

INTERIOR BOARD OF LAND APPEALS

Lorna L. Boykin and Reynold L. Allgood

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LORNA L. BOYKIN
REYNOLD L. ALLGOOD

IBLA 91-374

Decided August 31, 1994

Appeal from a decision of the Acting State Director, Idaho, Bureau of Land Management, denying protests of dependent resurvey used to determine location of patented Indian allotments. Group No. 782, Idaho.

Appeal dismissed in part, decision affirmed.

1. Indians: Lands: Allotments: Generally--Indians: Lands: Trust Patent--Patents of Public Lands: Generally--Surveys of Public Lands: Dependent Resurveys

A patentee takes title to land described in his patent, as surveyed on the ground at the time of patent. A successor-in-interest to a portion of land conveyed will not be permitted to overturn the dependent resurvey of the boundaries of the patent on the basis that the description in the patent encompassed other or different land than the land intended to be patented.

2. Indians: Lands: Allotments: Generally--Indians: Lands: Trust Patent--Surveys of Public Lands: Dependent Resurveys

In the absence of evidence of an original corner of the public land survey, the location of the lost corner is properly determined by means of proportionate measurement in a dependent resurvey. A BLM decision denying a protest of the resurvey on the basis of a local corner asserted to be a perpetuation of the lost corner will be affirmed where the preponderance of the evidence including distances and directions to natural and artificial landmarks indicate that the local corner is not a reliable perpetuation of the survey corner.

APPEARANCES: Jerry V. Smith, Esq., Lewiston, Idaho, for appellants; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Lorna L. Boykin and Reynold L. Allgood have appealed from a decision of the Acting State Director, Idaho, Bureau of Land Management (BLM), dated May 31, 1991, denying their protests to a dependent resurvey. The resurvey determined the location of patented Indian allotments, Nos. 1417a and 1442a.

The instant dispute principally involves BLM's location of the NE corner of sec. 13, T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho, and the resulting placement of the boundary line between the patented Indian allotments of Thomas Powers (Kol-kar-tzat) (No. 1417a) and George Washington (Wap-to-to-e-ma-lin) (No. 1442a) as they are situated in that section, within the Nez Perce Indian Reservation. Boykin and Allgood are successors-in-interest to a portion of the land patented to Washington, bounded on the north by the boundary line. BLM's placement of that line results in the location of some of the land that Boykin and Allgood had long assumed was in the Washington allotment in the Powers allotment. Included in the property now located in the Powers allotment is a house owned by Boykin. Specifically, it is undisputed that Boykin and Allgood assert ownership of land to a point about 5 chains north of BLM's boundary line. That line now represents the line between private land in the Washington allotment and land still held in trust in the Powers allotment.

The relevant boundaries (including the meandered boundary along the left bank of the Middle Fork of the Clearwater River) and subdivisional lines in the eastern half of sec. 13 were originally surveyed by David P. Thompson, a U.S. deputy surveyor, in 1873. The field notes of the survey disclose that, while surveying a portion of the east boundary of the township, Thompson established the NE corner of sec. 13. It was monumented with a stone measuring 20 by 11 by 8 inches tied to a bearing tree (10 inches in diameter) 58 links distant on a bearing of S. 30° W. The corner was located 5.5 chains north and 3.5 chains west of the left bank of the river. Thompson also established the E 1/16 corner of secs. 12 and 13, T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho, 20.02 chains from the NE corner of sec. 13, while surveying the northern boundary of sec. 13. It consisted of a post set in a mound of earth. The entire survey was approved on December 26, 1873.

Relying on Thompson's 1873 survey, the United States, on June 13, 1895, issued Indian allotment trust patents Nos. 1417 and 1442, respectively, to Powers and Washington, pursuant to section 5 of the Act of February 8, 1887, ch. 119, 24 Stat. 389 (now codified at 25 U.S.C. § 348 (1988)). As described by metes and bounds in the patents, all of the allotted land in sec. 13 was situated in the northeastern corner of that section, along the left bank of the Middle Fork of the Clearwater River. ^{1/}

^{1/} Both patented parcels of land were described in part by metes and bounds tied to the NE corner of sec. 13. The land in patent No. 1417 was described as beginning at the NE corner and then running due west 20 chains, then 7.5 chains due south, then due east to the left bank of the river, then northeasterly along the meandered bank of the river to a point due south

Patent No. 1417 encompassed 14.90 acres (more or less) that included parts of lots 1 and 2 and patent No. 1442 encompassed 24.64 acres (more or less), adjacent and to the south of patent No. 1417, that included lot 7 and parts of lots 1 and 2. 2/

On January 19, 1901, Edson D. Briggs, who had originally surveyed the two allotments prior to patent, 3/ stated in an affidavit that he had recently determined that the allotted land was erroneously described in the 1895 trust patents with the result that the Powers barn fell within the Washington allotment. 4/ He noted that the error was reflected in the fact that the western boundary of the land in patent No. 1417 was described as 7.5, rather than 12.5, chains long. He stated that he had monumented the allotments on the basis of the 12.5-chain measurement and the allottees had located their improvements in reliance thereon. In conjunction with a request for correction of this error in their original patents, Powers and Washington relinquished the patents by instrument dated December 15, 1900. The Secretary of the Interior authorized the issuance of new patents on March 11, 1901. The original patents were cancelled and new patents issued on May 17, 1901. Patent No. 1417a, encompassing 23.02 acres (more or less), was issued to Powers and patent No. 1442a, encompassing 16.52 acres (more or less), was issued to Washington. 5/

Many years later, BLM conducted a supplemental survey to describe the tracts embraced in the 1901 trust patents in order to effect the patenting in fee of the Washington allotment to Philip Types, an heir of Washington. The survey, accepted on April 22, 1953, and officially filed on June 8, 1953, designated the land in trust patent No. 1442a to be patented to Types as lot 21, containing 17.33 acres. The survey also designated the land in

fn. 1 (continued)

of the place of beginning, and finally due north to that place. The land in patent No. 1442 was described as beginning at the southwestern corner of patent No. 1417 (which was tied to the NE corner of sec. 13) and then running due south to the left bank of the river, then northeasterly along the meandered bank of the river to a point due east of the place of beginning, and finally due west to that place. The western boundary of the two parcels was the north-south center line of the NE 1/4 of sec. 13.

2/ The patents encompassed land other than that in sec. 13, T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho. However, for the purposes of his decision, we need focus only on the land in sec. 13.

3/ No official record of the allotment surveys was found by BLM. See Decision at 2.

4/ An error in the land description in a trust patent so as not to include the land which the allottee was actually using was not unheard of. See Lee v. Thomas, 29 L.D. 251, 253 (1899). Indeed, Briggs was employed "in 1896 * * * to re-examine certain allotments in which it was alleged that errors existed." Id.

5/ The only change in the description of the allotted land was that the western boundary of the land in patent No. 1417a was extended from 7.5 to 12.5 chains, with a corresponding decrease in the western boundary of the land in patent No. 1442a.

trust patent No. 1417a, north of the land in trust patent No. 1442a, as lots 19 and 20, containing 22.21 acres. A fee simple patent (No. 1140461) of lot 21 was issued to Types on August 24, 1953. He then conveyed that land on March 25, 1957, to Marion P. and Ruth B. McClelland, who proceeded to subdivide the land and convey portions thereof to various parties. A portion of lot 21 (13.23 acres) was acquired by Elmer R. and Naomi E. Morris on July 9, 1963 (as corrected October 25, 1965). Having decided to sell part of this land, the Morrises had it surveyed by Earl Erdman, a private surveyor, in 1965 and 1966. During the course of that survey, Erdman set a monument at the NE corner of sec. 13 and at the point on the northern boundary of sec. 13 that intersected the western boundary of the land subject to patent Nos. 1417a and 1442a (*i.e.*, the E 1/16 corner of secs. 12 and 13 (also the NW corner of lot 20)). He also monumented the eastern and western ends of his east-west boundary line between those patents (*i.e.*, the NE and NW corners of lot 21).

In 1972, during the course of a dependent resurvey of part of the west boundary of T. 33 N., R. 4 E., Boise Meridian, Idaho County, Idaho, Glenn F. Goodson, a BLM cadastral surveyor, sought but failed to find any evidence of the original NE corner of sec. 13 established by Thompson in 1873. However, he did find Erdman's monument for that corner. By letter dated April 12, 1973, BLM notified Erdman that his local corner did not match the topographic calls (reported by Thompson) to the south and east and the bearings and distances (reported by Thompson) to original corners found to the north, south, and east. BLM requested Erdman to provide any additional evidence he might have regarding the original location of the NE corner. BLM reports that no reply was received from Erdman. *See* Decision at 3. Lacking any evidence regarding the original location of the NE corner, Goodson reestablished the corner by the means of proportionate measurement, using (in the absence of other intervening corners) the E 1/4 corner of sec. 24 to the south and the SE corner of sec. 1 to the north. Both corners are situated in T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho, and were either found (SE corner of sec. 1) or reliably perpetuated (E 1/4 corner of sec. 24) by Erdman. The reestablished position of the NE corner was verified by Thompson's topographic calls south and east to the left bank of the Middle Fork of the Clearwater River (within 0.10 and 0.25 chains of the record call). The corner was remonumented by Goodson. He reported that Erdman's monument was located 4.01 chains north and 1.06 chains east of BLM's corner. Goodson's resurvey was approved October 3, 1973.

Between July 1977 and April 1984, Harold W. Heimark, a BLM cadastral surveyor, performed a dependent resurvey of some of the land in the northeastern corner of T. 33 N., R. 3 E., Boise Meridian, Idaho County, Idaho. During the course of that resurvey, Heimark resurveyed the northern boundary of sec. 13, using the NE corner of sec. 13 reestablished by Goodson. The BLM decision notes that:

In this survey Heimark dependently resurveyed the line between sections 12 and 13, using Goodson's corner of sections 7, 12, 13, and 18. Heimark's survey indicates that Erdman's local corner for the corner of sections 7, 12, 13, and 18, did not correlate well

with the position of the corner of sections 11, 12, 13, and 14 to the west, or fences within section 12.

(Decision at 4). Finding no evidence of the original E 1/16 corner of secs. 12 and 13 established by Thompson, Heimark remonumented the corner at a proportionate distance. The corner was located 20.12 chains from the NE corner of sec. 13. Heimark reported that Erdman's E 1/16 corner of secs. 12 and 13 was located 3.09 chains distant on a bearing of N. 14° E. from Heimark's corner. Heimark's resurvey was approved September 18, 1985.

Finally, between August 1989 and May 1991, in order to determine the boundaries of patented Indian allotments Nos. 1417a and 1442a and identify whether a trespass was occurring on the land still subject to trust patent No. 1417a, BLM, at the request of the Bureau of Indian Affairs, conducted a further survey. That dependent resurvey and survey of a portion of the meandered boundary and certain subdivisional lines of sec. 13 marking the boundaries of the patented Indian allotments was performed by Douglas A. Welman. Welman recovered Goodson's monument marking the NE corner of sec. 13 and the E 1/16 corner of secs. 12 and 13. He monumented anew the eastern and western ends of the east-west boundary line between patent Nos. 1417a and 1442a. At the western end, he located Erdman's monument 3.16 chains distant on a bearing of N. 10° 02' E. At the eastern end, he located Erdman's monument 2.84 chains distant on a bearing of N. 26° 17' E. ^{6/} The ultimate result as disclosed in a plat of survey is that the western end of the boundary line between the patented Indian allotments is now found by proceeding 20.13 chains N. 89° 08' W. from the NE corner of sec. 13 to the E 1/16 corner of secs. 12 and 13 and then continuing south 12.60 chains (which closely conforms to the description in the May 1901 patents).

During the course of the resurvey, Boykin and Allgood, who had succeeded to the interest in a portion of Washington's patented Indian allotment No. 1442a, filed protests to the resurvey on September 16 and 17, 1990. The resurvey was finally accepted May 31, 1991, following denial of the instant protests by the decision under appeal. The official filing of the resurvey plat was stayed by BLM pending potential administrative review of the protest denial.

In their statement of reasons (SOR) for appeal, appellants challenge the BLM refusal to accept the Erdman location of the NE corner of sec. 13 despite having accepted other corners found by him. Appellants also challenge the 1901 amendment of the patents as unnecessary on the basis that the improvements of the patentees were located within the allotments as described in the initial patents. Appellants have requested the Secretary of the Interior to amend the patents again. See 43 U.S.C. § 343 (1988).

^{6/} The eastern end of the east-west boundary line between the patented parcels was actually indicated by a witness corner located 0.20 chains from the present left bank of the Middle Fork of the Clearwater River. No monument could be set at the actual bank since it was considered unstable.

Appellants incorporate by reference the reasons stated in their request directed to the Secretary of the Interior that the patents be amended, including their assertion therein that BLM erred in locating the NE corner of sec. 13.

[1] To the extent that appellants are seeking relief in the form of amendment of the Indian patents, their appeal to the Board must be dismissed. The request for amendment of the patents was not addressed to the Board. Most significantly, the request was not adjudicated in the BLM decision under appeal. Hence, the requested relief is beyond the jurisdiction of the Board which extends generally to deciding appeals from final decisions of BLM relating to the use and disposition of the public lands. See 43 CFR 4.1(b)(3); 4.410.

Appellants also challenge the propriety of the amended patents themselves. Thus, they contend that the United States improperly issued new patents in May 1901 because the original patents correctly described the land allotted to Powers and Washington. In view of the fact that Powers and Washington relinquished their original patents and requested issuance of new patents with an amended description, the legal effect of this action is no longer at issue. Moreover, the record does not support the assertion by appellants that the original patents were amended in effect "without authorization from * * * the Federal Government" (Request at 7). The issuance of new patents was specifically authorized by the Secretary on March 11, 1901. This was followed by cancellation of the original patents and issuance of new patents by the United States in May 1901.

Appellants' objection to the amended patents is based on the fact that the recent resurvey (together with the prior resurveys) places the boundary line between the two patented parcels such that it encompasses land which they had long assumed belonged to them. It is well established that a patentee takes title to the land described in his patent, as then surveyed on the ground, since the patent incorporates the lines of the survey. See *Cragin v. Powell*, 128 U.S. 691, 696 (1888); *Robert R. Perry*, 87 IBLA 380, 384 (1985). In the context of this appeal the sole issue is whether the resurveys accurately retraced the lines of the original survey and thus allowed the correct placement of the boundary line between the parcels in accordance with that survey. ^{7/}

^{7/} Thus, appellants' contention that Briggs erred in recommending an elongation of the western boundary of patent No. 1417a (from 7.5 to 12.5 chains) and the consequent shortening of the western boundary of patent No. 1442a, while perhaps relevant to the request that the Secretary amend the allotments on the ground of a mistake in the description of the land, is not material to the propriety of the dependent resurvey. These descriptions (both tied to Thompson's NE corner of sec. 13) were contained in the 1901 patents and to the extent that the described land can be located on the ground by reestablishing Thompson's corner, that corner will control

the situs of the land patented to Powers and Washington in 1901 since it will restore the corner to its true original position. See BLM, Manual of

We, therefore, turn to the issue of the propriety of the current BLM dependent resurvey and also of the earlier resurveys. The land described in the 1901 trust patents to Washington and Powers was originally surveyed by Thompson in 1873 with the establishment not only of the NE corner of sec. 13, but also of the E 1/16 corner of secs. 12 and 13 and a portion of the meandered boundary of the Middle Fork of the Clearwater River as it passes through sec. 13. This land was dependently resurveyed by Goodson in 1972 (NE corner of sec. 13), Heimark in 1985 (E 1/16 corner of secs. 12 and 13), and Welman in 1991 (allotment boundary and meandered boundary of the river). 8/ To the extent that appellants object to those resurveys, that challenge must likewise fail.

In order to determine the situs of the boundary between the two patents, Welman first located the NE corner of sec. 13, which had earlier been dependently resurveyed by Goodson in 1972. The descriptions of the land encompassed by both patents Nos. 1417a and 1442a were tied to the NE corner of sec. 13, as originally surveyed by Thompson. Thus, the starting point for determining the proper location of the boundary between the patented parcels is the NE corner of sec. 13.

Appellants principally contend that BLM should have accepted the local corner established by Erdman as the NE corner of sec. 13 because it accepted other Erdman corners, particularly the E 1/4 corner of sec. 24 and the SE corner of sec. 1 which were used by Goodson in his reestablishment of the NE corner of sec. 13. According to BLM, the reliability of each of Erdman's corners must be independently determined. As the BLM decision noted, "an individual decision is made at each corner" (Decision at 5). This is what BLM did, concluding that, while other Erdman corners could be accepted as found or a faithful perpetuation of an original survey corner, the local corner erected by Erdman for the NE corner of sec. 13 did not constitute such a perpetuation. Appellants have failed to demonstrate that it did.

It is undisputed that no evidence of the original NE corner of sec. 13 remained on the ground at the time of the Goodson or Heimark resurveys. No monument or bearing trees were found. The only evidence of the original corner identified by Erdman was what he believed to be one of the original bearing trees 0.58 chains southwest of Erdman's location of the corner. See Exh. E attached to SOR ("Property Boundary Survey"). The tree (a yellow pine 5-6 feet in diameter at the base) was cut down shortly after it was observed by Erdman in 1965. See Affidavit of Ruth B. Chase (McClelland), dated Oct. 27, 1989; Memorandum to Chief, Field Survey Section, Idaho, BLM, from Welman, dated Oct. 14, 1989, at 2. The Chase affidavit describes a

fn. 7 (continued)

Instructions for the Survey of the Public Lands of the United States, 1973 [hereinafter Survey Manual], § 6-4 at 145; Alice L. Alleson, 77 IBLA 106, 108 (1983).

8/ We note that appellants acquired their interests in the patented Washington allotment on Nov. 17, 1986 (Boykin) and Nov. 28, 1989 (Allgood), after the October 1973 and September 1985 BLM resurveys.

scar on the southerly side of the tree and "a scar that had partially overgrown resembling a slit on the northerly side of the tree" (Chase affidavit). As such, it was not marked in the manner of a bearing tree, as required at the time of the 1873 survey. See General Land Office, Instructions to the Surveyors General of Public Lands of the United States (1855), reprinted in C. Albert White, A History of the Rectangular Survey System (1982), at 462 [hereinafter Instructions]; 9/ Memorandum to Chief, Field Survey Section, Idaho, BLM, from Welman, dated Oct. 14, 1989, at 2 ("not marked").

In the course of his survey work, Wellman also interviewed Charles R. Nottingham who accompanied Erdman on his survey. Nottingham neither agreed with Erdman's conclusion that this was a bearing tree for the original location of the corner by Thompson nor with Erdman's relocation of the corner. See Affidavit of Charles R. Nottingham (Nov. 3, 1989). Thus, the record does not support a finding that the tree was one of the original bearing trees. See Survey Manual, § 5-7 at 130 ("The nature of the accessories in evidence, including * * * markings, should not be greatly at variance with the record"). Nottingham suggested in his affidavit that it may simply have been a tree blazed in connection with the survey of the nearby right-of-way for the Camas Prairie Railroad. Nor is there any other evidence that the original (Thompson) corner has been perpetuated or that its location can be determined by relying on the testimony of witnesses or acceptable record evidence. Survey Manual, §§ 5-9 to 5-16 at 130-32. Accordingly, we must conclude that the NE corner of sec. 13, as originally surveyed by Thompson in 1873, was lost at the time of the Goodson and Heimark resurveys in 1972 and 1977-84 (as well as the earlier Erdman survey). See Survey Manual, § 5-20, at 133; United States v. Doyle, 468 F.2d 633, 637-38 (10th Cir. 1972).

[2] The location of a lost corner is properly determined by the method of proportionate measurement, i.e., reference to two or more interdependent corners in harmony with the record of the original survey, where there is evidence of the location of surrounding corners. See Survey Manual, § 5-21 at 133; United States v. Doyle, supra at 634, 638; Stoddard Jacobsen, 85 IBLA 335, 336 (1985). Using this method, Goodson reestablished the NE corner of sec. 13, relying on found and perpetuated corners to the north

9/ Bearing trees were to be marked as follows: "Such [trees] are to be distinguished by a large smooth blaze, with a notch at its lower end, facing the corner, and in the blaze is to be marked the number of the range, township, and section * * *. The letters B.T. (bearing tree) are also to be marked upon a smaller blaze directly under the large one, and as near the ground as practicable." Instructions, supra at 462 (emphasis in original). That Thompson followed this practice in connection with his surveying activity in the area of sec. 13 (as well as elsewhere) was confirmed by Briggs' 1891 resurvey of the NW corner of that section, which disclosed that Thompson had in fact so marked that corner. See "Field Notes of the Survey of the Subdivisions and Meanders of [T. 33 N., R. 3 E., Boise Meridian, Idaho]," dated July 24, 1891, at 9.

and south of the missing corner. There is nothing to suggest that Goodson improperly located the NE corner of sec. 13 by this means. Further, BLM determined that the location of Goodson's corner was substantiated by certain record calls (made by Thompson). Thus, it notes that his corner was within 0.10 and 0.25 chains of the record distance to the Middle Fork of the Clearwater River to the south and east. The corner located by Erdman in 1966 was found by Goodson to be 4.01 chains north and 1.06 chains east of the restored corner. Also, Thompson's corner was reported to be 8 chains south of a division between fields (bearing east-west). Goodson's corner was reported by him to be 7.9 chains south of a fence that Welman found in his survey marks the east-west boundary line between two fields distinguished by a 2-foot change in elevation.

As evidence that BLM improperly surveyed the boundary line between the two patented Indian allotments (as it was tied to the NE corner of sec. 13), appellants point to the fact that the line that they believe actually constitutes the boundary is situated along a fence that they assert has been in existence since at least 1917. ^{10/} Even accepting the fact that the fence has been longstanding (which appears to be the case, see Exh. A attached to SOR at 39, 40 (Affidavits of Moses Thomas and Willie Moody, dated Aug. 8 and 9, 1967); Letter to BLM from Ruth B. Chase (McClelland), dated Sept. 15, 1990), the record does not establish that it represents the location of the boundary line between the two parcels patented in 1901. Indeed, there is no evidence that it was intended to mark the location of the 1901 boundary line. See James O. Steambarge, 116 IBLA 185, 192-93 (1990).

A party challenging a dependent resurvey in a timely filed protest must demonstrate by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. See Crow Indian Agency, 78 IBLA 7, 11 (1983). Appellants have failed to show that Goodson's resurvey of the NE corner of sec. 13 or Heimark's resurvey of the E 1/16 corner of sec. 13 (both relied upon by Welman) were erroneous. The result was the location of the boundary line between patented Indian allotments Nos. 1417a and 1442a in the same position that it occupied at the time of the May 1901 patents. Contrary to what appellants believe, BLM has not "change[d] th[at] boundary" (Request at 14). Thus, we find no basis for overturning the resurveys. Therefore, we conclude that BLM properly denied appellants' protests of the May 1991 BLM dependent resurvey (Group No. 782, Idaho) that has finally resulted, together with the earlier resurveys, in the location of the boundary line between patented Indian allotments Nos. 1417a and 1442a.

^{10/} It appears that this fence also does not correspond with the boundary line asserted by Erdman. See Exh. E attached to SOR ("Property Boundary Survey"); Letter to BLM from Ruth B. Chase (McClelland), dated Sept. 15, 1990 ("Erdman decided that the north fence was 147 feet too far north"). In denying appellants' protest, BLM noted that Erdman's location of the NW corner of lot 21 was 147 feet south of the east-west fence. See Decision at 8.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

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