needless to say, no such promiscuous survey procedure has ever been sanctioned by the Federal courts, the department, or the General Land Office.

It should be remembered that the position of items of topography in the interior of sections, as shown upon the plats of the public-land surveys, have been in the past and are in surveys executed by the cadastral engineering service at the present time, almost invariably based upon estimates by the surveyor, rather than upon actual measurements thereto. It is ordinarily only the distances at which section lines intersect various items of topography that are actually measured on the ground. The platted position of topography in the interior of sections therefore depends entirely upon the individual skill and ability of the surveyor in estimating directions and distances, and at best represents only an approximation of the actual position of the topography.

The weight to be given an item of topography noted in the field notes of an original survey, and shown upon the plat thereof, should be commensurate with the importance attached thereto in the execution of such original survey. The survey of the north half of T. 2 N., R. 11 W., S. B. M., by W. H. Norway in 1875 was executed under the provisions of the Manual of Surveying Instructions for

1855, which by the act of May 30, 1862 (12 Stat. 409), "shall be taken and deemed a part of every contract for surveying the public lands of the United States."

On page 3, under Process of Chaining, the Manual of 1855 provides:

In measuring lines with a two-pole chain, every five chains are called "a tally" because at that distance the last of the ten tally pins with which the forward chainman set out will have been stuck. He then cries "tally," which cry is repeated by the other chainman, and each registers the distance by slipping a thimble, button, or ring of leather, or something of the kind, on a belt worn for that purpose, or by some other convenient method. The hind chainman then comes up, and having counted in the presence of his fellow the tally pins which he has taken up, so that both may be assured that none of the pins have been lost; he then takes the forward end of the chain and proceeds to set the pins. Thus the chainmen alternately change places, each setting the pins that he has taken up, so that one is forward in all the odd and the other in all the even tallies. Such procedure, it is believed, tends to insure accuracy in measurement, *facilitates the recollection of the distances to objects on the line*, and renders a mistake almost impossible.

And under "Of Field Books," on page 15, it is provided:

The field notes afford the elements from which the plats and calculations in relation to the public surveys are made. They are the source wherefrom the description and evidence of locations and boundaries are officially delineated and set forth. They, therefore, must be a faithful, distinct, and minute record of everything officially done and observed by the surveyor and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing boundary corners, &c.; and present, as far as possible, a full and complete topographical description of the country surveyed, *as to every matter of useful information, or likely to gratify public curiosity.*

Under the circumstances there appears little justification for counsel's contention that items of topography, the positions of which in the interior of sections were based solely upon an estimate or guess on the part of the surveyor, and the record distances to which on the section lines were dependent upon the "recollection of the chainmen," and which were noted as "matters of useful information or likely to gratify public curiosity," 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 department, or the Federal courts. In *Galt et al. v. Willingham et al.* (300 Fed. 761) the United States District Court for the Southern District of Florida held (syllabus):

A section corner as fixed by a Government surveyor being more important, and one in which he would ordinarily take more care, will prevail over minor conflicting points in the lines as fixed by him.

On appeal the decision of the district court was affirmed by the circuit court of appeals (11 Fed., 2d series, 757, 758), in which the court said:

It is also apparent from the evidence that the government surveyor was mistaken in the call of his field notes to cross New River Sound 45 chains north on his second mile. None of the engineers was able to so run the line as to leave any considerable acreage in lot 8 or to cross the sound as called for in the original survey. However, these mistakes do not impeach the integrity of the survey as a whole. A surveyor would naturally be more careful in establishing section corners than in noting minor points, especially in territory that was difficult to survey at best, where the primary object of the survey was to ascertain the acreage of lands which the government owned.

The appellant contends that his *bona fide* rights have been impaired by the resurvey. If this contention is well founded, the resurvey is undoubtedly bad. But he did not and could not acquire *bona fide* rights in any lands except in those contained in the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16, T. 2 N., R. 11 W., S. B. M., in its true original position, as defined by the *corners* of the original survey. The law is well established that no right, title, or interest is acquired by grant or patent from the United States to lands described in terms of the rectangular surveying system, except in the lands described in such grant or patent as defined by the corners of the original Government survey upon which the description is based.

The lands included in the Friel identification of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 are located by reference to a single item of topography (the west fork of the San Gabriel River and its tributaries), without any reference whatsoever to extant corners of the original survey of T. 2 N., R. 11 W., S. B. M., or any original corner in any of the adjoining townships. No attempt was made by Friel to identify the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 in accordance with its true original position as defined by the corners of the original survey. Had he made a *bona fide* attempt to locate the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 by reference to any extant corner of the original survey of T. 2 N., R. 11 W., S. B. M., or by reference to any of several existing original corners in the adjoining townships, he would have found that the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 does not and never did occupy a position in the bottom of the canyon of the San Gabriel River, but that it is located on the side of a mountain nearly a half mile north of the canyon bottom.

As above stated, the law is that the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 is governed by the corners of the original survey. The position of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16, or any other section or legal subdivision, is not and never was controlled or affected by the erroneous depiction of topography on the plat of the township in which the land is located.

The *bona fide* rights which the General Land Office is bound to and does protect in the execution of resurveys are those which are

acquired through the exercise of good faith. In failing to attempt to identify the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 by reference to the corners, or at least by reference to some one corner of the original Government survey, the claimant failed to exercise that degree of good faith cogizable in law or equity, and has therefore no *bona fide* rights under his title to the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16 in the approximately 160 acres of land included in the Friel survey in the bottom of the canyon of the west fork of the San Gabriel River.

The foregoing principles are applicable to the reestablishment of the lines and corners of any original survey, the corners of which have, by the action of the elements, by accident, or otherwise, become lost or obliterated. As a matter of fact, the reported surveys of the subdivisional lines in the north half of T. 2 N., R. 11 W., S. B. M., by Deputy Surveyor Norway in 1875, and of the south boundary and subdivisional lines of the south half of the township by Deputy Surveyor Pearson in 1884, are purely fraudulent and entirely fictitious.

In the report of the field investigation, dated October 7, 1926, the investigating surveyor states:

From a consideration of Norway's topographical data it is readily seen that his returns were based upon a very superficial investigation of the territory involved, the major items varying in position from moderate amounts to, in the greatest instance, a mile and a quarter \* \* \* The Pearson returns are as flagrantly erroneous as the Norway record. His greatest departure from fact, save in the noted ties to Norway subdivisional surveys, is in the location of the dividing ridge between the San Gabriel and Santa Anita Canyons. \* \* \* While the topographic calls are in many instances very explicit, one can not reconcile the returns in any instance to the actual features encountered.

Previous search for evidence of original surveys in this township by the U. S. Forest Service conducted intermittently since the designation of this area as a national forest has failed to reveal any trace of the subdivisional survey. None of the Pearson work has ever been found, either boundary or subdivision.

While the topography of the entire township is not shown upon the resurvey plat, the topographic maps of the area published by the Geological Survey bear out the statements of the investigating surveyor. The creek (indicated on the resurvey township plat as flowing in what is designated as Short Cut Canyon, and designated upon the Geological Survey topographic maps as Trail Fork, San Gabriel River), which the appellant contends is the creek shown upon the township plat approved April 3, 1876, as the branch of the west fork of the San Gabriel River flowing southeasterly through Sec. 17 and joining the west fork of the San Gabriel River in the SW.  $\frac{1}{4}$  Sec. 16, has a general course of slightly west of south for nearly a mile above its confluence with the river, instead of a southeasterly course as shown upon the original township plat.

The west fork of the San Gabriel River is indicated on the original plat as flowing in a direction slightly north of east through Sec. 16. Through what the appellant contends is the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16, the river actually flows in a direction nearly 20° south of east. Upon the original township plat the west fork of the San Gabriel River in Sec. 16 is shown to be approximately a mile and a quarter south of the divide between the Tujunga and San Gabriel. As a matter of fact, the divide is more than two miles north of the river.

On the original plat of the south half of the township the divide between the San Gabriel and the Santa Anita is shown as approximately 2½ miles south of the west fork of the San Gabriel River through Sec. 16. This divide is actually only one mile south of the San Gabriel in the area in question.

Throughout the township generally the topography indicated on the original township plat is equally as erroneous as in the vicinity of original Sec. 16.

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 Deputy Surveyors Norway and Pearson.

The appellant appears to have encountered great difficulty in connection with the weight to be given the decision of *Kirwan v. Murphy* (109 Fed. 354). Whatever may have been the technical grounds for the reversal of *Kirwan v. Murphy* by the Supreme Court (189 U. S. 35), the opinion of the lower court in the case was completely overruled by the Supreme Court in *Security Land and Exploration Company v. Burns* (193 U. S. 167), in which the question before the court was identical with that in the case of *Kirwan v. Murphy*, which involved title to other portions of the same belt of land lying between Cedar Island Lake and its meander line.

The survey questions involved in *Security Land and Exploration Company v. Burns*, *supra*, and those involved in the appeal of Beard are nearly identical in that, in the former case:

(a) The reported original survey of the subdivisional lines of the township involved was fictitious and fraudulent. Only one original subdivisional section corner in the township was ever found.

(b) The depiction of topography on the township plat was grossly inaccurate.

(c) The plaintiff contended that a so-called natural monument (the shore of a lake) should control both course and distance.

(d) The value of the land involved was to a great extent dependent upon its position with relation to a body of water.

(e) The methods employed in the resurvey of T. 57 N., R. 17 W., was that of proportionate measurement between existing or properly restored corners on the township boundaries without regard to incidental items of topography.

While in the case at hand:

(a) The reported original surveys of the subdivisional section lines of the township are entirely fraudulent and fictitious. No interior section corners whatsoever can be found.

(b) The depiction of topography on the township plat is grossly inaccurate.

(c) The plaintiff contends that an item of topography (in this instance a creek and its tributaries) constitutes a natural monument which should control both course and distance.

(d) The value of the land involved appears to depend to a great extent on the question as to whether or not it is located in the bottom of the canyon of the west fork of the San Gabriel River.

(e) The method employed in the resurvey of the township was that of proportionate measurement between existing original or properly restored corners on the boundaries of the township without regard to incidental items of topography.

To quote those portions of the decision of *Security Land and Exploration Company v. Burns*, *supra*, applicable to the present case, would mean to quote the major portion of the twenty-two pages of the reported decision. The decision leaves no possible doubt in the present case as to the authority of the Government to make the resurvey, the sufficiency and appropriateness of the methods employed in making the resurvey, the rights of the protestant under his title to the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 16, and the weight to be given to the indicated positions of items of topography erroneously depicted on the original township plats of T. 2 N., R. 11 W.; S. B. M.

With reference to counsel's inquiry in the motion for rehearing as to whether a call for the Mississippi River would be ignored, it may be stated that under authority of *Security Land and Exploration Company v. Burns*, *supra*, *White, et al. v. Luning* (93 U. S. 514), and numerous other decisions of the Supreme Court of the United States involving the survey of lands erroneously omitted from original surveys, a call for the Mississippi River (or for that matter a call for the Pacific Ocean) would be ignored if, due to gross error or fraud in the execution of the original survey, its platted position with reference to the lines of the public-land surveys were found to be widely at variance with its actual position with reference to those lines as de-

defined by the identified or properly restored corners of the original survey. This is the underlying principle upon which every "omitted land" survey is founded. Public lands described by the rectangular surveying system are defined by the lines and corners of such survey; not by their erroneously indicated positions with reference to the Mississippi River, the Pacific Ocean, the west fork of the San Gabriel River, or any other item of topography.

No reason appears why the decision of May 17, 1928, should not be adhered to. The motion for rehearing is therefore denied.

*Motion denied.*

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### CHAFFIN v. BOHLKE

*Decided July 31, 1928*

CONTEST—CONTESTANT—PREFERENCE RIGHT—LAND DEPARTMENT—STOCK-RAISING  
HOMESTEAD.

A contestant does not gain a preference right where the entry under attack is canceled not as the result of the contest but upon adverse proceedings previously instituted by the Land Department upon a charge substantially the same as that upon which the contest was predicated.

FINNEY, *First Assistant Secretary*:

On November 10, 1925, Michael P. Bohlke made original stock-raising homestead entry, Phoenix 057353, for the N.  $\frac{1}{2}$  S.  $\frac{1}{2}$  Sec. 10, and the S.  $\frac{1}{2}$  N.  $\frac{1}{2}$  and S.  $\frac{1}{2}$  Sec. 11, T. 14 S., R. 15 E., G. & S. R. M., Arizona.

On July 26, 1927, pursuant to the recommendation of an inspector, adverse proceedings against the entry were ordered by the General Land Office, upon the charge that the entryman had not established and maintained residence on the land.

On November 23, 1927, the register of the district land office transmitted the papers in the case to the General Land Office, including an unclaimed registered letter containing a notice of the charge as above, directed to the entryman at his post-office address of record. The register recommended that the entry be canceled because the entryman had failed to deny the charge.

On January 13, 1928, Walter W. Chaffin filed a contest against the entry charging that Bohlke had abandoned his entry for over six months, and that he had never built a house or placed any improvements upon the land. The contest was suspended by the register of the district land office because of the adverse proceedings already instituted on behalf of the Government.

On February 3, 1928, the Commissioner of the General Land Office canceled Bohlke's entry and closed the case. This action was taken pursuant to the adverse proceedings instituted on behalf of the