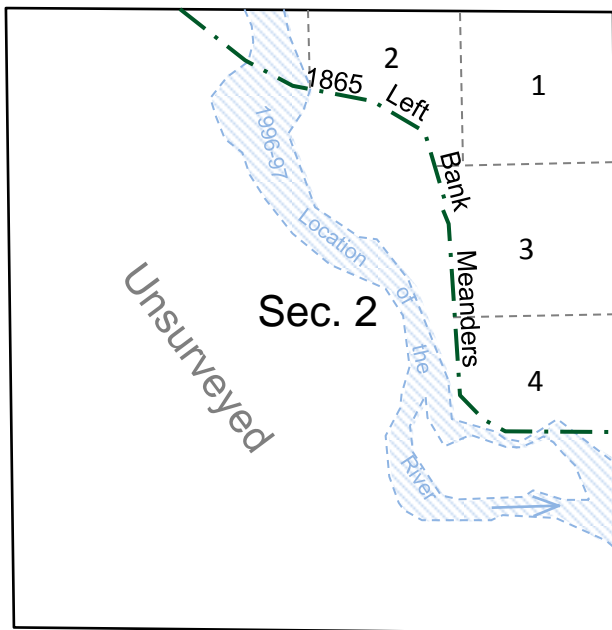


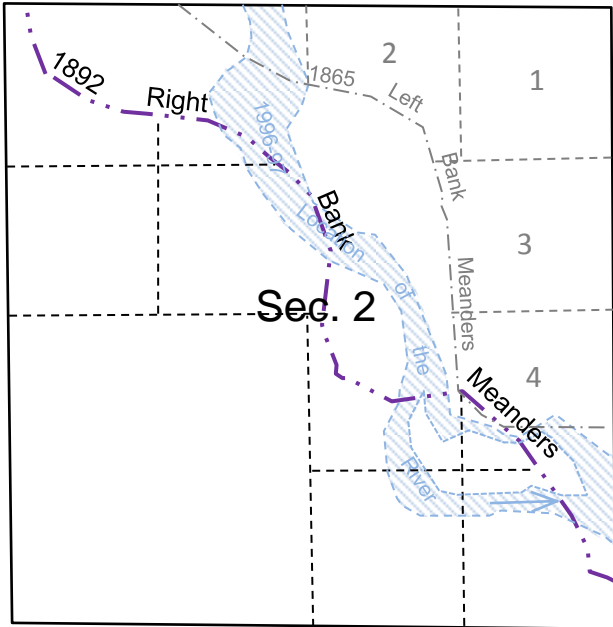
Quinton Douglas
166 IBLA 257

BLM found that changes in the main channel of the Yakima River were the result of avulsion thereby fixing the boundary of the Yakama Indian Reservation and placing an island claimed by Mr. Douglas on the Reservation. The Manual requires “positive evidence” to show that a change in the channel of a river is avulsive. In this case the Board considered what constitutes positive evidence.

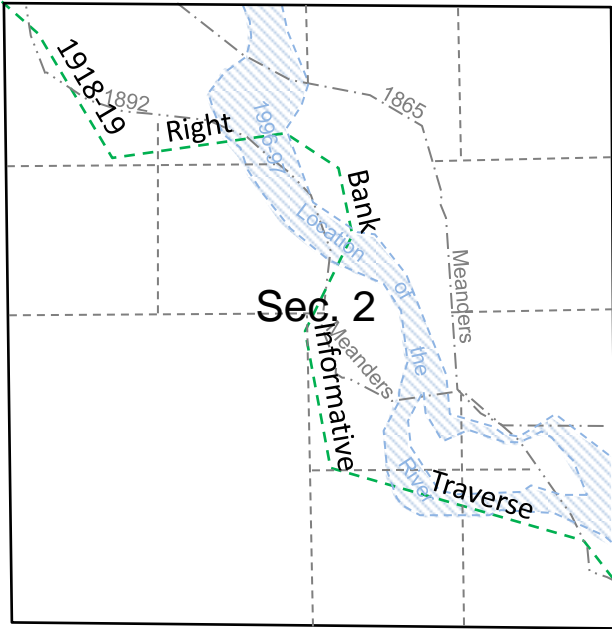
1865 Survey By House



1892 Survey by Mills



1918-19 Informative Traverse by Farmer



Revised Field Notes

T. 11 N., R. 19 E., Willamette Meridian, Washington

CHAINS

The following field notes are those of the dependent resurvey of a portion of the north boundary and subdivisional lines, the adjusted 1865, 1892, and 1918-19 record meanders of the left and right banks of the Yakima River in section 2, the informative traverses of the 1996 left and right banks of the current main channel and original main channel of the Yakima River, and the metes-and-bounds survey of a fixed and limiting boundary of the Yakama Indian Reservation in section 2, township 11 north, range 19 east, Willamette Meridian, Washington.

The history of surveys pertaining to this resurvey are as follows:

Charles N. White, U.S. Deputy Surveyor, surveyed the exterior boundaries of the township in 1865.

George R. House, U.S. Deputy Surveyor, surveyed the subdivisional lines north of the Yakima River and meandered the left bank of the Yakima River in 1865.

Harry A. Clarke, U.S. Deputy Surveyor, resurveyed a portion of the north boundary of the township in 1885.

George R. Mills, U.S. Deputy Surveyor, resurveyed a portion of the north boundary, surveyed the subdivisional lines south of the Yakima River, and meandered the right bank of the Yakima River in 1892.

Robert A. Farmer, U.S. Cadastral Engineer, resurveyed the township boundaries and subdivisional lines south of the Yakima River and meandered the right bank of the Yakima River in 1918-19. The meanders by Farmer were not used to re-lot section 2 and represent only an informative traverse of the location of the right bank of the river in 1918-19.

E. D. Calvin, U.S. Cadastral Engineer, resurveyed a portion of the north boundary in 1931.

The survey was executed in accordance with the specifications set forth in the Manual of Surveying Instructions, 1973, and the Special Instructions dated August 16, 1996, for Group No. 469, Washington.

The purpose of this resurvey was to delineate the boundaries of portions of original Lots 5, 6, and 7, now located on a land mass between active channels of the Yakima River in the SE¼ of Section 2.

The plat of survey was accepted February 12, 2001, and was protested by Quinton Douglas. On September 27, 2001, the State Director, Oregon State Office, Bureau of Land Management (BLM), denied the protest which was appealed.

On August 11, 2005, the Interior Board of Land Appeals (IBLA) reversed the appeal and remanded to BLM for further action consistent with their decision entitled Quinton Douglas, 166 IBLA 257.

T. 11 N., R. 19 E., Willamette Meridian, Washington

CHAINS

A complete investigation was conducted and documented in a report dated February 22, 2006, entitled "Return and Remand of Group 469 under Quinton Douglas, 166 IBLA 269" to the Chief Cadastral Surveyor of Washington. In this report it was determined that the current island was formed by a special form of avulsion known as the "Island Rule" resulting in an identifiable upland between the two channels which has been in continual existence since the original survey and therefore still maintains its appurtenances with the right bank of the Yakima River. Additionally new land had accreted to former Lots 5, 6, and 7 and the island with its accretions resided within the boundaries of the Yakama Indian Reservation.

The Chief Cadastral Surveyor of Washington concurred with the report by memorandum dated April 21, 2006, and, as directed by IBLA, issued instructions to the Chief, Cadastral Survey Section to:

- 1) Remove from the official plat accepted February 12, 2001, the notation "Avulsed Channel".
- 2) The boundary of the Yakama Indian Reservation has been determined to be along the medial line of the river channel on the north side of the island, as established from the informative traverse made under Group 469 for the left and right banks of this channel. As this is an active channel of the river, no monumentation will be required. The plat will show a line down the center of the channel with the caption "Yakama Indian Reservation Boundary". This boundary line will be extended to the north and south to its intersection with the main channel of the Yakima River.
- 3) The field notes will also be corrected to reflect this decision.

As a result of this survey, it has been determined that the original Lots 5, 6, and 7 were not changed by the avulsive movement of the river. Accretions have attached to these original lots, but no partition lines were determined to apportion the accretions. This survey identifies a portion of the east boundary of the Yakima Indian Reservation.

The directions of the lines are based on the true meridian as determined by direct solar observations and were carried forward by means of sustained angulation. All measurements along the lines were derived through the use of electronic measuring equipment. An analysis of the unadjusted field data assured a closure not exceeding 1:4000 in error. Measured distances and directions have been adjusted by Cadastral Measurement Management (CMM), computer program that incorporates a least squares adjustment routine. The adjusted bearings and distances are reported to the nearest second and 0.001 chain.

Revised Plat

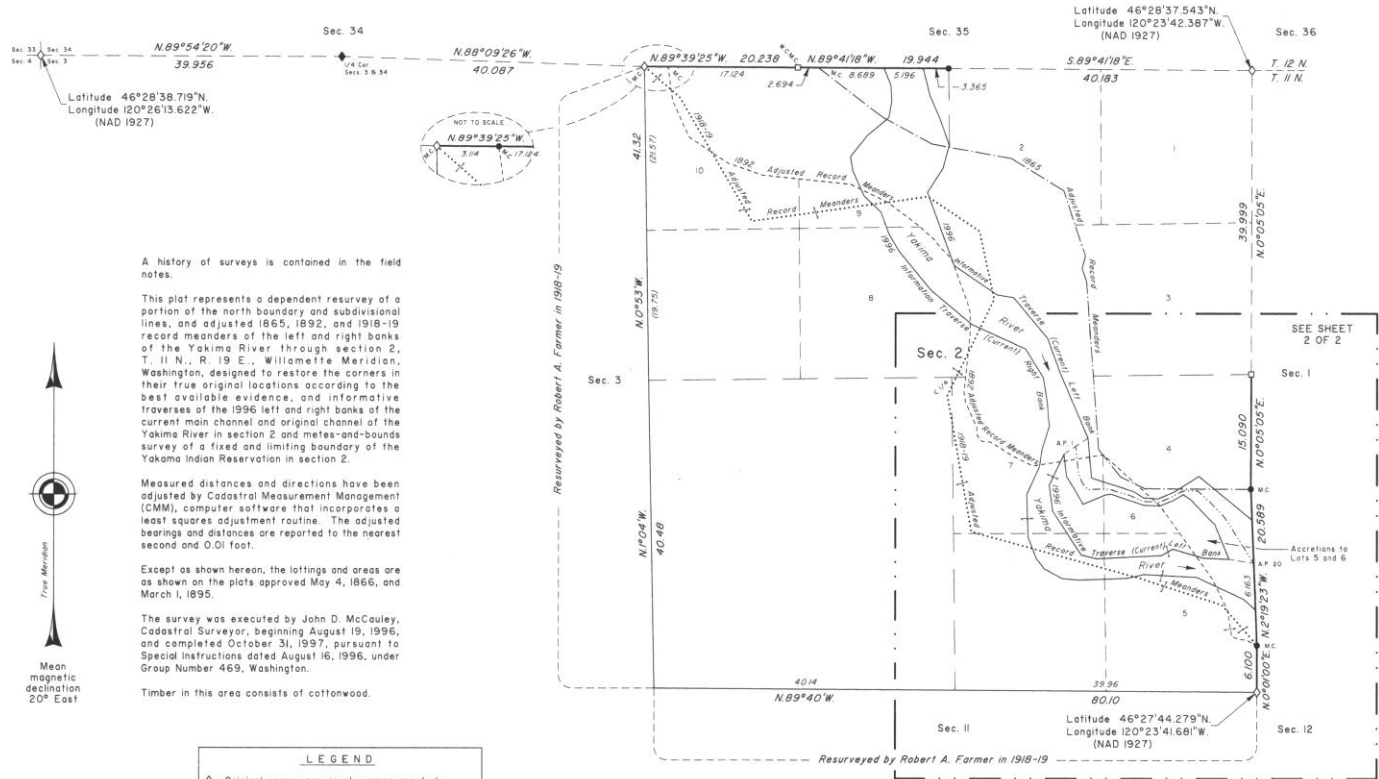
II-19-E

ORIGINAL

TOWNSHIP II NORTH, RANGE 19 EAST, OF THE WILLAMETTE MERIDIAN, WASHINGTON

SHEET 1 OF 2

DEPENDENT RESURVEY AND SURVEY



A history of surveys is contained in the field notes.

This plat represents a dependent resurvey of a portion of the north boundary and subdivision lines, and adjusted 1865, 1892, and 1918-19 record meanders of the left and right banks of the Yakima River through section 2, T. II N., R. 19 E., Willamette Meridian, Washington, designed to restore the corners in their true original locations according to the best available evidence, and informative traverses of the 1996 left and right banks of the current main channel and original channel of the Yakima River in section 2, and metes-and-bounds survey of a fixed and limiting boundary of the Yakama Indian Reservation in section 2.

Measured distances and directions have been adjusted by Cadastral Measurement Management (CMM), computer software that incorporates a least squares adjustment routine. The adjusted bearings and distances are reported to the nearest second and 0.01 foot.

Except as shown hereon, the lottings and areas are as shown on the plats approved May 4, 1866, and March 1, 1895.

The survey was executed by John D. McCauley, Cadastral Surveyor, beginning August 19, 1996, and completed October 31, 1997, pursuant to Special Instructions dated August 16, 1996, under Group Number 469, Washington.

Timber in this area consists of cottonwood.

LEGEND	
◊	Original corner previously remonumented
◆	Original corner remonumented this survey
◻	Corner previously established or reestablished
●	Corner established or reestablished this survey
---	1865 Adjusted Record Meanders
- - -	1892 Adjusted Record Meanders
⋯	1918-19 Adjusted Record Meanders
⋯	Yakama Indian Reservation Boundary
---	1996 Informative Traverse



Latitude 46°28'37.543"N
Longitude 120°23'42.387"W
(NAD 1927)

Latitude 46°27'44.279"N
Longitude 120°23'41.681"W
(NAD 1927)

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Portland, Oregon July 12, 2007

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director
Mary J. M. Hartz
Chief Cadastral Surveyor of Washington

Revised Plat

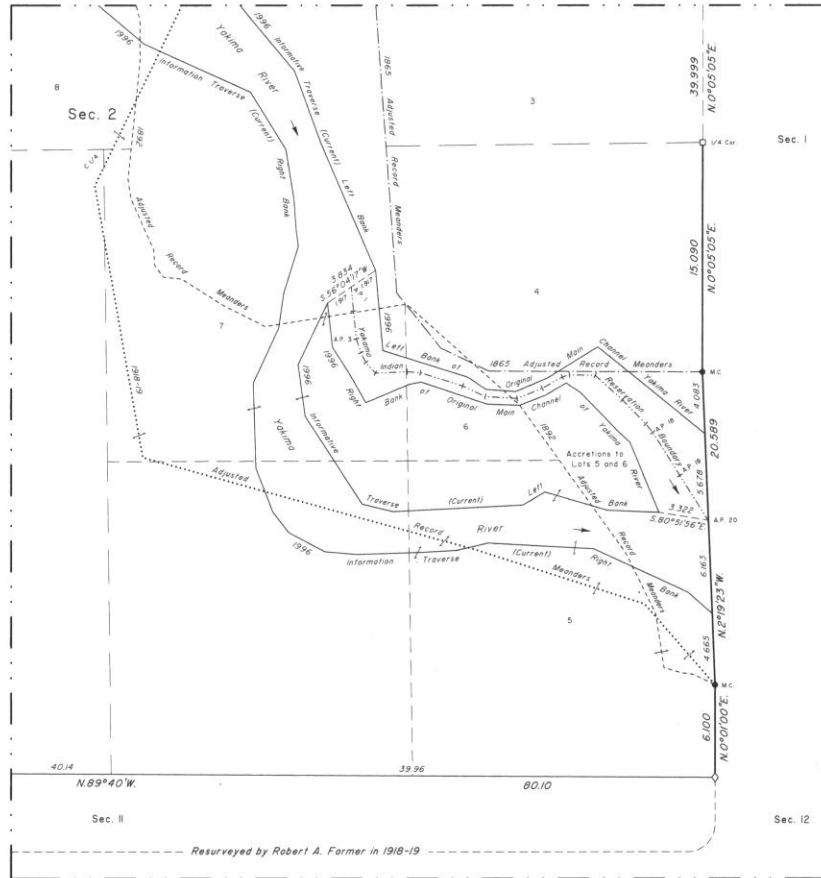
II-19-F

ORIGINAL

TOWNSHIP II NORTH, RANGE 19 EAST, OF THE WILLAMETTE MERIDIAN, WASHINGTON

SHEET 2 OF 2

DEPENDENT RESURVEY AND SURVEY



BEARING & DISTANCE TABLE Fixed and Limiting Boundary		
AP 1		1.600
AP 2	S 5°13'22\"E	1.630
AP 3	S 5°48'50\"E	0.968
AP 4	S 18°59'42\"E	0.727
AP 5	S 26°26'43\"E	0.946
AP 6	S 42°16'55\"E	2.100
AP 7	N 87°41'43\"E	0.864
AP 8	S 86°00'24\"E	2.930
AP 9	S 72°32'21\"E	1.650
AP 10	S 64°58'09\"E	2.311
AP 11	S 86°32'02\"E	1.784
AP 12	N 68°10'09\"E	1.531
AP 13	N 72°58'32\"E	0.488
AP 14	S 88°59'40\"E	2.419
AP 15	S 47°46'05\"E	2.206
AP 16	S 44°21'06\"E	0.722
AP 17	S 38°42'37\"E	3.347
AP 18	S 32°27'00\"E	3.502
AP 19	S 32°26'29\"E	
AP 20		

LEGEND	
◊	Original corner previously monumented
□	Corner previously established or reestablished
●	Corner established or reestablished this survey
—	1865 Adjusted Record Meanders
- - -	1892 Adjusted Record Meanders
⋯	1918-19 Adjusted Record Meanders
⋯	Yakoma Indian Reservation Boundary
—	1996 Informative Traverse

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Portland, Oregon July 12, 2007

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Mary J. M. Hartzel

Chief Cadastral Surveyor of Washington



QUINTON DOUGLAS

IBLA 2002-56

Decided August 11, 2005

Appeal from a decision of the State Director, Oregon State Office, Bureau of Land Management, denying a protest of the BLM dependent resurvey in T. 11 N., R. 19 E., Willamette Meridian, Group No. 469, Washington.

Reversed and remanded.

1. Surveys of Public Lands: Generally

Section 7-73 of the Manual of Instructions for the Survey of the Public Lands of the United States 1973 requires that an avulsive change in a channel of a body of water be proved by positive evidence. Such positive evidence must be direct, affirmative, and definite, and does not include circumstantial evidence, conjecture, or indirect evidence subject to different interpretations.

2. Surveys of Public Lands: Generally

Notations to an official survey plat that are based on the surveyor's conclusion that an island was created by avulsion will be ordered removed when the evidence relied on to reach that conclusion is not positive evidence, as required by section 7-73 of the Manual of Instructions for the Survey of the Public Lands of the United States 1973.

APPEARANCES: Gary M. Cuillier, Esq., Yakima, Washington, for appellant; Jack W. Bowder, Acting Chief, Branch of Geographic Services, Oregon State Office, Bureau of Land Management, Portland, Oregon, for the Agency.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Background

Quinton Douglas has appealed a September 27, 2001, decision (Decision) by the State Director, Oregon State Office, Bureau of Land Management (BLM), dismissing his protest to BLM's dependent resurvey (1996 Survey) of portions of the north boundary and subdivisional lines and adjusted record meanders of the right and left banks of the Yakima River (River) through Sec. 2, T. 11 N., R. 19 E., Willamette Meridian, Washington, as conducted under Group No. 469, Washington.^{1/} Appellant's protest, in a letter dated September 6, 2001, was submitted in response to BLM's August 7, 2001, notice to him of the dependent resurvey and its determination that the island within the River on which appellant operates an automobile towing and salvage business is part of the Yakama Indian Reservation (Reservation). That notice indicated that appellant had 30 days to submit a protest of the 1996 Survey, or the plat of T. 11 N., R. 19 E., would be officially filed. Appellant also petitioned for a stay of BLM's Decision, and BLM moved for dismissal of the appeal for lack of standing and for failure to serve the Office of the Solicitor, U. S. Department of the Interior. By order issued February 5, 2002, the Board granted appellant's petition for stay and denied BLM's Motion to Dismiss.

In his protest, appellant asserted that BLM erroneously concluded that the island is part of the Reservation. He indicated that he and his family have lived and operated a business on the island for the past 50 years. Appellant claimed his interest in and ownership of the island through the owners of Lot 4 in sec. 2, appurtenant to the island and across the River from the Reservation. BLM responded on September 27, 2001, stating that it considered the letter to be an official protest pursuant to 43 CFR 4.450-2. BLM provided additional information and explanation in support of its determination that the island was part of the Reservation, responded to the issues raised in the protest letter, and determined that appellant had not provided any evidence that the resurvey was erroneous. BLM dismissed appellant's protest and indicated that he could appeal the dismissal to this Board. Appellant did so.

The River is the northeastern boundary of the Reservation, created by treaty in 1855,^{2/} with Reservation land on the right bank and patented non-Reservation land

^{1/} The notice of filing of the plat of survey of T. 11 N., R. 19 E., accepted Feb. 12, 2001, was published June 15, 2001, 66 FR 32643.

^{2/} The pertinent provisions of the treaty describe this portion of the Reservation boundary as follows:

(continued...)

on the left bank.^{2/} At a point near the Wapato Bridge, the River splits into two principal channels, forming the island on which appellant's business is located. The first indication in the record of the dispute over the island is a letter dated July 30, 1993, from the Office of Legal Counsel, Yakama Indian Nation (Yakama Nation), to Pettit Towing, Douglas Wrecking & Scrapping (Douglas Wrecking), which is owned by appellant. That letter asserted that the island was within the Reservation and Douglas Wrecking was in trespass. The letter also suggested that the operations may be in violation of Federal and state laws and regulations regarding commercial operations in and near the River. In that letter, and in a subsequent February 4, 1994, letter from the Yakama Nation, Douglas Wrecking was directed to cease operations and vacate the island.

Appellant's attorney responded to the Yakama Nation by letter, stating that appellant had purchased the property from Paul W. and Amy McDonald and was in the process of acquiring a fulfillment deed. He noted that the land was not within the Reservation, and that even if the Yakama Nation had a claim to the island, that claim was forfeited by more than 50 years of uninterrupted, exclusive use of the land by appellant.

This correspondence set the stage for the 1996 Survey at issue in this case. Authorized at the request of Acting Superintendent, Yakama Agency, Bureau of Indian Affairs, see Special Instructions to Group No. 469, Washington, dated August 16, 1996, the survey was conducted by BLM pursuant to assignment instructions dated August 16, 1996, for Group No. 469, Washington. Those instructions provided:

You are hereby assigned, authorized, and directed to proceed with the dependent resurvey of a portion of the north boundary and subdivisional lines, retracement of a portion of the meanders of the right and left banks of the Yakima River, and investigation and

^{2/} (...continued)

"Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains * * *; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning."

Treaty with the Yakima (1855, June 9), 12 Stat. 951.

^{3/} The banks of a river are designated as right or left as it would appear facing downstream. In this instance, the right (south and west) bank is considered within the Reservation and the left (north and east) bank is considered outside the Reservation.

conditional survey of the Yakama Indian Reservation boundary in sec. 2, T. 11 N., R. 19 E., Willamette Meridian, Washington, as provided by Special Instructions dated August 16, 1996, under Group No., 469, Washington.

(Memorandum to Robert W. Dahl and John D. McCauley, Cadastral Surveyors, from Chief, Branch of Geographic Sciences, dated Aug. 16, 1996 (Survey Instructions).) The Special Instructions provided:

The easterly boundary of the Yakama Indian Reservation is defined by the thread of the Yakima River. Some local landowners believe there is an island in the SE 1/4 of section 2. An investigation will be conducted to determine if an omitted island exists and, if so, where such island is located with regard to the thread of the river; i.e., within or outside the reservation. A report of the investigation findings will be submitted to this office for review, followed by additional instructions if necessary.

(Special Instructions to Group No. 469, Washington, dated Aug. 16, 1996.)

In denying appellant's protest, BLM acknowledged that the "Yakama Nation had not previously asserted jurisdiction over the island because they have not known for sure that it was part of the reservation until recently. The purpose of the BLM resurvey was to determine if the island was within the reservation." (Decision at 3.) BLM supported its decision by comparing an earlier 1865 survey of the left bank of the River and an 1892 survey of the right bank (Reservation side) of the River with the results of its 1996 Survey, together with the assertion that one of the flood events in either 1894 or 1896 "caused the river to avulse^{4/} out of the channel location as surveyed [in 1892], and move southerly across lots 5, 6, and 7 to where it approximately flows today. * * * As a result, the portions of lots 5, 6, and 7 located between the avulsed channel and the new channel became the island." (Decision at 4.) In essence, BLM concluded that the island had been part of lots 5, 6, and 7 on the

^{4/} Avulsion is a sudden, violent, and perceptible shifting of the course of a stream or river, cutting a new channel and separating land from the shoreline to which it was formerly attached. If an island is formed by avulsion, ownership of the island remains with the owner of the shoreline to which it was formerly attached. In contrast, accretion is a gradual and imperceptible addition of land to a shoreline, and ownership of the land rests with the owner of the receiving shoreline. Also related to accretion, erosion is the wearing away of lands by a process similar to accretion, and reliction is the addition of lands to a shoreline by the withdrawal of a body of water. David A. Provinse, 35 IBLA 221, 231 and n.4, 85 I.D. 154, 159 and n.4 (1978), overruled on other grounds to the extent inconsistent with David A. Provinse, 89 IBLA 154 (1985).

right bank and, therefore, part of the Reservation. Flood events in 1894 or 1896 purportedly caused the River to shift, cutting a new channel and creating the island out of land on the right bank. Under that scenario, BLM justified the notations on the plat and argued that the island was within the Reservation. (Decision at 4.)

In his Statement of Reasons (SOR), appellant specifically objects not to the survey itself, but to that portion of the proposed plat consisting of the notation identifying the north channel of the River as the “Avulsed Channel” and the notations identifying the island as “Accretions to Lot 5 and 6” and “Accretion to Lot 7”^{5/} rather than accretion to Lot 4. (SOR at 2.) Appellant argues that BLM offers no evidence to contradict prior surveyors of the area who concluded that no changes in the River were the result of avulsion, and provides a report by Dr. Kenneth Mitchell of the firm of Irrigation and Hydraulics Unlimited, Yakima, Washington, disputing BLM’s conclusions and supporting appellant’s assertion that changes in the River occurred by erosion and accretion, and that the island accreted to Lot 4. (SOR at 3-8, and Ex. T.)

Both parties have submitted and referenced substantial documentation and argument in support of their positions. A review of this material confirms that the parties raise two different, but related, questions. The first of these questions involves the location of the boundary of the Reservation. Is the island within or without the Reservation?

BLM was instructed to conduct a dependent resurvey and to undertake an “investigation and conditional survey of the Yakama Indian Reservation boundary” in Sec. 2, T.11 N., R. 19 E. See Survey Instructions. The ultimate objective was to “determine if an omitted island exists and, if so, where such island is located with regard to the thread of the river; i.e., within or outside the reservation.” See Special Instructions. Because the Reservation boundary was described by treaty in 1855 as “up the Yakama River,” BLM’s investigation would have had to be directed first at determining the location of the channel of the River in 1855, then at how the island

^{5/} These notations on the plat are seemingly inconsistent with BLM’s position, considering BLM asserts that the island was formed as the result of an avulsive (sudden, rapid, perceptible) shift in the course of the River cutting off the land from the bank, not by accretive (gradual, imperceptible) deposition of material creating new land. However, BLM’s letter dated Jan. 14, 2002, answering appellant’s SOR (Answer) stated that “[t]he label of ‘accretions to lots 5, 6, and 7’ of section 2 are due to the island growing in size to beyond the Mills [Survey] meander line.” (Answer at 7.) Based on this explanation, the notation is misleading, but the explanation makes clear that both annotations result from and are dependent upon BLM’s conclusion that the island was created by avulsion.

was formed and whether the island is within the Reservation today. However, we need not adjudicate the Reservation boundary issue here.^{6/}

BLM's Report on the Extent of the Trust Interest on Lands Located in Section 2, Township 11 North, Range 19 East, Willamette Meridian, Washington, dated November 7, 1997 (Survey Report), submitted after completion of the 1996 Survey and in accordance with the Special Instructions, reached no conclusion with respect to the boundary of the Reservation. See Survey Report at 38.^{7/} This reflects the inadequacy of the available information with respect to determining the boundary. For example, the portion of the River in question in this case has been the subject of many surveys, as discussed in the Special Instructions to Group No. 469, Washington, dated August 16, 1996. In 1865, George House, U.S. Deputy Surveyor, surveyed a portion of the township subdivisional lines and meandered the left bank of the River, as shown on the official plat of survey approved May 4, 1866 (1865 House Survey). In 1892, George Mills, U.S. Deputy Surveyor, resurveyed a portion of the north boundary of the township, surveyed the subdivisional lines south of the River, and meandered the right bank of the River, as shown on the official plat of survey approved March 1, 1892 (1892 Mills Survey). In 1918-1919, Robert Farmer, U.S. Cadastral Engineer, resurveyed the township boundaries and subdivisional lines south of the River and meandered the right bank of the River as shown on the official plat of survey approved December 14, 1923 (1918 Farmer Survey). None of these surveys investigated both banks of the River, and we are left with partial views of the River at widely disparate moments in time.

The Commissioner of the General Land Office (GLO) recognized the difficulty this uncertainty about the Reservation boundary created, particularly with respect to private landowners along the left (non-Reservation) bank of the River.

As the situation now stands, the meanders of the left bank of the river in 1865 [1865 House Survey] * * * are not conclusive evidence of the position of the Reservation boundary line, defined by the center of the stream; neither are

^{6/} The parties apparently do not dispute that if the island is determined to be a part of Lot 4, then it would be fee land presumably owned by appellant or some other entity. They also do not seem to dispute that if the island is determined to be a part of Lots 5, 6, and 7, then the island would be within the Reservation and appellant would not have an ownership interest. So, the pertinent question is to which lot(s) does the island relate? Such a determination need not specifically address the boundary of the Reservation.

^{7/} This is confirmed in the field notes to the 1996 Survey, in which Cadastral Surveyor John D. McCauley stated that "[t]his survey did not identify the location of the Yakama Indian Reservation." (Field Notes at 4.)

the meanders of the south bank run in 1893 [1892 Mills Survey] an acceptable determination of the position of the Reservation line. Furthermore, the lack of harmony between these two surveys, due to either a changed position in the creek bed or a different standard of refinement of work, renders it impossible to adopt a medial course between the two meanders that will qualify as an acceptable determination of the boundary.

It appears, therefore, that the Government has never defined upon the ground, by an official survey, the Reservation line, but it has surveyed and made disposals of the lands, including those of the Reservation, down to the banks of the creek, which were regularly meandered. The settlers and land owners who are reported by the Surveyor to be claiming to the creek in its present position were, therefore, without any tangible evidences of the position of the Reservation boundary, and they had, accordingly, only the records of the meanders that were run and the position of the creek upon the ground to guide them in making their locations. * * * [T]his office does not feel disposed to take any action in the premises, such as to disturb rights acquired in good faith along the stream * * *.

(U.S.D.I. – BLM, Investigation Group 469, WA., Research Documents (Research Documents) Vol. I, Sp42-11 (Letter dated Oct. 29, 1919, to the U.S. Surveyor General, Olympia, Washington, from Commissioner, GLO) at 8-10.)

Despite the consistent opinion regarding the absence of a defined boundary to the Reservation, BLM's Answer states that "the BLM survey shows the island to be within the reservation * * *." (Answer at 2.) Although that statement may be a result of its conclusion regarding the origin of the island, we confirm that the 1996 Survey did not establish the boundary of the Reservation.

The 1996 Survey did, however, address the second, and determinative, question in this case – whether the island originally related to Lot 4 or to Lots 5, 6, and 7 – and it is that question that we now address. BLM describes its view of the creation of the island in its Answer.

The river avulsed southerly during one or both documented flood events of 1894 and 1896 * * *, cutting off a portion of lots 5, 6, 7 from the southwest [right] bank. [^{8/}] The violent water action transformed the cutoff portion of lots 5, 6, and 7 into a large gravel bar; * * * . Over

^{8/} In the decision being challenged, BLM stated that "damaging floods took place" in 1894 and 1896 and asserted that only "one of these floods caused the river to avulse out of the channel location as surveyed by Mills, and move southerly across lots 5, 6, and 7 to where it approximately flows today." (Decision at 4.)

time, this gravel bar developed into the island that exists today, and which is still part of the right bank upland (lots 5, 6, and 7).

The avulsive occurrence is documented in an 1897 county surveyor report * * * in which he describes the massive changes to the river and the need for longer bridges to cross the widened river bed at that location. * * *

* * * * *

The geographic location of the island with respect to the locations of the plotted original meander lines is strong evidence that the island has always been part of the south bank * * *. The label of “avulsed channel” was placed on the BLM plat to show that this channel marks the ownership division as it existed just prior to the avulsive act. * * * The label of “accretions to lots 5, 6, and 7” show the portions of those lots that have grown beyond Mills’ meander line. The rights to lots 5, 6, and 7, and the accretions thereto, also terminate at the avulsed channel.

(Answer at 3-5.)

[1] BLM must provide positive evidence to demonstrate that an avulsive change occurred. United States Department of the Interior, Bureau of Land Management, Manual of Instructions for the Survey of the Public Lands of the United States 1973 (Survey Manual) at 7-73 (“An avulsive change cannot be assumed to have occurred without positive evidence”). Such evidence must be direct, affirmative, and definite, such as eyewitness testimony that an event occurred, and does not include circumstantial evidence, conjecture, or indirect evidence subject to different interpretations.^{2/}

With respect to the “avulsed channel” and “Accretions to Lots 5 and 6” notations on the plat, BLM relies principally upon three discrete elements of proof that the island was created by an avulsive act of the River: the location of the island with respect to the original plotted meander lines; documented flood events in 1894 and 1896 that cut off a portion of the right bank, creating a large gravel bar that developed into the island; and the 1897 county surveyor report that described the massive changes in the river. We look at these elements in order.

BLM compares the location of the island with respect to the plotted meander lines of the 1865 House Survey, the 1892 Mills Survey, and the 1996 Survey. See

^{2/} See, e.g., State v. Hubbard, 171 S.W.2d 701, 704 (Mo. 1943).

Diagram A to Answer. The 1865 House Survey shows the meander lines only along the left bank of the River, at the relevant location extending south along the western boundary of Lot 4, then curving to run perpendicular to the east, along the southern boundary of Lot 4. The 1892 Mills Survey shows the meander lines only along the right bank of the River, extending south almost parallel to the 1865 House Survey approximately 20 chains to the west, then curving to run perpendicular to the east until it coincides briefly with the 1865 House Survey near the southwestern corner of Lot 4, then running generally southeasterly. The 1996 Survey plat shows informative traverses run along both banks of the River, extending generally south, mostly between the two earlier lines of survey, to the 1892 Mills Survey perpendicular meander line running east, at which point the River splits, and the informative traverses follow the resulting north and south channels, which run around the island toward the east.^{10/}

Overlaying these plotted meander lines shows the island, as of 1996, in a location just south and southwest (across the north channel) of Lot 4 where the 1865 House Survey left bank meander line generally coincides with the 1892 Mills Survey right bank meander line. The island in 1996 is shown within parts of Lots 5, 6, and 7, and immediately adjacent to Lot 4 (as depicted by BLM on the 1996 Survey plat). It is clear that the River has moved several times since 1865. Although the location of the island and the likely movement of the river is not inconsistent with one or more avulsive events creating the island, it also is not inconsistent with erosion and accretion creating the island.^{11/} Accordingly, the location of the island is not positive evidence of its creation by avulsion.

BLM asserts that “the river avulsed southerly during one or both documented flood events of 1894 and 1896,” creating the island by cutting off a portion of Lots 5, 6, and 7 from the right bank of the River. (Answer at 3-4.) The Survey Report mentions these floods numerous times, referring to them as “damaging floods on the Yakima river of unrecorded magnitude” (page 5), “flood events of 1894 and 1896” (page 9), “the history of flood events in 1894 and 1896” (page 9), “[a]lthough there was historically the potential for flooding during [December 1892] * * *, there is no record of a flood event taking place until 1894” (page 11), “several flood events;

^{10/} According to the Glossary of BLM Surveying and Mapping Terms, 1980, at page 31, the term “informative traverse” is defined as “[a] survey made to obtain topographic data or to define the present river bank in front of patented land.”

^{11/} The Survey Report proposes six possible theories explaining the development of the island, including “[t]he island could have been formed by accretions to upland of either bank that was later separated from the upland by an avulsion.” Survey Report at 3. That suggests that merely overlaying the plotted meander lines does not conclusively rule out accretion as a mechanism for forming the island.

1894, 1896, * * *” (page 18), “there is documentation of flood events on the Yakima river in 1894 (biayasmc-1) and 1896 (biayasmc-2) but the magnitude of these floods is unknown” (page 20), “[i]n 1894 and 1896 there were damaging flood events on the Yakima river of unrecorded magnitude” (page 34), “the 1894 and 1896 flood events” (page 34), and “the history of flood events in 1894 and 1896” (page 37). Unfortunately, the mere repetition of the same limited data does not increase its credibility.

The only actual evidence provided in the record for the crucial flood events relied upon by BLM are two reports. The first is by the District Engineer, War Department, United States Engineer Office, Seattle, Washington, dated September 21, 1935, entitled “Report on preliminary examination of Yakima River, Wash., with a view to the control of its floods.” Three pages of that multi-page report are included in Research Documents, Vol. II, as document “WSDNR-3,” and the third page describes floods in the Yakima Basin.

34. *Floods.*—Five floods of major magnitude have been recorded in the Yakima Basin: in November 1906, November 1909, December 1917, December 1921, and December 1933; or on an average of once in 6 years. Earlier floods, of unknown magnitude, are reported to have occurred in 1862, 1864, 1865, 1869, 1881, 1882, 1888, and 1896.

(Emphasis added.) No mention is made of a flood in 1894 and no other information concerning earlier floods is provided.

The second report was prepared for the Yakima Indian Nation and State of Washington by the Army Corps of Engineers, Seattle, Washington, District, and is entitled “Flood Plain Information, Yakima River, Parker to Mabton and Vicinity, Washington” and dated June 1975. (Research Documents, Vol. II, Document “biayasmc-7,” consisting of the cover page and two pages (15 and 22) of a multi-page report.) Page 15 of this report provides a summary of historical floods, and states “[d]amaging floods have been noted on the Yakima River as early as 1894.” (Emphasis added) No other information about a flood in 1894 is provided, in this report or elsewhere in the record. No mention is made in this report of a flood in 1896.

BLM provides no specific evidence of floods on the River in 1894 and 1896 except for these vague references. There is no evidence in the record as to the magnitude of the two purported flood events, and nothing to link them with the stretch of the River at issue or the creation of the island, except for BLM’s conjectures. Accordingly, these references to flood events are not positive evidence of the creation of the island by avulsion.

Finally, BLM relies on a two-page report by the Yakima County Surveyor to the Board of County Commissioners, dated July 6, 1897, on the Simcoe [Wapato] Bridge Site. Research Documents, Vol. I, Document “YCDPW-5.” BLM states that “[t]he avulsive occurrence [creating the island] is documented in an 1897 county surveyor report * * * in which he describes the massive changes to the river and the need for longer bridges to cross the widened river bed at that location.” (Answer at 4.) That report states:

Commencing at North [left] bank of River, I find the total width of river at this point to be 1342 feet in width, about one-half the distance being gravel bars, as shown in map. Width of river channels commencing at point on North [left] bank is as follows: To water 0 feet; a channel 311 feet wide, Gravel bar 115 feet; Channel 260 feet; Gravel bar 468 feet; River channel 240 feet.

As will be seen the river at this point is divided into Three (3) channels, one channel at the North [left] bank, one near the center of river bed, and one at the south [right] bank of river. * * * Owing to the conditions of the river at this place, the low banks and changing current, to say where the river channels may be in the future is mere conjecture, but as far as can be predicted, (unless intiligent [sic] action is taken to confine the river to its banks and to one channel,) the main channel will be at the South side * * *.

This report does not mention floods in 1894 or 1896, and says nothing of avulsive events, although it suggests a very active river with several channels. Also, the report does not discuss which channel might be the principal channel at that time,^{12/} or further describe the gravel bars. BLM interprets this brief report as providing evidence of the avulsion that created the island.

The area referred to as the “468 feet wide gravel bar” is the land base of the island. [^{12/}] * * *

* * * * *

^{12/} There is no evidence when the field work utilized to prepare the report took place, although BLM guesses that it was some time earlier in the year 1897, possibly “at some time after the higher Spring flows during lower than flood stage water levels and this gravel bar area is then above ordinary high water.” (Survey Report at 5-6.)

^{13/} BLM provides no clear basis for this assumption.

It can be assumed that the widest channel would have been the main Channel of the river. Therefore, the center channel was still the main channel of the river in 1897. * * * This report combined with information from the Mills [1892] survey supports the theory that the principal channel probably changed locations sometime between the original survey of the right bank in 1892 and the County Surveyor[']s report in 1897. This change may have been abrupt as in an avulsion or it may have occurred gradually between 1892 and 1897 whereby the flow in the center channel diminished until the majority of the volume of flow was in the southern channel.

(Survey Report at 5-6.)

The 1897 County Surveyor Report does not document an avulsive event that created the island. It describes three channels of the River (the northernmost channel at 311 feet being the widest) and two gravel bars, and confirms the changeable nature of the River's course. The rest is merely BLM's interpretation of the report. Accordingly, the report is not positive evidence of creation of the island by avulsion.

Other evidence in the record shows that one GLO surveyor, who subsequently surveyed and investigated sec. 2 and prepared a report, dated September 27, 1923, concluded that changes in the River in the vicinity of the island were the result of accretion and erosion but not avulsion.^{14/} Another GLO surveyor, who investigated conditions in T. 11 N., Rs. 19 and 20 E. by floating down the River in a rowboat, prepared a report, dated April 23, 1926, in which he did not rule out avulsive changes to the River in those townships since the date of creation of the Reservation, but it is not clear that he was addressing the area of the River in question.^{15/} None of this constitutes positive evidence that the island was created by avulsion.

Following the 1996 Survey, BLM concluded, primarily based upon the above proffered evidence, that the island was created by avulsion, a sudden, violent, and perceptible event, and then added notations to the official plat reflecting that conclusion; however, BLM has provided no positive evidence of such an event. BLM even acknowledged that the evidence it does provide could indicate creation of the island by a gradual occurrence or even accretion. That is not avulsion.

^{14/} See, e.g., Research Documents, Vol. I, Document "Sp42-23" at 2; Research Documents, Vol. I, Document "Sp42-24"; Research Documents, Vol. I, "Sp42-27" at 2.

^{15/} (Research Documents, Vol. II, Document "Sp42-33" at 15-18.)

[2] The 1996 Survey was to be conducted in accordance with BLM's Survey Manual. See Special Instructions at 1. The Survey Manual explicitly states that "[a]n avulsive change cannot be assumed to have occurred without positive evidence. When no such showing can be made, it must be presumed that the changes have been caused by gradual erosion and accretion." Survey Manual at 7-73. We have held that a dependent resurvey that is not consistent with the Survey Manual "constitutes gross error and must be canceled." Domenico A. Tussio, 37 IBLA 132, 133 (1978). However, appellant does not seek cancellation of the survey based on a failure to conform to the Survey Manual. He challenges only specific notations on the plat and the necessary interpretations and conclusions underlying those notations. In this case, the survey is consistent with the Survey Manual. But, the record does not support the surveyor's conclusion on avulsion, and it is that conclusion which led to inclusion of the notations on the plat.

Without positive evidence in the record of avulsion to support the plat notations, BLM's Decision dismissing appellant's protest must be reversed, and BLM is directed to remove the notations from the official plat. In addition, because removal of the notations leaves unresolved the underlying question of creation and ownership of the island, and because the creation of the island must be presumed, in accordance with the Survey Manual at 7-73, to have been by erosion and accretion, this matter is remanded to BLM for further review and decision as to how the island was formed and to which lot(s) it accreted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the matter remanded to BLM for further action consistent with this decision.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge