

INTERIOR BOARD OF LAND APPEALS

Kendal Stewart

132 IBLA 190 (March 28, 1995)

Title page added by:
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KENDAL STEWART

IBLA 93-409

Decided March 28, 1995

Appeal from a decision of the Utah State Director, Bureau of Land Management, dismissing protest of certain aspects of a 1982 dependent resurvey of T. 16 S., R. 4 W., Salt Lake Meridian, Utah. UT-934.

Affirmed.

1. Rules of Practice: Appeals: Burden of Proof—Surveys of Public Lands: Dependent Resurveys

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

2. Surveys of Public Lands: Dependent Resurveys

There must be substantial evidence of a perpetuated corner location in order to consider the corner obliterated, rather than lost. Where there was no evidence that an old fence was built along the north-south centerline between quarter section corners, BLM properly determined that the fence did not perpetuate any original quarter corner locations.

APPEARANCES: Kendal Stewart, Las Vegas, Nevada, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Kendal Stewart has appealed a May 12, 1993, decision of the Utah State Director, Bureau of Land Management (BLM), dismissing his protest of certain aspects of a 1982 dependent resurvey of T. 16 S., R. 4 W., Salt Lake Meridian, Utah.

BLM conducted the survey pursuant to "Special Instructions for Group No. 614, Utah," dated May 12, 1982. The field work was executed from May 20 through June 18, 1982. The official plat of survey was accepted February 14, 1984, filed on February 29, 1984, and notice of the filing was published in the Federal Register on March 7, 1984. Appellant disputes the survey as it relates to the east boundary of his property, which is adjacent to BLM land along the north-south centerline of secs. 2 and 11, T. 16 S., R. 4 W., Salt Lake Meridian, Utah.

On November 30, 1992, appellant wrote BLM asserting that "approximately 10 years ago" as a result of a fire started by BLM, cedar fence posts marking appellant's property line burned. Thereafter, BLM replaced the fence "so as to cut out a huge section of the best property that we own." Appellant requested BLM to relocate the fence "to its original boundary lines."

BLM's House Range Resource Area Manager replied by letter of December 10, 1992, stating that the fire referred to by appellant had not been started by BLM, but was a wild fire that started in nearby Fishlake National Forest and spread to public land administered by BLM, as well as to private lands. The Area Manager explained that during its fire rehabilitation effort in the fall of 1981, it was discovered that most of the 1870 cadastral survey corners, marked with cedar posts, had been destroyed by the fire. He stated that, therefore, a new survey had to be completed before any fences could be reconstructed. The Area Manager further stated:

During a visit to your property this week, I observed that the fence along the east, south, and west sides of your property was right where the survey corners indicate it should be. There was a brass cap marker on every corner and bend of the fence. It appeared that the old fence along the east side of your property had been constructed for convenience purposes only and bore little resemblance to the property line.

In a December 22, 1992, response to the Area Manager's letter, appellant maintained that the new survey lines were illegal and again requested BLM to "relocate the fences to their original lines." Appellant alleged that he was singled out by having his fence lines moved to conform to the 1982 survey. Appellant stated that either other property owners' fence lines should also be moved to conform to the new survey, or his fence line should be relocated to the original line.

On January 27, 1993, BLM's Chief, Branch of Cadastral Survey (Chief), Utah State Office, wrote appellant that "[b]ased on the information in your letter there appears to be evidence on the ground that may have been overlooked by our surveyors in 1982." The Chief further advised that a full field investigation would be conducted as soon as the weather permitted, and invited appellant to accompany the BLM survey crew.

On February 10, 1993, because of appellant's protest, the Chief suspended the plat representing the dependent resurvey of a portion of T. 16 S., R. 4 W., under Group No. 614, Utah, Salt Lake Meridian.

From March 31 through April 2, 1993, a BLM survey crew conducted a field investigation. On the morning of April 1, 1993, they were accompanied by appellant and his father. A BLM memorandum of that investigation states in part as follows:

We visited several areas along the north-south centerlines of sections 2 and 11, the east boundary of Stewart's property.

Sighting northerly about 2 to 3 miles they showed us where they thought the old fence once was, which they believed constituted the east boundary of their property, but because of the 1981 fire they said there was no evidence of the old fence that was along the north-south center line of sections 2 and 11. Mr. Stewart stated that the fence did wander somewhat and was put in for convenience. About 11:00 a.m., the Stewarts left and said they would be looking forward to hearing from us.

That afternoon we dug up the remains of numerous fence posts which verify the location of the fence, as pointed out by the Stewarts. The alignment of the fence wanders in a northerly direction along an old ditch. We also found the remains of an old fence to the west but could not determine any relationship with the north-south fence. There seems to be no relationship between the fences and the 1870 survey.

In his decision on the protest, the State Director reviewed the history of the official United States surveys of T. 16 S., R. 4 W. In 1870, Ferdinand Dickert surveyed the west boundary, a portion of the north and south boundaries, and a portion of the subdivisional lines. The east portions of secs. 2 and 11 were left unsurveyed. In 1915-16, Howard Miller and Isaac Hayes completed and resurveyed a portion of the north boundary. In 1982, Richard A. Zaninovich resurveyed a portion of the north boundary, a portion of the subdivisional lines, and completed the survey of secs. 2, 9, 10 and 11, among others.

The State Director observed that the north-south centerlines of secs. 2 and 11 are controlled by the quarter section corners on the north and south boundaries of their appropriate sections. These corners, established in the 1870 survey, were not found in the 1982 survey and were determined to be lost. A further search, during the 1993 field investigation, also failed to disclose evidence of those corners. The State Director stated the questions for decision were (1) whether there was substantial proof that the old fence, pointed out by appellant, represented a faithful establishment of the north-south centerline of secs. 2 and 11, and (2) whether the quarter section corners were in existence when the fence was built.

The State Director found that appellant had presented no evidence to show that the old fence was built on "evidence of the-1/4 section corners controlling the north-south center lines [of secs. 2 and 11]" (Decision at 3). He found further that there was no information to show who built the fence or its purpose. He stated that the fence appeared to have been built as a drift fence "and is generally meandering in the basic north direction, with no evidence of its being straight or surveyed." *Id.* He further stated that because the old fence could not serve to aid in establishing the corners, they were determined by the "one-point method—record bearing and distance." *Id.* The State Director concluded that appellant had failed to show that the resurvey was fraudulent or grossly erroneous. Consequently, he dismissed appellant's protest.

Appellant asserts in the statement of reasons that the "cedar post, barbed wire fence" existed prior to his purchase of the property and "established the recognized boundaries of our land." Appellant states that this fence "lined up with the still existing, unburned fence running north from the north end of our property for as far as the eye can see." According to appellant, this fence line "corresponds exactly with the 1870 Dickert survey." Appellant alleges that BLM has erroneously disregarded evidence of the 1870 Dickert survey which demonstrates that the north-south centerline of secs. 2 and 11 corresponds to the old fence line. Pointing out that he does not live near the property, appellant observes that the present dispute could more easily have been handled years ago if BLM had notified him of the resurvey at the time it was performed. Appellant contends that the 1982 resurvey is grossly in error, resulting in a confiscation of his private property.

Appended to appellant's statement of reasons are excerpts from A Treatise on the Law of Surveying and Boundaries, 4th ed., by John S. Grimes, a member of the Indiana Bar. The excerpted material contains instructions to surveyors on the performance of dependent resurveys, the significance of intersecting fence lines, and the identification of tract boundaries and lines.

[1] The Secretary of the Interior is authorized to consider what lands are public lands, what public lands have been or should be surveyed, and has the authority to extend or correct the surveys of public lands and make resurveys to reestablish corners and lines of earlier official surveys. John W. & Ovada Yeargan, 126 IBLA 361, 362 (1993); see 43 U.S.C. §§ 2, 52, 751-753 (1988).

A dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the original survey. In legal contemplation and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical. Manual of Instructions for the Survey of the Public Lands of the United States (1973) (Manual), 6-4 at 145; John W. & Ovada Yeargan, supra at 363; Crow Indian Agency, 78 IBLA 7, 10 (1983).

In this case, BLM conducted the dependent resurvey in 1982 and filed the plat in 1984. As we have held, in reviewing a resurvey after the filing of the plat, the party challenging the resurvey has a difficult burden. It must establish by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous. James O. Steambarge, 116 IBLA 185, 188 (1990); First American Title Insurance Co., 100 IBLA 270, 278 (1987).

In its 1982 dependent resurvey, BLM determined that the quarter section corners controlling the north south centerline of secs. 2 and 11 were lost corners. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position and whose location can be restored only by reference to one or more interdependent corners. Manual, 5-20 at 133. BLM determined the location of the corner according to the survey instructions:

Where a line has been terminated with measurement in one direction only, a lost corner will be restored by record bearing and distance, counting from the nearest regular corner, the latter having been duly identified and restored.

Manual, 5-45 at 143.

The record indicates that Dickert, in his survey of 1870, set cedar posts for the quarter section and section corners. In 1915, Miller and Hayes retraced and/or resurveyed the west 4 miles of the south boundary of T. 15 S., R. 4 W. They found the original corner of secs. 4, 5, 32, and 33, but were unable to find evidence of the quarter section corner of secs. 33 and 4, the corner of secs. 33, 34, 3, and 4, the quarter section corner of secs. 34 and 3, or the original monument for the corner of secs. 34, 35, 2, and 3. However, they accepted the evidence of local landowners that the original cedar monument for the corners of secs. 34, 35, 2, and 3 was located at the corner of fences extending from east to west and north to south. Miller and Hayes accepted this point as the perpetuation of the original corner of secs. 34, 35, 2, and 3, and from it established, at proportionate distance between this fence corner and the original corner of sections 32, 33, 4, and 5, the corner of secs. 33, 34, 3, and 4. In its 1982 survey, BLM measured the south boundary of sec. 34 at 81.52 chains, "almost exactly as found in the 1915 retracement." ^{1/}

Essentially, appellant disputes that the quarter corners controlling the north-south centerline of secs. 2 and 11 were lost, as BLM determined. He contends that those corners were established by the old fence and were then obliterated by the fire. Other than the old fence, appellant has failed to offer any proof of monuments or accessories to so locate the corners.

An obliterated corner is defined as a corner

at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the

^{1/} Nov. 8, 1982, memorandum from the Chief, Branch of Cadastral Surveys, Utah State Office, to House Range Resource Area Manager, providing an account of the 1982 dependent resurvey.

acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

A position that depends upon the use of collateral evidence can be accepted only as duly supported, generally through proper relation to known comers, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony.

Manual, 5-9 at 130.

[2] In Jacobsen & Downer v. BLM (On Reconsideration), 103 IBLA 83 (1988), aff'd, Downer v. Hodel, No. 88-513-HDM (D. Nev. Oct. 12, 1989), we found that "the proper standard for BLM to apply in the course of a resurvey is to consider a comer existent (or found) if such a conclusion is supported by substantial evidence." Id. at 86. Where physical evidence has entirely disappeared, a comer will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location (Manual, 5-5 at 130). However, there must be substantial evidence of a perpetuated comer location in order to consider the comer obliterated, rather than lost. James O. Stearns, supra at 191. No such evidence is present in this case.

Although appellant contends that the intersections of the old fence established the comers, it is clear from the record that the old fence line was not intended to follow the centerline of secs. 2 and 11. As BLM stated in its report of the field investigation in 1993, "alignment of the fence wanders in a northerly direction along an old ditch" (Apr. 5, 1993, Memorandum). Therein, the BLM field investigators concluded that there was no relationship between the fence and the 1870 survey.

As we recognized in Stearns, supra at 193, quoting Alfred Steinhauer, 1 IBLA 168, 171 (1970), a comer cannot be determined to have been obliterated in the absence of a showing that an old fence was built "to an accepted comer established by [an original] survey or that any fence started at and terminated at established comers of that survey." Appellant has produced no evidence that the comers, as determined by the dependent resurvey, are in positions other than those of the original survey.

Appellant's allegation that BLM departed from the original survey is also unsupported by evidence and is contrary to the record. Appellant's opinion that the dependent resurvey is not an accurate retracement of the lines of the original survey is not tantamount to a showing of reversible error in that resurvey. See John & Ovada Yeagan, supra at 369. Accordingly, BLM's decision dismissing the protest against the survey must be affirmed.

With respect to the excerpts from the treatise submitted with appellant's statement of reasons, we note that the authority to conduct surveys and resurveys of the public lands is vested solely in the Secretary of the Interior who in turn has delegated this authority to BLM. Volney Bursell, 130 IBLA 55, 56 (1994). Thus, the Manual cited in the decision appealed from and in this opinion is the text which is properly relied on in resolving disputes relating to surveys of the public lands.

Appellant has also stated that he was not timely made aware of the dependent resurvey. Delay or lack of notice, however, did not foreclose appellant's right to challenge the resurvey or to appeal the denial of his protest of that survey to this Board. As in previous cases, where there is lack of evidence that BLM provided interested parties an opportunity to file objections to the official filing of a plat of survey, and where objections are filed subsequently, they will not be dismissed, but will be adjudicated by BLM (as they were in this case), and appeals from BLM's decisions will be entertained by the Board. Peter Paul Groth, 99 IBLA 104, 109 (1987), and cases cited. There is no indication in the case now before us that had appellant been afforded an opportunity to challenge the 1982 dependent resurvey prior to the filing of the plat, the result would have been different. ^{2/}

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

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

Franklin D. Amess
Administrative Judge

^{2/} This is so even though one who protests prior to the filing of a plat of a dependent resurvey has a lesser burden of proof than one protesting after the filing. One protesting prior to the filing of a plat has the burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey, while one protesting subsequent to the filing must show by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous. Peter Paul Groth, 99 IBLA at 111. Appellant's evidence falls far short of either burden.