Special Boundary Problems 1

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STUDY GUIDE

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Table of Contents

Introduction	1
Course Goals	1
Objectives	3
Key Definitions	4
Junior/Senior Corners	9
BLM Manual Examples	9
Junior/Senior Corners Exercise #114	4
Junior/Senior Corner Exercise #1 Debrief 10	6
Hiatus	0
U.S. vs. Weyerhaeuser Case	5
U.S. vs. Weyerhaeuser Case Debrief	6
U.S. vs. Macmillan Case	8
U.S. vs. Macmillan Case Debrief	2
Hiatus Exercise #2	6
Hiatus Exercise #2 Debrief	0
Hiatus Exercise #3	6

Hiatus Exercise #3 Debrief	48
Hiatus Exercise #4	52
Hiatus Exercise#4 Debrief	55
Overlaps	58
Oregon 1924 Overlap	61
Overlap Exercise #5	77
Overlap Exercise #5 Debrief	80
Mineral Survey Hiatus/Overlap	85
Conclusion	87
Index	88

Introduction

Welcome to the Special Boundary Problems course. My name is John Farnsworth and I am a cadastral surveyor with the Bureau of Land Management Oregon State Office. At the Oregon State Office, I am the senior technical specialist and programming coordinator.



I am Bob Thompson, and I am a cadastral surveyor with the BLM in the Nevada State Office and I am the Office Section Chief there.

Course Goals

Given a special boundary problem, analyze the record and evidence and determine the proper course of action in accordance with established boundary law. The types of problems that we are going to discuss today are caused when there have been multiple official government surveys along the line where monuments have been established in each of the official surveys.



This discussion will mainly focus on township and range lines although these situations can occur along sub-divisional lines in a township. When the public land survey system (PLSS) was first developed, it was not anticipated that these problems would occur.

The perfect design of the public land survey system would only have had multiple monument situations where closing corners were established according to the plan. The special boundary problems we will discuss have happened when retracements or resurveys were executed in order to complete the original surveys.

The special boundary problems that we are going to cover in this course are not the only special boundary problems within the rectangular system. There are problems with water boundaries; there are problems with mineral surveys, and many other places where there are special problems. We are just going to concentrate on the ones that have to do with the township boundaries.

Objectives

The objectives for this course include the student being able to:

- Define the terms associated with special boundary problems.
- Identify boundary and title principals established in case law.
- Distinguish between junior/senior corners, hiatus/overlaps, and technical differences.
- Recognize key information within the record/evidence to determine if a junior/senior corner, hiatus/overlap, or technical difference exists.
- Determine associated title issues for a special boundary problem.
- Develop a plan to complete the survey.





Key Definitions

The first definition we have is **Junior Survey** which is a survey made subsequent to an earlier survey.

A **Senior Survey** is the oldest of two or more surveys, which fixed the position of the line and is controlling unless officially superseded by a subsequent survey.



Now, we are going to be covering these two concepts and definitions more in depth when we get into the Junior/Senior section of the course.

Next, we are going to look at **Junior Rights**, which are subordinate to senior rights. The later patent issued usually has the subordinate right in a situation where a later survey is in conflict with an earlier survey.



Senior Rights are those that take precedence. The first patent issued usually takes precedence in a situation where a later survey is in conflict with an earlier survey. The first patent issued usually has the superior or senior right of title, regardless of the other dates of the surveys.



We will look at these concepts again when we look into overlaps later in this presentation.

Another important concept is **Date of Entry.** Date of Entry is the date on which an application to acquire title to public lands has been approved. When you need this information, go into the BLM and inquire about where the date of entry may be located. Typically, it is found in the serial register pages or serialized case files.



Finally, **Patent Certificate**, a document by which the United States conveys to those entitled therein, legal title to some portion of public lands.



Junior/Senior Corners

Let us look at some Junior/Senior corner situations. Turn to the casebook and look at page C1-6. There is a lot of good information there on Junior/Senior corners, especially the legal background.

The first case they discuss is **Van Amburgh vs. Hitt**. In that case, they ruled that when you have two overlapping surveys, the first one made has priority. That's an important part of the junior/senior surveys situation. The first survey controls.

The second case they look at is **Washington Rock vs. Young**. That is an interesting case because they looked where there was extensive obliteration of the senior survey and they said that the junior survey could control the line in these cases when the senior survey is all but gone.

There are also some good examples of junior/senior corner situations in the 2009 BLM Manual of Surveying Instructions particularly at sections 7-22, 23 and 42. There are three primary examples in there.

BLM Manual Examples

The first one is an example where both sets of corners have been established by measurement along the line in a single survey. Each corner controls equally for both measurement and alignment.



The third case is where a single set of corners was established in the survey of the line and closing corners were subsequently established at intersections of section lines on one side. The corners first established control both the alignment and the proportionate measurement along the line. The closing corners do not control the alignment or the proportionate measurement along the line.



The second example is sometimes one set of corners was established for one side of the line and a second set of corners was established for the other side in the course of a later retracement. The line is regarded as having been fixed in position by the senior survey unless that survey was officially superseded. If both sets of corners are recovered, a junior corner line off the line is treated in the same manner as a closing corner as far as alignment is concerned.



When was the acreage for the townships on either side of this line returned? The township to the north was the first survey and considered the senior survey so areas were returned for the township to the north first. The township to the south was later retraced and then areas returned for that township.

I hear you use the term **retraced** and I have heard the term **careful retracement** used. What does that term mean? A careful retracement is one that is executed within the requirements of the Manual in effect at the time of the survey. When I think about careful retracement, you are looking for all the marks and corners of the first record and it is not a careful retracement unless you utilize and try to find all those marks and all those corners.

Some people think the junior corners need to be perfect in junior surveys. If the survey is executed properly, certainly, the junior corners should be very close to the senior line, but we know from experience in many cases that those junior corners were not placed very carefully on that senior line and in that case, those junior corners need to move to the senior line. How do you distinguish between what is a junior corner and what is a closing corner. A? A **closing corner** is usually set as a line intersecting from the adjoining township.

Therefore, a closing corner is more of a line of intersection with the senior line where a **junior corner** is one that is placed on the senior line while running the senior line. So in effect, the junior corner is one where you actually retrace the first line and set the corners, the closing corners are when you intersect.

I think it's time to move on now, and we have an exercise that's coming up on junior/senior corners, so please turn to your exercises and start looking at Exercise #1 and we'll discuss it in a few minutes.

Junior/Senior Corners Exercise #1



The boundaries and sub-divisional lines of Township 28 South, Range 17 East, were surveyed in 1886.

The N, W. and S. boundaries of Township 28 South, Range 16 East were surveyed and the East boundary was resurveyed in 1902. The original corners along the East boundary were changed to minimum control (for one side of the line only) for Township 28 South, Range 17 East and new corners were established for Township 28 South, Range 16 East. You have retraced the line between Townships 28 South, Ranges 16 and 17 East and found all the original corners between sections 13 and 18. You find the 1902 corners off the original line as shown in the above diagram.

1. You must mark the boundaries of the NW ¼ of section 18. How will you determine the position of the West boundary? Why?

2. You must mark the boundaries of the SE ¹/₄ of section 13. How will you determine the position of the East boundary? Why?

Junior/Senior Corner Exercise #1 Debrief

Let us return now to Exercise #1 and this is quite an interesting situation. It looks like we have multiple monuments along the range line. It looks like it could be closing corners or possibly a junior/senior situation.



How would you go about determining where that fits? Well, it does look like we have a junior/senior situation here. We have Township 28 South Range 17 East. The plat was approved in 1886, which would make it the senior survey, and then we have the original plat for the township to the west, Township 28 South Range 16 East approved in 1902, which would make it the junior survey.

One of the things that we do not know here is that whether that junior survey consists of closing corners or whether they consist of junior corners that were placed on the senior line. The best way to determine that is to get the original plat and field notes. In most cases, the way that township surveys are completed you would not see closing corners coming from the west into the east boundary of the township. I have seen it happen before, and because of that, you should always get the plat and field notes. You have a situation like this where there is a quarter corner established for Section 13 in the township to the west, you would not normally see that occur if we had closing corners either.

This would make a person tend to think that this was a junior corner placed along a senior line in the course of a retracement of the senior line. Having the plat and field notes is important to make sure that is the case. It is always important in every situation to have the plats and field notes because I think that is the only way that you can really tell what is going on. Let us look at the first question.

You must mark the boundaries of the northwest quarter of Section 18. How will you determine the position of the west boundary, and why?

Well, we are looking now at the northeast corner of Section 13. According to the diagram, it shows it being 6.02 feet off line. This is a junior /senior situation and we have determined that, and so you have the junior corner off the senior line by more than 6 feet. In those situations, what you normally do is treat them as if they were closing corners. You would intersect through the nearest corner to the west, through that corner to the senior line and place the monument on the line.

The west boundary of Section 18 is the senior boundary. You would move the monument for Section 13 in the northeast corner onto the senior line and that would control. This is not one of those cases where you are looking at what we might call a small gap that was created, but in the **Van Amburgh vs. Hitt,** they said that you do not look at **trifles**. It is called **diminimus** and this is a minimal gap that you are looking at here. These things are not classic gaps that we will discuss later in the class. These are diminimus or minor. These should be closed up by moving the corners onto the lines.

The second question was - You must mark the boundaries of the southeast quarter of Section 13. How will you determine the position of the east boundary, and why?

That is an interesting situation because it is the opposite of the one we looked at when we looked up the northeast corners of Section 13. We are looking at the quarter corners of 13 being over 5 feet east of the senior line. When you have patent on that senior side, which a patent goes to the senior line. So there's no way that you can have a monument and land described as the southeast quarter in any part of section 13 cross over the senior line and be determined by the position of that corner where it's at now.

You are looking at an alignment situation that would be used as an end point in alignment to move it back to the senior line. I noticed also that in this exercise we have a different land status. We have both U.S. public land and we have patented land.

Does the land status affect that situation?

I think we really need to look at the line and the **controlling monuments** on the line to answer that question. The senior monuments on the line control the alignment and the junior corners must be moved to that line. If we want to indicate here on this slide, the senior corners are that corner there, and the quarter corner of Section 18 and the southwest corner of Section 18. Those three monuments control the line, irregardless of the status.

If in the southeast corner of Section 13, which is shown on this as U.S., if that was actually patented land, and then in the southwest quarter of Section 18 where it says patent, if it was actually U.S. land, the status wouldn't make any difference. You would be moving those junior corners onto the senior lines no matter as utilizing the monuments as the controlling corners.

Would there be circumstances where maybe you would consider using those junior corners as controlling the alignment of that line?

Several things could have happened that might lead you to some other considerations. First, it was practiced in some areas of the **General Land Office** (**GLO**) when they retraced these lines later they would call the junior corners on line even if they were off line a little bit.

You might find that your retracement those are really actually still not on the line, they are a minor amount off. However, that would be one thing to consider. What GLO has done in the past when they have looked at the situation? Another thing that could have occurred is you could have had user occupancy along that line.

For instance, what if the landowners on the adjacent side fenced to the junior corners and then fenced from junior corner to senior corner in effect putting a break in the bearing and the boundary on their lines by fencing between the monuments on the ground.

Perhaps private surveyors (one or two or three), have retraced the line and for development activities on either side of the line they bent the line through the corner and maybe there's housing, a subdivision of some sort of development goes up against the line with a junior survey or breaks bearing through each of those monuments. These are all things that you are going to have to look at and consider when you are looking at the junior/senior corner situations.

Sometimes people might think that a sixteenth corner set in a retracement or resurvey would be a junior corner. A sixteenth corner that is set on a line that is senior on both sides, meaning that both sides of the line were returned at the same time. A sixteenth established on that is not a junior corner if found slightly off line or not at midpoint. It is a senior corner.

There is a temptation to look at them like a junior corner, but if they were done according to the Manual of Surveying Instructions and set within the limits and guidance in effect at that time, that senior corner, that sixteenth should actually function as a senior corner for both sides of the line. So in effect, if you had a dependent resurvey, you were retracing, and finding the original corners, and you set a sixteenth corner in the course of a dependent resurvey it is the same as a senior corner on that line.

The rule is a dependent resurvey if executed properly, in effect retraces and defines the original survey itself.

Hiatus

Welcome back to the Special Boundary Problems course. Now we are going to move on to the hiatus portion of the course. By now, you have had a chance to read the first four paragraphs of the casebook.

You have also seen the links to an Act of Congress and three court cases. The Act of Feb. 11, 1805 was significant because it said that the corners are the true corners, regardless of correctness. That means if a line surveyed North and 80 chains is found to be something different, the monuments control, not the measurements. The court case Haydel vs. Dufresne was significant because it stated that government surveys are unchangeable. Again, that substantiates or follows The Act and it says that the differences in bearings and distances are not as important as the monuments. The monuments control even though that they may not be exactly at the measured bearings and distances.

Cragin vs. Powell discussed that government surveys are unassailable except under direct precedence. For example, if John was my neighbor, he has an issue with me trespassing against him, and John had an issue with the survey and it was government survey, John could not attack that government survey in the trespass case against me. He would have to file suit directly against the government.

The third court case is **Lindsey vs. Hawes** and that discusses the importance of a date of entry. So let us go ahead and take a look at what hiatuses are in the public land survey system.

The definition in the glossary calls for it to be an area between two surveys, the record of which describes them as having one or more common boundary lines with no omission.



What that means is a hiatus is a substantial gap of unsurveyed line between two monumented survey lines. Let us look at how they are created. Usually hiatuses are created when there were completion surveys where the original corners were not recovered.



In addition, when a retracement of a previously established line actually sets a second set of corners not on the previous line. Thirdly, when resurveys were made where the original corners were not found. A new line was run and corners established.

Often there is a long span of time that occurs between the first and second surveys - 20 or more years. Usually this leads to the situations above. A hiatus is characterized by the second surveyor not finding the original monuments and establishing an entirely new line.



In these situations, the problem is usually not discovered until many years later, and there must be evidence on the ground of two monumented survey lines. In order for there to be a hiatus, the following conditions must exist.

There are two official surveys of the same line. Each of those surveys set monuments and two sets of monuments do exist. None of the monuments was set as closing corners. Both are official surveys of the government and neither was cancelled or superseded by another survey.



I think it is also important to note that closing corners established at considerable distance off line do not normally create a hiatus. I have had many discussions with county surveyors and private surveyors who have looked in the paper records in the General Land Office and they say - there is a hiatus here - we have two sets of monuments.

I can tell by comparing records and in actuality, I have to tell them that unless you can go out and find two sets of monuments on the ground, you do not have a hiatus. You have a paper hiatus, but you do not have a true hiatus without the double set of monuments.

Are hiatuses a common problem in the public land survey system?

In some areas. Some states do not have too many problems with hiatus situations, some do. I know in Nevada, the same pair of surveyors that we'll see in the Macmillan case - Hatch and Eaton, and Maxson seem to have a propensity for creating hiatuses and overlaps, so in Nevada it is a common occurrence. However, I know there are many other places where it is not really a common occurrence.

Even though were going to look at a case study situation that is in Oregon, I would have to say in Oregon, hiatuses are really not a common problem. Let us go to the field and look at a survey problem. What are the conditions on the ground in the Weyerhaeuser vs. U.S. case?

U.S. vs. Weyerhaeuser Case

Here we are in the beautiful western Oregon coast range to discuss a case known as Weyerhaeuser vs. U.S., which is a classic hiatus situation. Let us talk about the survey history. In 1855, **Dennis Hathorn** was contracted to survey the Sixth Parallel south as the north boundary of Township 28 South, Range 8 West and subdivide that township.

In 1896, **William Heydon** was contracted to subdivide 27 South, 8 West. As part of that contract, he was to retrace the standard parallel and set his corners to the north before subdividing the township.

Heydon found the 1855 standard corners of Sections 1 and 2, 2 and 3, found no corners for Sections 3 and 4; found the standard one-quarter corner for Section 5 and all standard corners to the west. He then established his corners along that standard parallel to the north and subdivided the township.

In 1876, patents were issued for the township to the south and Sections 3, 4, and 5. Beginning in 1899, patents were issued for the township to the north.

In 1961, it was discovered that the Heydon and Hathorn lines were not coincident. All of the 1855 Hathorn corners except for the one-quarter corner of Section 3 were found. All of the 1896 Heydon corners for the north were found.

The Hathorn line was surveyed south of a due east-west line and the Heydon line was north of a due east-west line which created a gap or hiatus between the two surveyed lines. In 1961, BLM then dependently resurveyed both those lines and surveyed the gap in between as Township 27 1/2 South, Range 8 West. How big was that gap? Well, let us go look at some of the corners and we will see.

Here we are at the quarter corner of Section 4 on the south boundary of the hiatus. Approximately 145 feet north of here is the north boundary of the hiatus. As you can see, there is valuable timber and quite a bit of brush in this strip. This hiatus is approximately 3 miles long and at its widest point it is 306 feet wide which contains about 46 acres. Down this way is a blazed line here on the south boundary of the hiatus.

We have moved a little west now where the hiatus is near its widest point. We are near some stumps of trees that were logged after the time of the court case. In the 1960's and 70's around the time of this case, old growth timber was worth \$125 - \$225 per thousand board feet. That made the total value of the timber in the hiatus between \$500,000 -\$850,000 at that time.

Today, that old growth timber is worth over \$300 per thousand board feet, which would put the value in the hiatus well over \$1.1 Million. As you can see, there is now some very nice second growth timber in here, which still has an extremely high timber value and would someday be logged.

U.S. vs. Weyerhaeuser Case Debrief

Now we have seen the field situation, let us discuss what happened in the court cases. In the Weyerhauser vs. U.S. Case, it started out in the District Court and ended up in the 9th Circuit Court of Appeals.

The arguments that Weyerhauser put forth when they went to court, was that there should only be one standard parallel, that two standard parallels should not exist in that location. Thus, their ownership rights should go to the first standard parallel surveyed the one to the south, not to the one that was done in a later survey to the north.

I characterize that as being the "could've, would've, should've" argument - that the original surveyor, the second one, should have found the original survey, and if he had done it right the southerly line would have been the boundary and they said they owned the land in the hiatus due to that situation. The government's argument, on the other hand, was that each survey stood on its own for the townships adjoining that standard parallel. Thus, the township to the north where Weyerhauser had ownership, they were bound by the second running of the standard parallel because their plat and their acreage was dependent on that plat.

The interesting thing about this case is that in the District Court, they agreed with Weyerhauser. They said, yes, there should only be one standard parallel, that standard parallel would have been the first one run, and that Weyerhauser owns the land in the hiatus. Well, the government really disagreed with that, and I know the survey community in Oregon where this occurred disagreed with it, so they went ahead they had it appealed to the 9th Circuit Court of Appeals.

When the 9th Circuit Court of Appeals considered it, they looked at both arguments and they said, government, your argument is correct that the land Weyerhauser owns was bound by the second running of the standard parallel and by the acreages and plat for that township. Therefore, they reversed the District Court and they said that the government, because the hiatus was on unsurveyed land, they owned that land. Weyerhauser was not happy with that, and they went ahead and appealed to the Supreme Court. The Supreme Court denied their **writ of certiorari** and in effect when you appeal to the Supreme Court and they deny a rehearing on it, they make the Circuit Court decision the law of the land.

When I first looked at that case, for some reason it looked to me like we might have a junior/senior relationship issue there. What is the difference between this case and a junior/senior relationship? The difference is in a junior/senior relationship, you have a careful retracement of the first line.

In this situation, the second surveyor did not find corners of the original survey over a span of approximately 3 miles, and he established all new corners in that stretch.

Therefore, it was not a careful retracement. He was not putting corners and following the senior line. He diverted from the senior line and when that happened and they created the township plat to the north, you ended up with that gap. So they did not follow the same line, they were on very distinctly different lines in this situation. Let us return to the field and look at the United States vs. Macmillan case.

U.S. vs. Macmillan Case

Hi. I am Ron Scherler and I am here with Bob Thompson, who is the Cadastral Office Section Chief in the Nevada State Office of BLM. We are here to talk about the case of the U.S. vs. Macmillan. As I look around here, all I see is grazing land. I do not see much value. There is an interstate freeway just north of us but for this case, this boundary dispute to end up in the U.S. District Court in Nevada. What happened? What was the issue here?

This area here is primarily used for grazing but if you notice off the west here, we have the remains of a material site. The State of Nevada was issued a permit by the United States to extract gravel from this site. BLM issued a permit to the state and I assume then the Macmillans thought they owned this land. What happened?

The Macmillan's own some land in Township 33 North, Range 49 East. They were successor in title to lands that were owned by the railroad. They felt that they had a claim to title to this same land here.

So exactly what land are we talking about? We are talking about Lot 5, Section 31, Township 33 North, Range 49 East Mount Diablo Meridian Nevada. Where is it from where we are standing? This monument is actually at the southeast corner of Lot 5. Lot 5 is to the northwest of here. So kind of out this way. About a quarter or more of this gravel pit appears to be on Lot 5. So why did BLM, what was their claim? Why did BLM think it was theirs?

Well, what we had here was two inconsistent surveys, one original survey in Township 32 North, Range 49 East behind us, and the other original survey in Township 33 North, Range 49 East ahead of us. Those two surveys were not coincident. The two boundaries were separate and they left a gap or hiatus between them. It was a hiatus so the federal government, BLM said the hiatus land is ours. The U.S. government claimed it as public domain. So the Macmillans, what was their claim?

Well as I mentioned previously they were successors in title to the railroad who received a patent in Section 31. In 1921, the General Land Office approved a plat that filled in that gap and hiatus by extending the township to the north, - Township 33 North, Range 49 East, to the north boundary of Township 32 North.

They took the hiatus land and added it to Section 31. The Macmillan's owned in Section 31, so they thought this addition went to them. How big is this lot? Lot 5 is 12.57 acres. So still not an awful lot of land, but whatever the court decided here would have an effect on the entire hiatus. The hiatus was not just confined to Lot 5, it extended for six miles across the entire boundary between the two townships. It ranged anywhere from 2 chains tall on the west end to as much as 12 chains tall on the east end.

It is a substantial piece of property. Any other abnormalities in this township or this area. Well interestingly enough we have a gap between the two townships here. On the east boundary of Township 33 North, Range 49 East, we have an overlap with Range 50 East.

So there we have two township boundaries that overlap and down here, we have two township boundaries that do not get together. That is not supposed to happen. How did that happen in this situation?

Well, you would have to look at the history. In 1869, AJ Hatch surveyed the exterior boundaries and sub-divisional lines of Township 33 North, Range 48 East, establishing the southeast and northeast corners of that township.

In 1871, Hatch surveyed the west and south boundaries, west 2 miles of the north boundary, and surveyed the sub-divisional lines of the west two ranges of Sections in 32 North, Range 49 East. In 1872, Hatch surveyed the south and east boundaries and sub-divisional lines of 34 North, 49 East.

In 1874, Hatch surveyed the remaining east 4 miles of the north boundary, the east boundary and additional sub-divisional lines in 32 North, 49 East, including the line between Sections 1 and 2, but not the remaining lines of Sections 2, 3, and 4. In the same year, 1874 Hatch surveyed the westerly part of the north and south boundaries and west range of Sections in 33 North, 50 East.

In 1893, HB Maxson received a contract to subdivide 33 North, 49 East. Maxson's field notes indicate that he retraced the Hatch east boundary of 33 North, 48 East and did not find the southeast corner of that township, nor any corners in the south 3 miles. He did find the corners of Sections 13, 18, 19, and 24 and the corners north of there. Maxson reported resurveying the south 3 miles, by surveying due south 40 and 80 chains and reestablished the corner of Townships 32 and 33 North, Ranges 48 and 49 East.

He then resurveyed the south boundary running east, setting corners at 40 and 80 chains. He reported finding traces of a few of the Hatch corners and destroyed them. Maxson set his own corner for Townships 32 and 33 North, Ranges 49 and 50 East, reported finding the Hatch township corner and destroying it. He then ran north setting his own corners for Township 33 North, Ranges 49 and 50 East, reported finding some of Hatch's corners but again destroying them. Maxson repeated the same procedure along the north boundary. He then subdivided 33 North 49 East from the corners he had himself established.

On June 20, 1902, most of the odd numbered sections in these townships, were patented to the Central Pacific Railroad Company. Macmillan and others are successors in title to Sections 31, Township 33 North, Range 49 East. From 1914 to 1920 retracements of the Maxson and Hatch surveys in the course of the completion surveys in adjacent townships revealed the following situation.

The Hatch corner of Townships 32 and 33 North, Ranges 48 and 49 East was lost. This corner was restored by double proportionate measurement between recovered original Hatch corners 3 miles North, 2 miles East, 3 miles South and 1 mile West.

From the restored corner, the southwest corner of 33 North, 49 East, established by Maxson was located N. 16° 49' E., 2.32 chains distance. The field notes indicate the Maxson corners were found along the south 3 miles of the west boundary, but none of the Hatch corners. Most of the Hatch corners along the boundary of 32 North, 49 East were recovered. All of the Maxson corners along the south boundary of 33 North, 49 East were found located from about 2 chains to more than 12 chains north of the Hatch corners.

From the Hatch corner of Townships 32 and 33 North, Ranges 49 and 50 East, the Maxson southeast corner of Township 33 North, Range 49 East was located 11.60 chains north and 2.27 chains east. The original Hatch 1 quarter corner of Sections 7 and 12 on the east boundary was found, and at the same point the corresponding Maxson 1 quarter corner of the same sections. Northerly there from, only the Maxson corners were found. In the south 4 ½ miles of the east boundary, the

recovered Maxson corners were found to the north and east of the recovered Hatch corners.

The general land office surveyed the hiatus lands by extending the Maxson section lines southerly to an intersection with the Hatch north boundary of 32 North, 49 East where closing corners were established. The south half of Sections 32, 34 and 36 were lotted because those sections were still public domain. The hiatus land south of the Maxson south boundary of the patented Sections 31, 33, and 35 were lotted and were given appropriate areas and lot numbers pertaining to those sections.

The Maxson lines between Sections 12 and 13, 13 and 24, 24 and 25 and 25 and 36 were resurveyed but terminated with closing corners on the Hatch west boundary of 33 North 50 East. Lots and areas were created in the public domain Sections 12, 24 and 36 against the senior Hatch line eliminating the overlap of the Maxson survey of those sections into the patented sections in Township 33 North, Range 50 East.

U.S. vs. Macmillan Case Debrief

Welcome back to the studio. Let us look at the arguments in the Macmillan case. Macmillan argued that since all of Section 31 was patented, Lot 5 was also patented.



If you look at the plat approved in 1921, you will see that Section 31 was extended to the north boundary of Township 32 North. The government argued that title passed only to that part of Section 31 from the Maxson survey. The government was saying that since the title had passed on the Maxson survey before the hiatus was identified that title was limited by the Maxson survey. The court ruled that the hiatus was public land.

The conclusion is that when two separate monumented lines exist representing a single senior line, a hiatus exists and the land is public land. I noted in that court case that they pointed out that the Maxson survey was not mentioned in the patent, so why did they limit the lands in Section 31 to only those shown on the Maxson plat?
It has been established in the courts that once a patent is issued, it is issued based on the survey in effect at the time and the plats and notes are associated with patent are as if the plat and notes were accompanying or on the face of the patent itself. So they did not need to. It was implied that the Maxson survey was the controlling survey for that patent.

I also want to paraphrase something here that the Commissioner of the General Land Office said concerning this, the only rights that are affected are those of the Central Pacific Railroad Company who was Macmillan's predecessor in title in Section 31. In addition, he mentioned, the loss of land in some sections is offset by the increase in Sections 31, 33 and 35. The GLO commissioner anticipated that the land surveyed in that hiatus would belong to the railroad company. In the late teens and 20's, it was an early period for the government in dealing with hiatuses and overlaps.

The GLO was looking at equity, and really did not have the benefit of the precedents of the court cases that we have now. While equity may be a concern among private individuals, with case law associated with gaps and overlaps, it's really the double set of corners and the case law that has evolved to what we have today that is controlling. I guess there were also some plating issues with the way it was plated. Because the 1921 plat was in the early days of dealing with hiatuses the General Land Office lotted, they extended the lotting from Township 33 North down to the north township boundary of 32 North.

What we learned from that case is that the extension of lotting from one township to the other is not a good idea. An example of a Nevada plat where we dealt in modern times with hiatus. As you can see, we created a half township, and by this method, you can avoid the circumstances that we saw in Macmillan where an owner who has title believes that their land extends to the other boundary. We created a completely separate township, and we call them **half townships**.

In this example, you can see where we've not only labeled it a half township but we've also given it section numbers and lotting, this hiatus not only goes through one township but extends to the township to the east where you can see it taper to a single point.



In the early days of identifying these hiatuses, the General Land Office was not sure of the best way to plat them. By the sixties when we looked at the Weyerhauser case, we saw that plat as a half township and now this is a very recent one from Nevada, again platted as a half township. That avoids many of the problems with maybe an adjacent landowner thinking that they own part of that hiatus land. Now when you see half townships usually you can pretty much expect that it was a situation like this that caused it.



I think now it is time to move on to our hiatus exercise, it is Exercise #2. Look at the exercise, consider the questions, and come on back when you have developed and formulated your own answer.

<u>R. 6 E.</u> Driginal 1882 plat

<u>R. 7 E.</u>

(Original 1882 plat) (Original 1865 plat)

West 80.00	West 80.00			
Sec. 1	Sec. 6			
640 acres	640 acres			
S. 89° 48' W. 80.16	N. 89° 50' W. 79.88			
Sec. 12	Sec. 7			
640 acres	640 acres			
S. 89° 55' W. 80.22	N. 89° 46' W. 79.96			
Sec. 13	Sec. 18			
640 acres	640 acres			
S. 89° 40' W. 80.13	N. 89° 51' W. 80.02			
0 04	0			
Sec. 24 640 acres	5ec. 19 640 acres			
N. 89° 43' W. 79.85	N. 89° 58' W. 79.99			
Sec. 25	Sec. 30			
640 acres	640 acres			
S. 89° 53' W. 80.09	N. 89° 48' W. 80.17			
Sec. 36	Sec. 31			
640 acres	640 acres			
vvest 80.00	vvest 80.00			





An analysis of the recovered original corners together with the ancient fence lines indicates that either the1882 survey of the sub-divisional lines of R. 6 E.; 1) did not actually close on the west boundary of R. 7 E., 2) closed on a spurious line, or 3) surveyed a new boundary approximately 10 chains westerly of the original line surveyed in 1865. You have found no evidence of a second surveyed line; however, the ancient fences indicate that a second line may have existed. You must survey and mark the boundaries of the SE ¼ of Section 25.

1. Do you believe a hiatus exists between Rs. 6 and 7 E.? Why or why not?

2. By law, does a hiatus exist between Rs. 6 and 7 W.? Why or why not?

3. You must reestablish the ¹/₄ sec. cor. of Secs. 25 and 36, what methods will you consider. Why?

4. What method will you use to reestablish the ¼ sec. cor. of Secs. 25 and 26? Why?

Hiatus Exercise #2 Debrief

Let us look at Exercise #2. These may not show up all that well on the screen so you may want to refer to your handouts as we go along here. What we have is two original surveys. We have an original survey of Range 7 East in 1865 and we have an original survey of Range 6 East in 1882. As you can see, they look like regular sections not too far off from east and west and near 80 chains in length.



Upon retracement, you can see a couple of things in this slide. Many of the corners were lost but you can also see the found corners seem to be about 40 chains from the west boundary of the sections in Range 7 East and again 40 chains from the west boundary of the sections in Range 6 East.



Some of the things to start to think about here, do we have a hiatus going on? Do we have just an error in measurement? What do we have here?

Let us now refer to your handout on the Recovered Evidence of Ancient Fences (page 3 of Exercise 2), and you can see from that handout that we have got some lines dashed in here representing fence lines. You can see that in Section 25, we have irregular fence line towards the east that may have been a topography call in the original survey and we have the remains of some fences here that look rectangular that may represent where the original corner was set in the original survey.

We also have the remnants of a north-south fence along the west boundary of Section 25. There are some differences between what were the regular measurements recorded on the original plat versus what we have on retracement, so those are the conditions we have on the ground. It looks like there is about a 10-chain discrepancy.

The sections as they actually are on the resurvey are about 10 chains wider than what they are on the original survey and that kind of leads me to believe that something strange is going on out there.

Do you think a hiatus exists between Ranges 6 and 7 East?

If we examine the evidence here and you look at what's going on, first of all you've got an extra 10 chains, so, all of these lines coming in from the west closing on that line in the east were originally around 80 chains, they're now somewhere around 90 chains.

There is an indication that he did not measure all the way? Did he stop short? Did he have a different line that he closed up against? These are questions that the distance themselves lead me to think about. If you look at that slide with the ancient fences, and up in Section 12 there actually appears to be a fence line in the interior of Section 12 about 10 chains off the range line. Those are things that make you start to think that there could be a hiatus here.

The further you think about it and the more you develop the evidence, I think what you are getting now is, what are some of our conditions that have to exist to have a true hiatus? The one main condition is you have to have two monumented survey lines on the ground. Having not found a monumented line 10 chains to the west of that range line, without those monuments, I do not think a hiatus actually exists here.

By law, a hiatus does not exist between Ranges 6 and 7. No, I think by law, there is no hiatus because, you have to have two monumented survey lines and you have to have two approved surveys of that line and we do not have that situation here. We have one, on the face, that looks like on paper that it could be a hiatus but without any kind of evidence on the ground, no actual hiatus exists.

You must re-establish the one quarter section corner of Sections 25 and 36 that's portrayed by this lost symbol here, but that's not necessarily where we'd restore it, If you had to re-establish that quarter corner, what methods would you consider?

Well, you've got a number of things going on here, so if you go ahead and you look at the found quarter corners there between Sections 13 and 24, and 24 and 25, they're very close to 40 chains from the west boundary of those sections, which is what record would have been. They would have been set at 40 and then all of the excess placed when they went into the range line.

Then when you look down again, Section 25, you look at there's some fence lines out there, and looking at that north-south fence line, you know, you'd probably want to extend that north-south fence line in the interior of Section 25, see if there are any remains of it crossing the section line between Secs. 25 and 36.

If not, you would probably want to project that line down there. You would also want to project that line up to the north and see if it falls close to the quarter corner between 24 and 25 indicating that maybe it was measured, or placed in reference to that corner. So then going back down again to 25 and 36, you would look at where that fence line, the ancient fence line, or the projection of it crossed the section line. Then you look at the topography calls along the line.

Does the location as indicated by the intersection of that fence line and the line between 25 and 36, match the position as given as it relates to topography?

Looking at all of these things together, you may come to a point where you say, you know the extension of that fence line with fixed east and west position of that quarter corner at 25 and 36, but then you'd go ahead and put it on the line between the found section corners. You may use those fences to put them in.

I think we should keep an element of caution in there when we look at fences and we should make sure they're attributable to the original survey and not just a fence that is an approximation or placed for convenience because the lack of corners because if you're not careful, you could actually presume that a fence represents an original survey when in fact, it doesn't.

That is where you have to look at all of the elements that I was discussing. Does that fence apparently originate at the north quarter corner of the section? Does the intersection match the topography calls along the line for where that corner would have been in relation to topography? All these things are important points and I think you would have to have almost all of the conditions we have discussed to consider utilizing that fence line as determining the east-west position of the quarter corner.

As a surveyor, once you have done that, how are you going to make your work stand the test of time? You cannot just put a new plat when you do the work here, say if utilizing, you did use that fence line utilizing the position of the corner. You are not just going to put a tiny little note on your plat saying 'utilized the fence line to indicate the corner' and boom, and that is it. You need to leave a strong record. You need to give somewhere in your plat, in your memorandum, in your record, why you did it, what you considered, what you discarded, and then, this is how I did it. I think that when you leave clear records for surveyors to follow, it make it very hard for them to discount what you have done.

What method would you use to re-establish the quarter corner of Sections 25 and 26? I think we would be looking at a similar situation that we were looking at the quarter corner of 25 and 36. You have a fence line on the north-south line. You would probably want to retrace that whole boundary and between the found corners, that fence line you find, may or may not be on the line when you run the line between those section corners. That would be one place that would really indicate to you how much reliance the people who established these fences on the surveys themselves placed.

Is that fence on the line? Is it not on the line? You know if you find that that fence is not on the line, then, you know, that can give you a clue that maybe these fences were fences of convenience and not necessarily following the lines of the survey. Then you look at another fence as shown there it is on the east-west centerline, it goes to the position of the quarter corner approximately. Well, how does that relate to the corners and **calls of record**?

The thing you have got with this fence line that you did not have with the one where we were talking about the quarter corner of 25 and 36, is you don't have a quarter corner on either side of this section to see whether that fence indeed ran to or from or apparently close to any found corner.

You would have many considerations. You'd have to look at where it fit, where the topography calls fit, where it fit in relation to the proportionate position and again, was that north-south fence line on the line or was it apparently something close, or just a fence of convenience and they never really followed the lines. Therefore, you would consider those things.

I thought you said these fences could possibly be used to determine or re-establish the one-quarter corner of Secs. 25 and 26, and that possibly the east-west fence line here could be used for the latitudinal position of the quarter corner and the north-south fence line here could be used for the longitudinal position of the quarter corner.

That is kind of close to what I said, I would be hesitant to use that fence, that north-south fence line, unless it was right on the section line, or so close to it as to be right there as controlling for longitude. You have two found corners on either side of it; again, you need to evaluate that. Was that right on the line? Very close to the line? Was it a fence of convenience?

Because certainly if it is apparently on the slide when it looks like it is right on the line maybe its 5, 10, 15 feet off. I would hesitate to utilize something far off the line between two section corners as determining for the alignment. It is all about evaluating the evidence.

It is what you find, how you evaluate it, you know, and making sure all the pieces fit. Making sure that it is something, you can document and something you can defend if you are ever challenged in the future.

So, with that having been said, we're ready to go on to Exercise #3. So turn to the exercise, review, evaluate it, and come on back when you have some conclusions that you have made.

Hiatus Exercise #3



T. 11 N., R. 46 W.

You must survey and mark the boundaries of the NW -1/4 of Sec. 3. There are no fences or other evidence of occupation in the area.

1. Does a hiatus exist between Tps. 11 and 12 N.? Why or why not?

2. What corners will control the north boundary of Section 3? Why?

Hiatus Exercise #3 Debrief

Now you have had a chance to look at Exercise #3, let us discuss what we see in this exercise.

The original survey for Township 12 North was performed in 1876. At that time when they ran this township line, they would have marked the corners and quarter corners as common to all the sections involved.



After that township, line was surveyed and the township to the north would have been subdivided, platted, and made available for entry and patent. Later in 1883, Township 11 North was surveyed.

In the course of surveying from south to north in that township, they close on to the north boundary of the township.

You can see where they closed within Sections 1 and 2 they ran into that corner, and that is a common corner. That was not the case when they ran the rest of the

lines along that north tier or sections between 2 & 3, 3 & 4, 4 & 5, and 5 & 6 they established closing corners.



According to the practice of the manual at that time, they would have made one way ties to the corners that controlled from the township to the north, and they would have been as close to the line as they could have made them with a one way tie. Now, you have gone through and retraced those surveys, and you are finding something very much different.

First, you have found all the corners set by both surveyors in the original surveys. You are finding that those closing corners, as opposed to being close to the line are anywhere from about 5 1/2 to 6 1/2 chains south of closing on the older line.

You have quite a discrepancy there that might need to be considered. In your retracement, you found no other fences, no signs of occupation or reliance on those corners, so, you have a pure surveying situation without any other situations that you really need to consider.

Does a hiatus exist between 11 and 12 N? I do not think we have a hiatus in this situation. We do not have a separate running of this senior line on the south boundary of Township 12 N., in order to establish the closing corners. The closing corners were established at intersections and presumably, in this situation a one-way tie was made to the senior corners. We do not have that separate running of the senior line.

Remember, closing corners established at considerable distance off line do not normally create a hiatus. We do have about 5 to 6 chains which could be considered a considerable distance off the line, but still, in this case I think we have a classic junior/senior situation with the closing corners would be brought up to the senior line, and a hiatus would not exist.

Let us look at Section 3 now; since we are talking about a hiatus that does not exist, we're talking about moving closing corners to the line, what corners are going to control the north boundary of Section 3?

The north boundary of Section 3 for alignment purposes is going to be determined or controlled by the senior corners along the South boundary of Sec. 34. As you can see here, we've got a lost corner between Sections 33 & 34 so that's going to have to be re-established, so the actual controlling corners for the north boundary of Section 3 are going to be the quarter corner of Section 33, the quarter corner for Section 34 and the section corner between Sections 34 & 35.

Presuming that that closing corner falls to the west of the corner of Sections 34 & 35. If it fell to the east then we would have to come further to the quarter corner of Section 35. If you were subdividing Section 3 then how do you establish that quarter corner on the north boundary?

We'd have to really look at the actual plat for 11 North 46 East, but under normal conditions the quarter, the north quarter corner for Section 33 would be set on the south boundary based on the senior corners for Township 12 N and at midpoint between the closing corners on the east and west side of Section. 3. Because in these cases when we have closing corners established, they did not normally set the quarter corners for those sections.

Well I hope that you found that interesting and we would like you to go ahead now and turn on and get to Exercise # 4. Look at it, consider it and come up with a solution of your own and come on back and we will discuss it.

Hiatus Exercise #4

		T. 12 N., F Surveyed by	R. 46 W. Brown 1881		
Sec. 31	Sec. 32	Sec. 33	Sec. 34	Sec. 35	Sec. 36
Sec. 6	Sec. 5	Sec. 4	Hiatus Sec. 3	Sec. 2	Sec. 1

T. 11 N., R. 46 W. Surveyed by Black 1891

The boundaries and sub-divisional lines of Township 12 North, Range 46 West, were surveyed by Brown in 1881. The south boundary of Township 12 North, Range 46 West was retraced by Black in 1891. Black found the cor. of Secs. 1, 2, 35, 36, and the cor. of Secs. 4, 5, 32 and 33, but failed to recover any corners on the three miles along the south boundary of Secs. 33, 34 and 35.

He therefore, resurveyed the line establishing new corners at 40 and 80 chains intervals. Your retracement recovers all of the Brown monuments and all of the Black monuments creating a hiatus, as shown on the diagram above.

Statu

T. 12 N., R. 46 W.

Sec. 31	Sec. 32	Pat.	1916		Pat. 1904	Pat. 1916	Sec. 36
Sec. 6	Sec. 5	Pat. 1902 Acquired by US 1918	Pat. 1902 Re-conveyed to US 1914	Pat.	1905	Pat. 1946	Sec. 1

T. 11 N., R. 46 W.

Original Survey, T. 11 N., Brown 1881 _____ Original Survey, T. 12 N., Black 1891 _____

On the diagram below, mark the boundaries of what was actually conveyed by each patent.



T. 11 N., R. 46

Hiatus Exercise#4 Debrief

Welcome back to the course. You have had a chance now to look at Exercise #4, let us review it. Township 12 North that was surveyed by Brown in 1881. He surveyed that township line between the two townships and all of the sections to the north of that were returned and made open for patenting and occupation.

In 1891, Black came back in and he retraced that township line. In addition, it is significant that for a 3-mile stretch between the corner of Sections 32, 33, 4 & 5 and Sections 1, 2, 35 & 36, he did not find any of the Brown 1881 corners.



Black separately retraced that line; established monuments for what he thought were both sides of the line at that time. In your retracement later, you went out and you were able to find that there was evidence of both lines on the ground. Again, because it was not a careful retracement, the Black survey of 1891 surveyed an entire new line; we have two monumented lines existing with some land in between. This is a classic hiatus situation.

Look further down at the status involved with these sections and you can see that there is a mix of patented land and public lands throughout both townships. Given what the status is for the sections on either side of this township line, what do you think was actually conveyed in the patents. It is a classic hiatus situation, and patent, the limits of the patents seem is straightforward. The patent in Sec. 35 that was issued in 1916 is based on the Brown survey, so it is limited on the south by the township boundary as surveyed by Brown.



The boundaries of the patent conveyed in 1916 are what you see here. In Sec. 2, the patent that was issued in 1946. That was based on the Black 1891 survey and since it has fixed and bounded by that survey it would be bounded like so. In addition, the same as you go across in each township. In this situation, it is straightforward. None of the patentees would have rights in that hiatus or unsurveyed land. That is public land.



We have had a real good discussion on hiatuses. From this point, we are going to move over to the overlap presentation, so take a break and come back and we will discuss overlaps.

Overlaps

Welcome back to Special Boundary Problems and the Overlap portion of the course. By now, you have read the Overlap introduction out of the casebook and have links to the statutory and case law and you will notice that it is very similar to what we had in hiatus. An overlap is lands surveyed in conflict. A common area included in separate surveys. That portion of area which one survey extends over and covers a part of a different survey as shown by evidence on the ground.



I think it is a little clearer when you think of an overlap as an area of land where a second survey extends over the previous survey. The land in the second survey is then platted, creating an overlap where the lands in the overlap are platted on two separate plats.

How are these overlaps created? Overlaps are created by the same conditions that create hiatuses. There were completion surveys where the original corners were not recovered. A retracement of a previously established line actually set a second set of corners not on the previous line.



Resurveys were made where the original corners were not found. A new line was run and corners established. A long time span usually occurred between the first and second surveys. It sounds like hiatuses' and overlaps are closely related situations.

Like the hiatus, the overlap is characterized by the second surveyor not finding the original monuments and establishing an entire new line. In these situations, the problem is usually not discovered until many years have passed. There must be evidence of two separate monumented lines on the ground.



The condition that must exist for there to be an overlap in the public land survey system is the same conditions that we talked about in the hiatus portion. Two official surveys of the same line, two sets of monuments exist, neither set of monuments were established as closing corners.



Both surveys are official; neither was cancelled or superseded by another survey. Are these just like hiatus or are they common problems? I think where you find hiatuses you find overlaps. It is the same problem. One is just where the senior surveyor or the junior surveyor has overlapped the senior survey, versus a hiatus where there is a gap left.

As we saw in the Macmillan case, the east boundary of that township had an overlap. It was a little bit complicated, but there was an overlap in that same case. I understand that you have a case from Oregon that is a little bit cleaner to demonstrate what an overlap is.

Oregon 1924 Overlap Situation

We have one that occurred and discovered in 1924 and it is a very interesting case and it has has good principles to it that I think we would like to discuss. Looking at the Oregon 1924 overlap situation, we had Township 29 South, Range 7 West, surveyed in 1854. It was platted and approved in March 1855.



The adjoining township to the west, Range 8 West was surveyed in 1855 and platted and approved in July 1856. Therefore, Range 7 West the one to the east when we start looking at plats, which is the senior survey in this situation.

An overlap was discovered in the early 1900s, and then in 1924 it was surveyed, and it was platted and approved in 1926. Here we want to look at the entire plat of the overlap situation between these townships. You can see they platted half the township to the right and half to the left.



We are not going to look at the entire plat, but we will look at the situations along the line on the left side of the screen. As you can see here, we have the overlap showing by two surveyed lines. You have the sections showing on either side of the township.

In the original surveys in the Oregon Territory in the early 1850's when they surveyed up against township boundaries where you would normally see lots and acreages they just showed the acreage but they did not show lots. When the General Land Office came in and surveyed this overlap, they created lots of the government land for the first time.

You can see by this that Section 24 are all patented and actually, the Section 30 down to the lower right, that was mostly patented. You have some strange things going along this range line between these two townships.



Just looking at this plat there are some things that rather catch my eye here. First, as you mentioned we have patented land in Section 24, we also have some tracts here on the other side of the range line in Section 30. Which tells me that those tracts are possibly patented land that we are trying to protect because we are doing some lotting in there?

It looks like the areas where I have the arrows are patented land at the time of this survey. At the time the survey was done, all of those lands were patented. Why don't we look at the next slide and maybe try get a little clarity of what was going on in this situation.

Let us look first at the northeast corner of Section 24, the outlined in orange patented in 1908. You can see when the GLO did this in 1926 on the plat; they gave the rights for that patent, the NE ¼ corner over to the easterly line. In fact, because Section 19 was all government, they went to the second surveyed line and gave that private owner full patent rights against the government, and then they relotted the government land, up against the boundary.



What is interesting is they surveyed Tracts 53 and 54 along the range line and they gave the patentee in Section 30 the rights to the overlap portion? Why did they do that?

When we start looking at situations like this, we start looking at patent dates, we start looking at dates of entry, those are key dates and generally, the date of entry is the one would be utilized in this type of situation.

When the general land office did this survey, they adjudicated who owned what in this situation even though both pieces of land were patented at the time they adjudicated who owned it. In a modern survey, which we will see later, the government would not make a call as to who owned a piece of land when you have an overlap situation such as this.

So going back to the slide, you can see that the piece of land in Section 30 was patented on October 3, 1904. Funny thing, the piece of land in the southeast corner of Section 24 was also patented on October 3, 1904. Now in the survey when they did the overlap survey, they gave us the date of final application or that is the date of entry for the piece in Section 30 as February 28, 1903. Then we got the date of final certification as being July 14, 1903.

That final certification was the last step in the land office before somebody applied for patent. Once you get a final certification, you can sell that before patent and whomever you sell it to can then apply to the Commissioner of the General Land Office and get a patent. If we look now over to Section 24, I could not find in our office the date of entry or final application date for the southeast corner of Section 24. I guess this is a good point to talk a little bit about research.

I went into the land office or public room as it is called in some states in the Oregon State Office to look for information on the date of entry, final application date for that SE ¼ Section 24 and I found that they started the serial registered pages of that information in 1908. All our office had were those serial register pages.

They had nothing earlier than that. I was forced to call the archives in Washington, DC. That was a couple of weeks ago and I still do not have that information. As a point to you, if you find something that is before 1908, you may end up having to do archival research to find out when somebody had his or her date of entry on any piece of patented land.

When we look at the slide, and we see that they gave the rights to the patentee in Section 30, it leads me to one of two conclusions. One, the entry date on the piece of land in Section 30 was earlier than the entry date for the land in Section 24. Two, they utilized the senior survey line.



Now, there are some mixed reactions and mixed decisions in court cases on this and we will talk about that here in just a little bit. In this case, it had to be one of these two situations for the general land office who adjudicated that the patentee who owned Section 30 owned the land in the overlap.

Further south in the hiatus between the two townships and you can see that again there are some tracts surveyed from the east side to the west side, again over into the overlap area, but the remainder of the lands we have dashed lines looks like they let the line the most easterly line prevail in this area, so you'll probably want to look at the patent dates and the status here and see what it occurred.

Section 25 was all government. The land in Tract number 55 I believe was patented in 1909, so they gave that patentee full rights to the line of survey that was utilized that created that piece of land on a plat in the general land office. So again, it was not lotted in the original survey but it was just shown as an area without a lot number. The patentee got the lands.



All of the other lands on both sides were government. Therefore, the government held the line to be eastern line in the case. If we go further south in this hiatus, down to Section 36 left and Section 31, again they went to the easterly line.


Let us look at the status and see why they might have done that. All of Section 36 was part of a state grant when Oregon became a state in 1859. Because it was government land on the other side, the government utilized the second survey line to determine the 1859 state grant. The government in effect gave land or gave away the line to make sure that the state had their full rights.

You can have patent versus patent, patent versus government lands. Just many case situations can occur here. What it comes down to is the guiding principle - the first entry would usually control. I would say usually with a qualification.



What I find surprising in this case is that there is only one year separating the two surveys. We have talked before where it is usually 20 years or more separating the surveys that cause a gap or an overlap, but this time there was only one year. You would think that one year later the second surveyor would have been able to find the first surveyor's monument.

Especially in this situation because you're dealing with a heavily timbered area, you'd think that the brushing, the trees that were blazed along the line that would have been relatively easy to find one year after someone else was in there surveying. It is rare to find an overlap situation where the surveys occurred one year after another.

We are talking about how we felt the courts have done some different kind of rulings in these situations. Well they have gone in many different areas. Sometimes they use the senior entry date. That is the leading guidance we have but other courts have utilized the senior patent date and even had courts say no it is the senior survey line.



So sometimes in these situations with law, which seemingly is not settled, it can come down to how good is the lawyer that is arguing your case. If you get in this kind of situation and you are dealing with these patent conflicts, by all means, get your lawyer's advice before you start dealing with that as a field situation.

Many times in a district court, judges make decisions based on what they feel provide the most equity for the situation involved that do not necessarily follow past precedence. When you get cases that is appealed to circuit courts or above, you get guidance that is more firm.

Let us look at some of those cases and what we have with them. We have what I call "first in time, first in right decisions".



Lindsey vs. Hawes, we discussed that a little before this case, said the date of entry controls. The next cases were **Branson vs. Wirth** and **Wirth vs. Branson** once a patent is issued, another patent cannot be issued for the same tract. That was an unusual situation where the original survey that was cancelled and another survey put over the top of it but it was after somebody had already gained rights.

Another leading court case is **U.S. vs. Brightwood Lumber Co.,** said that title is to patentee whose patent is first in time. So even these first in time, first in right decisions, you have some conflict between date of entry and patent dates. The real clear guidance would be date of entry.

Then we have our first survey decisions that we just discussed before. Van **Amburgh vs. Hitt** where you have two overlapping surveys the first one made has priority. In **U.S. vs. Macmillan**, their indicta discussion, said the senior survey controls.



Right of entry seems to also control. I think what was being said in the Macmillan case was that normally when you have patents, you have patents that follow surveys. So that when you have a senior survey, usually you will have patents that follow right after, the junior patents follow the junior surveys, and therefore the sequence is the same.

What they were saying in Macmillan case is that they would expect senior patents would happen with the senior survey and junior with the junior and therefore the survey senior in time would control. As you can see, it can be the opposite of that where you do have a senior entry on the junior side of the survey. In those cases, the senior entry on the junior side may have precedence over the other.

The difference in this case again was the one year differential between the times of the original surveys that created the overlap. When you have those situations where you have 30, 40, 50 years between the survey of the original township and an overlapping township. There is a greater chance that the side that had been surveyed, platted and available for entry, probably had entries well before the second survey was performed for the adjoining township.

The point at which the whole senior survey controls is that might go along real well with the gap in time, and then you do have senior entries because of that gap in time.

We have been discussing this Oregon example, that is how the general land office did that back in1924, and again they adjudicated the rights of the private owners, which is something the government would not do today if we had a similar situation.

A fairly recently example is in Nevada. It is a little hard to see at this scale, we will zoom in and look at Section 21 that shows an overlap. Instead of being on a township boundary, it is within the interior of the township.



In addition, presently, we prefer to show those and label them as **conflicts**. Generally, the government does not adjudicate between two private owners. That is more in the realm of the courts. As you can see there, that is a typical way of how we would show a conflict in the interior of a section.



That is a very good showing a conflict in patents. This just shows the conflict. We make no call, no judgment and I think that's something that as time has gone by in the public land survey system, that maybe in the government, we in the government have figured out that we knew better than what they knew 100 years ago.

In those cases a hundred years ago, the government actually would do some adjudication as to who owned what. I think there have been enough court cases now, maybe enough wisdom in the government to learn that we are not the final adjudicators. And even when we looked at Macmillan court case, there were some equity arguments put forward that came from the surveyor general about how that should be performed that the court did not accept.

I think it is all a learning experience. It's like anything with surveying, we have leading court cases and when you get something that goes beyond the district or maybe all the way to the supreme court, you get guidance in a situations you have to apply across the country. I think this is one of those areas.

Even though it is unfortunate that we do have an overlap there, it is really between the private individuals and it is not for the government to settle. These overlaps certainly are a lot more difficult situation than the hiatuses we discussed before even though the same conditions create both problems. You can see from what we have discussed. It is a heck of a lot easier to figure something out when we have a hiatus and the government never patented the land than it is to figure out you have an overlap and you have conflicting patents. Now you have a mess and it is extremely difficult to figure out.

With that, it is time to look at Exercise #5. So if you turn to that, please give it some consideration and come to in your mind how you might resolve the situation and we will come back and discuss it.

Overlap Exercise #5

Surveyed by Smith 1903											
Sec. 31	Sec. 32	Sec. 33	Sec. 34	Sec. 35	Sec. 36						
Sec. 6	Sec. 5	Sec. 4	Sec. 3	Sec. 2	Sec. 1						

T 12 N D 16 W

T. 11 N., R. 46 W. Surveyed Jones1896

The boundaries and sub-divisional lines of Township 11 North, Range 46 West were surveyed by Jones in 1896. The north boundary of Township 11 North, Range 46 West was retraced by Smith in 1903. Smith found the cor. of Secs. 1, 2, 35, 36, and the cor. of Secs. 4, 5, 32 and 33, but failed to recover any corners on the three miles along the north boundary of Secs. 2, 3, and 4. He therefore, resurveyed the line establishing new corners at 40 and 80 chains intervals.

Your retracement recovers all of the Jones monuments and all of the Smith monuments creating an overlap, as shown on the diagram above.



T. 12 N., R. 46 W.

:	:	: 		: 		: L				
Sec. 31	Sec. 32	Pat. 1916		U.S.	Pat. 1904	Pat. 1916	Sec. 36			
Sec. 6	Sec. 5	Pat. 1902 Acquired by US 1918	Pat. 1902	j j j Pat. 1905		Pat. 1946	Sec. 1			
T. 11 N., R. 46 W. Original Survey, T. 11 N., Jones 1896 ———										
	<u> </u>	-								

On the diagram below, mark the boundaries of what was actually conveyed by each patent.



T. 11 N., R. 46 W.

Overlap Exercise #5 Debrief

Let us discuss the survey situation in Exercise #5. You want to look at your survey situation. We have Township 11 North was surveyed by Jones in 1896. At the time he surveyed it, he set corners common to all of the sections, land and township to the south was platted and made available for entry and patent.



Later in 1903, Smith surveyed 12 North. And Smith just like in our previous example we had used, from his corner 4, 5, 32 and 33 to 1, 2, 35 and 36 he didn't find any of the Jones monuments over that three miles. So he did not have a careful retracement. What he did is separated an entirely separate monumented line that you discovered later.

All the monuments from both sides and due to having found those monuments there was actually an overlap in this township along the township lines for three miles between all of those sections. So again monumented boundaries on the ground, overlap area, a clear overlap, how are you going to deal with that? Well I think the first thing you need to do is to start looking at the status on the land. Remember back in the hiatus exercise, we talked about the land status not really having an impact because the entire area within the hiatus was public land. Now the situation has become complex. We have patents that have been issued in the area and we have some intermingled government land. So for the sake of this exercise, let us presume that the patent date is the same as the entry date. However, as you discussed before, the entry date is really, what you need to look for in land status.



Let us look at the patents and the sequence of how maybe the ownership would fall within this overlap. Start with the senior survey side, which is Township 11 North in Section 2. We have a patent in 1946. That would be junior to the patent on the north side of the line, which is in 1916.

In actuality, even though the survey to the north was done on a later date, because the entry and patent were prior to the entry and patent in the section below, they would get the rights to the overlap. That falls along what we said about the Macmillan case. That senior in time does not always mean senior in rights as far as the survey is concerned. It is the entry date or the rights to the land that is more important.



Moving on to Section 3, we see it was patented in 1905. To the north, we have a 1904 patent and we have U.S. land. The 1905 patent would be invaded by the 1904 patent to the north because of the senior right of the 1904 patent.

What about the little sliver over to the east? Where it is up against the patent in Section 3. That area is where the 1916 patent overlaps the 1905 patent. The 1905 patent would have rights to that area in there. Looks like just enough room for a driveway in there.

Let us move on to the west where things get even more complicated. Here over in Section 4, we have got reconveyed land to the U.S. in 1914. Reconveyed usually means by action of law. Whoever obtained the initial right to the land, had to give up that right and reconvey it back to the United States.

Isn't it a typical situation that happened quite frequently with the railroad grants. Where the railroads were granted every other section for so many miles on each side of the center line of the railroad tracks. Those railroad companies did not comply with the terms of the grant as far as having to sell it to settlers or for other reasons and by action of law because they did not comply with the terms of the grant, the land was reconveyed to the United States. I am sure you are very familiar with that because of the O and C (Oregon and California Railroad) in Oregon. Further to the west, we have lands that were acquired by the U.S. That means the lands were patented and for some reason the U.S. bought back or acquired the land.

Let us take a closer look at those two parcels. The reconveyed parcel here, the patent was in 1902 and the reconveyance back to the U.S. in 1914. So this all happened prior to the patent in Section 33 that occurred in 1916. In this case, the patent for Section 33 would come down in this area here, invade, and overlap. This patent would be entitled to the land that overlapped into the reconveyed land.

The acquired land in this parcel here is a little bit more complicated. The patent was in 1902 for this parcel while it was in private ownership, the patent for Section 33 was granted in 1916 and then the land was acquired back for this parcel by the United States in 1918. So while this parcel was in private ownership. It was actually entitled to this area up in here and when this patent was issued, this parcel was still in private ownership; therefore, this patent does not obtain the land in this triangle right here.

Is that somewhat a controversial type of interpretation or is that pretty straightforward. It depends. As we have seen in situations where government land was public domain gave way to the overlapping patent. In this case, because of the sequence of events, the overlap, rights occurred while it was out of government ownership. In that case, it is a different situation.

The senior rights went to the patented parcel in 1902 and then when the government acquired that land again in 1918, the patent to the north had already been issued and it was constrained by the line survey for that township for the northerly line. Because the southern area has already had ownership.

Answer to Exercise #5





T. 11 N., R. 46

We have come to the end of our string here on talking about overlaps. I think one of the next things we wanted to move on to was to show a few different types of situations that occur in mineral surveys where we have overlaps and hiatuses.

Mineral Survey Hiatus/Overlap

Gaps and overlaps can happen other places besides range lines and sub-divisional lines of the rectangular system. They can happen in special surveys such as **mineral surveys**. Because of the different nature of special surveys, the way overlaps are regarded are a little different.

I have an example here of a mineral survey where we have an intended overlap. This prior mineral survey has been overlapped by a more recent survey. That is intended. It is a little different situation than what we have with the unintended gaps and overlaps that we have discussed in this course.



There are cases where mineral surveys will have potential overlap and gap situations.

In this next mineral survey example, you can see where we have two prior mineral surveys that have been abutted by a more current mineral survey that intends to utilize the same boundaries or partial common boundaries with the prior claims. Those are areas where you could see a potential gap and overlap.



Looking at these gaps and overlaps in mineral surveys it is a lot to do with the peculiarity with the mineral survey laws and how the lots are laid out. People are following lode lines in the minerals and because of the laws for mineral surveys, you can have overlapping mineral claims, but it's not until you take a mineral claim to patent its finally adjudicated who might own what.

Especially in the first example where you will have a mineral survey that is right on the face of the patent you might see excepting those lands in conflict with another that may have a prior right.

Going back to the other example where the mineral survey is intended to abut the prior survey that is where you have more of a potential but it is not identical to the situations we have discussed. We try not to create slivers or small overlaps between mineral surveys; actually, that is a topic for another course. There are different practices and laws that are involved in those types of gaps and overlaps.

So we have gaps and overlaps that occur in mineral surveys. They really occur due to quite different circumstances than gaps in the rectangular survey system

and there are different means to deal with them than what we have talked about today.

Conclusion

I think we are coming close here to the end of our class on junior/senior corners, overlaps and hiatuses. I just want to remind everybody that these circumstances all occurred when there were two surveys of the same line. In addition, in both surveys, monuments were established. When that survey was a careful retracement and monuments were established, you generally end up in your junior/senior corner situation.

When it was not a careful retracement, a separate line was surveyed and monumented you then end up with a situation where you have an overlap or hiatus. Two separately surveyed lines, separated by some distance. Both monumented that you can find on the ground.

Index

1

2009 BLM Manual of Surveying Instructions. See Manual

Α

Act of Feb. 11, 1805, 20 adjudicated, 65, 67, 74, 86

В

Black, 52, 55, 56 Branson v. Wirth, 72 Brown, 52, 55, 56

С

careful retracement, 12, 27, 55 chain, 41 closing corner, 11, 12, 17, 50 **conflicts**, 71, 74 **Cragin vs. Powell**, 20

D

Date of Entry, 7 Dennis Hawthorne, 25

G

General Land Office, 24, 28, 33, 34, 66 General Land Office (GLO), 18

Н

half townships, 33, 34 Haydel vs. Dufresne, 20 hiatus, 3, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 39, 41, 42, 47, 50, 52, 55, 56, 58, 59, 60, 61, 67, 68, 76, 77, 81, 87 hiatuses, 84, 87

J

Jones, 77, 80 Junior Rights, 5 Junior Survey, 4 junior/senior corners, 3, 13, 87

L

Lindsey v. Hawes, 72 Lindsey vs. Hawes, 20

Μ

Macmillan, 24, 27, 28, 32, 33, 61, 72, 73, 75, 81 Manual of Surveying Instructions. *See* 2009 BLM Manual of Surveying Instructions Maxson, 24, 32 mineral survey, 85, 86 mineral surveys, 2, 84, 85, 86 monuments, 1, 16, 18, 20, 22, 23, 24, 42, 52, 55, 59, 60, 77, 80, 87 Mount Diablo Meridian, 28

0

Oregon 1924 overlap situation, 61 overlap, 3, 29, 57, 58, 59, 60, 61, 62, 63, 65, 67, 70, 73, 74, 75, 80, 81, 83, 85, 87 Overlap, 58, 61, 77, 80, 85 overlaps, 3, 7, 24, 33, 57, 58, 59, 61, 75, 82, 84, 85, 86, 87

Ρ

Pacific Railroad Company, 33 Patent Certificate, 8 patent date, 70, 81

Q

quarter corner, 17, 25, 42, 43, 44, 50

R

reconveyed, 82, 83 Recovered Evidence of Ancient Fences, 41 resurveys, 2, 22 Resurveys, 59 retraced, 12, 15, 18, 49, 52, 55, 77, *See* **retracement** retracement, 11, 12, 17, 19, 22, 27, 40, 41, 49, 52, 55, 58, 77, 80, 87 retracements, 2

S

Senior Rights, 6 Senior Survey, 4 sliver, 82 Smith, 77, 80

Т

township boundaries, 2, 29, 63

U

U.S. v Brightwood Lumber Co., 72

U.S. vs. Macmillan, 28

V

Van Amburgh v. Hitt, 9, 17, 72

w

Washington Rock v. Young, 9 water boundaries, 2 Weyerhauser, 26, 27, 34 Weyerhauser v. US, 26 William Hayden, 25 Wirth v. Branson, 72