

INTERIOR BOARD OF LAND APPEALS

Longview Fibre Co.

135 IBLA 170 (April 10, 1996)

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LONGVIEW FIBRE CO.

IBLA 92-520

Decided April 10, 1996

Appeal from a decision of the Oregon State Office, Bureau of Land Management, denying protest against dependent resurvey. Group No. 1620, Oregon.

Affirmed.

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

Objections raised for the first time on appeal from denial of protest against a BLM resurvey to BLM's acceptance of comers that were not included in that resurvey are not justiciable.

2. Surveys of Public Lands: Dependent Resurveys

A comer is properly considered lost where there is no remaining evidence of the original comer (including the monument and its accessories) or other acceptable evidence pointing to its original position. The remains of trees will not be considered the original accessories where there are no identifying marks on them; their size cannot reliably be determined; the bearings and distances from the purported comer position (to the extent they can be determined) are at variance with the record; and there is no corroborative evidence.

3. Surveys of Public Lands: Dependent Resurveys

Where a comer was reestablished by proportionate measurement and has remained outstanding for almost 60 years, BLM properly refuses to relocate the comer by a second reportioning based on the recent recovery of a control comer closer than one previously used, where the first resurveyor did not commit gross error and where, in any event, to do so would impair rights established by reference to the earlier comers.

APPEARANCES: Richard H. Wollenberg, Esq., Longview Fibre Company, Longview, Washington, for appellant; Wayne M. Gardner, Chief, Branch of Cadastral Survey, Oregon, Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

Longview Fibre Company (Longview) has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated May 27, 1992, denying its protest against a 1991 BLM dependent resurvey of public lands situated in T. 4 N., R. 2 W., Willamette Meridian, Columbia County, Oregon.

The case concerns three corners along a line running north from the section corner common to secs. 32 and 33, T. 4 N., R. 2 W., Willamette Meridian, and secs. 4 and 5, T. 3 N., R. 2 W. (SE corner of sec. 32), Willamette Meridian, through the quarter corner between secs. 32 and 33 (E<sup>1</sup>/<sub>4</sub> corner of sec. 32), through the section corner common to secs. 28, 29, 32, and 33, T. 4 N., R. 2 W. (NE corner of sec. 32), through the quarter corner between secs. 28 and 29 (E<sup>1</sup>/<sub>4</sub> corner of sec. 29), to the section corner common to secs. 20, 21, 28, and 29, T. 4 N., R. 2 W. (NE corner of sec. 29). The controversy focuses on the E<sup>1</sup>/<sub>4</sub> and NE corners of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29.

The subdivisional lines in T. 4 N., R. 2 W., including the line in question here, were originally surveyed in 1855 by Joseph W. and John Trutch (the Trutches), U.S. Deputy Surveyors. Running a line north from the SE corner of sec. 32, the Trutches established, at 40 chains, the E<sup>1</sup>/<sub>4</sub> corner of sec. 32, which was described as a wood post tied to two 18-inch diameter fir trees 47 links distant on a bearing of N. 67° and 14 links distant on a bearing of S. 47° E. <sup>1/</sup> They then proceeded north and established, at 80 chains, the NE corner of sec. 32, which was described as a wood post tied to a 12-inch diameter fir tree 91 links distant on a bearing of N. 65° W., an 18-inch diameter fir tree 48 links distant on a bearing of N. 10° E., a 40-inch diameter fir tree 100 links distant on a bearing of S. 80° W., and a 24-inch diameter cedar tree 120 links distant on a bearing of S. 55° E. (1855 Field Notes at 3). <sup>2/</sup>

Proceeding north, the Trutches established, at 40 chains, the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, which was described as a wood post tied to a 40-inch diameter fir tree 24 links distant on a bearing of N. 52° W. and a 24-inch

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<sup>1/</sup> Governing procedures dictate that the diameter of a bearing tree is determined at breast height, and that the distance to the tree is the horizontal distance to the center of the tree at its root crown. See Manual of Instructions for the Survey of the Public Lands of the United States, 1973 (Survey Manual) § 4-85 at 122. The tree is marked with identifying information regarding the section involved in a vertical line, ending with the letters "BT" about 6 inches above the root crown. Survey Manual §§ 4-65, 4-86, 4-102, 4-106.

<sup>2/</sup> The record contains a copy of a portion of the original field notes for the 1855 Trutch survey. We have paginated that document.

diameter fir tree 57 links distant on a bearing of S. 45° E. Id. at 5.

They then proceeded north and established, at 80 chains, the NE corner of sec. 29, which was described as a wood post tied to an 18-inch diameter fir tree 69 links distant on a bearing of N. 77° W., a 6-inch diameter dogwood tree 28 links distant on a bearing of N. 35° E., an 18-inch diameter cedar tree 90 links distant on a bearing of S. 35° E., and a 15-inch diameter cedar tree 40 links distant on a bearing of S. 50° W. The Trutch survey was approved on January 19, 1856, by the Surveyor General of Oregon.

In 1933, Otis O. Gould, U.S. Transitman, resurveyed certain of the subdivisional lines in T. 4 N., R. 2 W., including the line in question. Gould was unable to locate any of the three original corners along that line at issue here, i.e., the E<sup>1</sup>/<sub>4</sub> and NE corners of sec. 32 or the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 (1933 Field Notes at 9). Gould reestablished the SE corner of sec. 32 at the position of the original corner that was deemed to have been perpetuated with an iron pipe. Id. at 6. 3/ Gould proceeded on a bearing of N. 1° 07' W. from the SE corner of sec. 32. Id. at 10.

He did not reestablish the E<sup>1</sup>/<sub>4</sub> corner of sec. 32, but did reestablish the NE corner of sec. 32 by the method of proportionate measurement. 4/ Gould proceeded on a bearing of N. 0° 32' W. from the NE corner of sec. 32. Id. at 12. He reestablished the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 at 40.09 chains, which was its proportionate position. 5/ Gould continued north to the NE corner of sec. 29. The original post was not found, but three of the four original bearing trees were found. Gould accordingly determined the position of the NE corner of sec. 29 by reference to the record bearing and distance from the original bearing trees. 6/

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3/ At that location he set an iron post, 2 inches in diameter and 3 feet long, 27 inches in the ground, with a marked brass cap. The post was

tied to an 18-inch diameter fir tree 77 links distant on a bearing of N. 21-<sup>1</sup>/<sub>2</sub>° E., a 24-inch diameter fir tree 224 links distant on a bearing of S. 39° E., a 7-inch diameter fir tree 21 links distant on a bearing of S. 85-<sup>1</sup>/<sub>2</sub>° W., and an 8-inch diameter fir tree 101 links distant on a bearing of N. 53° W. Id. at 7.

4/ At 80.19 chains, Gould set an iron post, 2 inches in diameter and 3 feet long, 27 inches in the ground, with a marked brass cap. The post was tied to a 20-inch diameter fir snag 45 links distant on a bearing of N. 71° E., a 60-inch diameter fir snag 527 links distant on a bearing of S. 7° E., a 28-inch diameter fir snag 633 links distant on a bearing of S. 38° W., and a 20-inch diameter fir snag 66 links distant on a bearing of N. 40° W.

5/ At that point, he set an iron post, 1 inch in diameter and 3 feet long, 27 inches in the ground, with a marked brass cap. The post was tied to a 20-inch diameter fir tree 153 links distant on a bearing of N. 39-<sup>1</sup>/<sub>2</sub>° E. and a 10-inch diameter fir tree 450 links distant on a bearing of S. 18° W. 6/ At 80.18 chains, he set an iron post, 2 inches in diameter and 3 feet long, 27 inches in the ground, with a marked brass cap. Id. at 12-13. The post was tied to the three remaining bearing trees, i.e., the remains of a cedar stump 90 links distant on a bearing of S. 35° E., an 18-inch diameter

The 1933 Gould resurvey was approved on January 7, 1935, by the U.S. Supervisor of Surveys.

In 1983 and 1984, Jerry C. Olson, a registered private surveyor, acting at the request of Longview, resurveyed the line running from the SE corner of sec. 32 through the NE corner of sec. 32 to the E $\frac{1}{4}$  corner of sec. 29. Olson had earlier found and accepted Gould's SE corner of sec. 32 (Olson Survey Plat at 2; Longview Fibre Survey at 4). <sup>7/</sup> During the course of his 1983/84 resurvey, he also recovered what he believed were the original 1855 corners for the three corners Gould had determined to be lost in 1933, viz., the E $\frac{1}{4}$  and NE corners of sec. 32 and the E $\frac{1}{4}$  corner of sec. 29.

At the E $\frac{1}{4}$  corner of sec. 32, Olson did not find the original wood post, but did find what he believed were the two original bearing trees. He noted a 36-inch diameter fir stump with scribing 14 links on a bearing of S. 46° E. and a 50-inch diameter fir snag with scribing 45.76 links on a bearing of N. 66° W., both from a center position (Olson Survey Plat at 2). The bearings and distances matched very closely those recorded by the Trutches: 18-inch diameter fir (S. 47° E., 14 links) and 18-inch diameter fir (N. 67° W., 47 links) (1855 Field Notes at 3).

At the NE corner of sec. 32, Olson again did not find the original wood post, but did find what he believed were three of the four original bearing trees. He noted the remains of three fir trees the following bearings and distances from a center position: N. 66° W. (88.64 links); N. 10° E. (49.24 links); and S. 79° 30' W. (95.15 links) (Olson Survey Plat at 2). Olson reported, however, that the trees were "badly rotted and it is not possible to find scribing." Id.

At the E $\frac{1}{4}$  corner of sec. 29, Olson again did not find the original wood post, but he did find what he believed were the two original bearing trees. The remains of two trees were the following bearings and distances from a center position: N. 52° W. (23.94 links) and S. 45° E. (56.97 links) (Longview Fibre Survey at 28). He reported, however, that both trees were "badly decayed" (Olson Survey Plat at 2). No scribing was found.

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fn. 6 (continued)

cedar snag 40 links distant on a bearing of S. 50° W., and a 20-inch diameter fir snag 69 links distant on a bearing of N. 77° W. Id. at 13. The post was also tied to two new bearing trees, i.e., a 66-inch diameter fir tree 349 links distant on a bearing of N. 86- $\frac{1}{2}$ ° E. and a 60-inch diameter fir tree 485 links distant on a bearing of N. 41° W.

<sup>7/</sup> The record contains a copy of Olson's private survey plat, dated April 1984 and entitled "Survey of a Portion of Sec. 32, T4N, R2W, W.M.[.] Columbia County." It consists of two pages. The plat was officially filed with the Columbia County Surveyor on May 24, 1984, as Survey No. 3437.

The Longview Fibre Survey, dated July 27, 1992, appears in the record as Exhibit A attached to appellant's statement of reasons.

All three corners were remonumented by Olson with 1-inch diameter iron posts topped by marked brass caps and tied to new bearing trees (Olson Survey Plat at 1). <sup>8/</sup>

Olson's evidence was investigated by Frank A. Tuers, a BLM Cadastral Surveyor, in 1983/84. Noting Olson's recovery of the two original 1855 bearing trees, Tuers accepted Olson's E<sup>1</sup>/<sub>4</sub> corner of sec. 32 (1984 BLM Memo at 3). However, he did not accept either Olson's NE corner of sec. 32 or his E<sup>1</sup>/<sub>4</sub> corner of sec. 29. <sup>9/</sup> Id. at 4. <sup>9/</sup> While he noted the bearing trees recovered by Olson in each case, he did not regard this as "clear and convincing evidence" regarding the location of the original 1855 corners. He concluded instead that Gould's corners should be considered the true corners. BLM took no formal action at that time because the E<sup>1</sup>/<sub>4</sub> corner of sec. 32 was on private land, and the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 were considered properly reestablished (1984 BLM Memo at 3, 4; Memorandum to the District Manager from the Deputy State Director, Dec. 10, 1985 (1985 Memo)).

In 1991, BLM dependently resurveyed the exterior lines of sec. 29, T. 4 N., R. 2 W., to delineate the boundaries of the public land in that section. At that time, sec. 29 was composed entirely of public land and was bordered by private land in secs. 28 and 32 of that township. Cornering sec. 33 was also private land. In order to provide control for that resurvey, BLM decided to perform a corrective dependent resurvey of the line between secs. 32 and 33 of the township, taking into account Olson's 1984 recovery of the E<sup>1</sup>/<sub>4</sub> corner of sec. 32, which Gould had incorrectly thought to be lost in 1933.

Although, by accepting the E<sup>1</sup>/<sub>4</sub> corner of sec. 32, BLM corrected Gould's dependent resurvey of the line between secs. 32 and 33, it decided not to alter his proportionate positions for the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, both of which he had determined were "lost" in 1933. BLM did so even though reportioning the corners using the original E<sup>1</sup>/<sub>4</sub> corner of sec. 32 would have shifted the NE corner of sec. 32 0.52 chains to the north and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 0.26 chains to the north (Memorandum to the Chief, Cadastral

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<sup>8/</sup> As monumented by Olson, the E<sup>1</sup>/<sub>4</sub> corner of sec. 32 was located 40.87 chains on a bearing of N. 0° 25' 36" W. from the SE corner of sec. 32. The NE corner of sec. 32 was located 40.09 chains on a bearing of N. 1° 28' 11" E. from the E<sup>1</sup>/<sub>4</sub> corner of sec. 32. The E<sup>1</sup>/<sub>4</sub> corner of sec. 29 was located 39.77 chains on a bearing of about N. 0° 45' E. from the NE corner of sec. 32. <sup>9/</sup> According to BLM, Olson's NE corner of sec. 32 is situated 0.69 chains on a bearing of N. 12° W. from the 1933 Gould corner accepted by BLM in its 1991 dependent resurvey. Olson's E<sup>1</sup>/<sub>4</sub> corner of sec. 29 is 0.48 chains on a bearing of N. 54° W. from the 1933 Gould corner (Memorandum to the Oregon State Director from Salem District Manager, Jan. 3, 1984 (1984 BLM Memo), at 3, 4).

Office Section, from the Chief, Cadastral Surveyor, Nov. 6, 1991 (November 1991 Memo) at 2). <sup>10/</sup> BLM reasoned that moving the corners would not necessarily place them at their original location, or even a "more equitable position," and that retaining them would protect bona fide rights. BLM also noted that private landowners in secs. 28, 32 and 33 had relied on Gould's corners "for almost 60 years," with the result that "moving the corners would undoubtedly create confusion and conflicts." Id.

BLM commenced its 1991 corrective dependent resurvey at the SE corner of sec. 32, which was found to be monumented with the 2-inch diameter iron post topped by a marked brass cap set by Gould in 1933 (1991 Field Notes at 4). BLM also found three of Gould's four bearing trees record bearing and distance from the corner in the NE, NW, and SW quadrants.

BLM proceeded 40.87 chains on a bearing of N. 2° 10' W. to the E<sup>1</sup>/<sub>4</sub> corner of sec. 32, which was found to be monumented with the 1-inch diameter iron post topped by a marked brass cap set by Olson in 1983/84. BLM also found the two original 1855 bearing trees recovered by Olson, which were reported to be "decayed," and the three new bearing trees established by him.

BLM continued 39.415 chains on a bearing of N. 0° 05' W. to the NE corner of sec. 32, which was found to be monumented with the 2-inch diameter iron post topped by a marked brass cap set by Gould in 1933. BLM also found one of Gould's four bearing trees located 627 links distant on a bearing of S. 5-<sup>1</sup>/<sub>4</sub>° E. BLM tied in Olson's NE corner of sec. 32, but did not accept it because "Tuers did not find evidence [in 1984] to support that Olson recovered the original corner." Id. at 6.

From the NE corner of sec. 32, BLM began its dependent resurvey of sec. 29. BLM proceeded 40.17 chains on a bearing of N. 0° 25' W. to the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, which was found to be monumented with the 1-inch diameter iron post topped by a marked brass cap set by Gould in 1933. BLM also found Gould's two bearing trees close to record bearing and distance from the corner. Again, BLM tied in Olson's E<sup>1</sup>/<sub>4</sub> corner of sec. 29, but did not accept it because "Tuers did not find evidence to support that Olson recovered the original corner." Id. at 7.

BLM continued 40.17 chains on a bearing of N. 0° 19' 30" W. to the NE corner of sec. 29, which was found to be monumented with the 2-inch diameter iron post topped by a marked brass cap set by Gould in 1933. BLM also found one of the four original 1855 bearing trees close to record bearing and distance from the corner in the SW quadrant. Id. at 8. This tree had

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<sup>10/</sup> In its May 1992 decision, BLM reported slightly different figures, indicating that the NE corner of sec. 32 would shift 0.50 chains north and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 would shift 0.25 chains north,

also been recovered by Gould in 1933. BLM also found one of the two bearing trees established by Gould close to record bearing and distance from the corner in the NE quadrant. The 1991 BLM resurvey was approved on May 22, 1992, by the Chief, Cadastral Surveyor of Oregon.

On May 6, 1992, Longview filed a protest against BLM's 1991 resurvey. It objected to BLM's resurvey of the line running north from the E $\frac{1}{4}$  corner of sec. 32 to the E $\frac{1}{4}$  corner of sec. 29 because (it asserted) BLM ignored evidence recovered by Olson in 1983/84 pointing to the original 1855 location of the three corners on that line. Longview noted that BLM's resurvey placed its past logging efforts, which (based on the Olson survey) had been assumed to be on private lands within secs. 28 and 32, in trespass on Federal lands in adjacent sec. 29. <sup>11/</sup>

BLM denied Longview's protest in its May 1992 decision. Relying on Tuers' 1984 investigation, BLM indicated that, although it had accepted Olson's corner for the E $\frac{1}{4}$  corner of sec. 32, it had not accepted his corners for the NE corner of sec. 32 and the E $\frac{1}{4}$  corner of sec. 29: "These alleged original corners [consist] of the remains of tree stumps that [form] a bearing and distance pattern simulating the original record. Tuers found the stumps to be in an extremely advanced state of decay with no chance of finding marks or determining clear measurements in all cases." In general, BLM reaffirmed its position that there was not a "preponderance of the evidence" that Olson had remonumented the original 1855 corners.

BLM also refused to reportion the NE corner of sec. 32 and E $\frac{1}{4}$  corner of sec. 29 on the basis of Olson's recovery of the original 1855 E $\frac{1}{4}$  corner of sec. 32. It reaffirmed its position that to move the corners would not necessarily locate them at their original or a more equitable position and would undermine the longstanding reliance by private landowners on the existing Gould corners, and that not moving them would not impair bona fide rights. Longview appealed.

[1] For the first time on appeal, appellant objects to BLM's acceptance of the corner common to secs. 29, 30, 31, and 32, T. 4 N., R. 2 W. (reestablished by Gould in 1933 using proportionate measurement) and the quarter corner between sec. 31, T. 4 N., R. 2 W., and sec. 6, T. 3 N., R. 2 W. (SOR at 5-7). However, BLM did not resurvey those corners in its 1991 resurvey and they were not the subject of BLM's May 1992 decision denying appellant's protest against the 1991 resurvey. As a result, appellant's objections are not justiciable on appeal. See Robert H. Cooper, 75 IBLA 354, 357 (1983).

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<sup>11/</sup> Longview owns the W $\frac{1}{2}$  sec. 28, the NE $\frac{1}{4}$  sec. 32, and the NW $\frac{1}{4}$  sec. 33. The total trespass area, which involves land east and south of sec. 29, is about 3.5 acres (BLM Answer at 2).

Appellant does not contest BLM's acceptance of three of the five corners along the line that runs from the SE corner of sec. 32 through the NE corner of sec. 32 to the NE corner of sec. 29, viz., the SE corner of sec. 32, E<sup>1</sup>/<sub>4</sub> corner of sec. 32, and NE corner of sec. 29. Appellant objects to BLM's acceptance of the two corners reestablished by Gould in 1933 for the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 (SOR at 5, 7).

Appellant contends that BLM, in its 1991 resurvey, should have accepted Olson's corners for the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, as they were based on evidence of the original 1855 corners set by the Trutches. Alternatively, it argues that BLM should have reportioned the corners, using the original 1855 E<sup>1</sup>/<sub>4</sub> corner of sec. 32 recovered by Olson in 1983/84 (SOR at 1, 9).

[2] We first consider whether BLM improperly refused to reestablish each corner in accordance with evidence regarding its original position, since it is well established that this should be done if at all possible. See United States v. Doyle, 468 F.2d 633, 637 (10th Cir. 1972); Stoddard Jacobsen v. BLM (On Reconsideration), 103 IBLA 83, 86 n.7 (1988), aff'd, Downer v. Hodel, No. 88-513-HDM (D. Nev. Oct. 12, 1989); Survey Manual § 5-21 at 133; Restoration of Lost or Obliterated Corners & Subdivision of Sections (1979) at 10. The question is whether the corner can be considered "existent" or found (Survey Manual § 5-5 at 130).

The Board will generally uphold a BLM dependent resurvey where the party challenging it fails to demonstrate, by a preponderance of the evidence, that the resurvey did not constitute an accurate reestablishment of the corners and intervening lines of the original survey. See Peter Paul Groth, 99 IBLA 104, 111 (1987); Stoddard Jacobsen, 85 IBLA 335, 336, 342 (1985). According to the Survey Manual, an existent corner is "one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony" (Survey Manual § 5-5 at 130).

We first consider whether BLM found any remaining evidence regarding the original 1855 location of the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29. The wood post set by the Trutches in 1855 was not found by Gould in 1933, by Olson in 1983/84, by Tuers in 1984, or by the BLM surveyors in 1991. Nor is there any evidence that these posts have ever been perpetuated by any means. No bearing trees scribed or marked in any way have ever been recovered, although, in 1983/84, Olson found a grouping of trees that he felt fit the pattern of original bearing trees described by the Trutches in their 1855 field notes (Olson Survey Plat at 2).

In the case of the NE corner of sec. 32, the Trutches described four bearing trees the following bearings and distances from the corner: 18-inch diameter fir (N. 10° E., 48 links); 12-inch diameter fir (N. 65° W., 91 links); 24-inch diameter cedar (S. 55° E., 120 links);

and 18-inch diameter fir (S. 80° W., 100 links) (1855 Field Notes at 3). Olson identified three bearing trees: fir remains (N. 10° E., 49.24 links); fir remains (N. 66° W., 88.64 links); and fir remains (S. 79° 30' W., 95.15 links) (Olson Survey Plat at 2). <sup>12/</sup>

In the case of the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, the Trutches described two bearing trees: 40-inch diameter fir (N. 52° W., 24 links); and 24-inch fir (S. 45° E., 57 links) (1855 Field Notes at 5). Olson identified two bearing trees: root collar (N. 52° W., 23.94 links) <sup>13/</sup> and fir stump (S. 45° E., 56.97 links) <sup>14/</sup> (Longview Fibre Survey at 28). <sup>15/</sup>

Given the advanced state of decay of all of the trees identified by Olson, it is difficult to establish their exact location by bearings and distances from a center point, as shown by the discrepancies between Olson's and BLM's reports setting the locations of the remains of the trees (Olson Survey Plat at 2; Longview Fibre Survey at 20-21, 28; 1984 BLM Memo at 4). The groupings of trees as reported by Olson match, either exactly or very closely, the patterns of the original bearing trees reported by the Trutches. Nothing indicates that any of the deviations from the record fall outside acceptable degrees of error in original surveys dating from the 1800's.

However, the areas where the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 are situated contained timber at the time of the 1855 Trutch

<sup>12/</sup> At the time of his 1984 examination of the NE corner of sec. 32, Tuers located Olson's corner, which was a 1-inch diameter iron post topped by a marked brass cap (1984 BLM Memo at 3). In addition, Tuers determined the bearings and distances from that post to the three bearing trees identified by Olson: fir stump (N. 7° E., 50 links); root (N. 68° W., 91 links); and fir stump (S. 78° W., 102 links). *Id.* at 4. Tuers' reported bearings and distances differ from those noted by Olson.

<sup>13/</sup> Olson further stated: "The remains included the ring of bark along the ground and the attached roots. The diameter of the collar would match very well with the expectations of the 40" fir noted [in the official notes]" (Longview Fibre Survey at 28). According to Tuers, it was simply a "piece of fir bark (possible shell of stump)" (1984 BLM Memo at 4).

<sup>14/</sup> Olson further stated: "The remains include an intact slab, decayed wood, and roots in place. The remains are of a size that would match very well with the expectations of the 24" fir noted [in the official notes]" (Longview Fibre Survey at 28). According to Tuers, it was a "fir stump slab, at base 30 [inches in diameter]" (1984 BLM Memo at 4).

<sup>15/</sup> Olson did not state, on his 1984 survey plat, the bearings and distances from the 1-inch diameter iron post that he set at the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 (Olson Survey Plat at 2). However, they are stated in the copy of Olson's survey submitted on appeal and confirmed by Tuers (Longview Fibre Survey at 28; 1984 BLM Memo at 4).

survey and for some time thereafter (1855 Field Notes at 3, 5). The lands near the NE corner of sec. 32 contained deciduous and evergreen (fir and cedar) trees; those near the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 contained only evergreen (fir and cedar) trees. Gould reported in 1933: "At one time [sec. 29 was] covered with a good stand of timber but most of it has been logged at this date" (1933 Field Notes at 19). He also repeatedly reported scattered patches of "heavy timber" in the general area. Id. at 10, 11, 13, 18. Thus, there is good reason to believe that, in 1983 and thereafter, there were or had been any number of fallen or logged trees in the areas where the two corners are found and that a number of different groupings of such trees might, at one time, have been identified that would match the record, either exactly or very closely. The fact that any one grouping was in fact identified did not necessarily render it the original set of bearing trees identified by the Trutches in 1855.

This reality is reflected in the rule that the pattern of trees will not alone suffice to identify the location of either of the original corners, in the absence of some evidence corroborating that the trees are the original bearing trees. See O.R. Williams, 60 I.D. 301 (1949).

Olson limited the area of his search for the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 by reportioning using the newly-discovered E<sup>1</sup>/<sub>4</sub> corner of sec. 32 (SOR at 6, 7). Thus, in each case, Olson limited the area of his search for evidence of the original corner to an area 40 feet (on a north-south axis) by 60 feet (on an east-west axis), surrounding the reportioned location of the corner. Appellant argues that this procedure increased the chances that a grouping of trees matching the original bearing trees reported by the Trutches would actually be the remains of those trees. This limitation is at best highly speculative, as reportioning does not actually ensure that the corner is placed where originally located. 16/

We have carefully reviewed, and now reject as unpersuasive, Olson's probability analysis. The Forest Service data on which it is based reflects only the "approximate number of trees" that would be expected to be found in a timber stand (Longview Fibre Survey at 42). There is no proof that the original 1855 stand was identical or even close to the stand currently assumed to have existed. There is no evidence regarding the distribution of fir trees generally in the areas of each of the disputed corners, based on observations of remnants of the original stand. Also, we cannot say that such observations would even be complete given the fact that, in many cases, trees standing in 1855 may have become totally obliterated. That seems likely since, even at the time of the Olson resurvey in 1933, many of the bearing trees themselves had already succumbed to fire or logging (1933 Field Notes at 9, 13). Appellant does

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16/ This procedure yields results closely approximating those from reportioning using the reestablished E<sup>1</sup>/<sub>4</sub> corner of sec. 32.

not discount that possibility. Indeed, some of the trees relied upon by Olson were themselves barely discernible (Longview Fibre Survey at 21, 22, 29). Thus, we cannot conclude that Olson correctly determined the density of trees in 1855. This casts considerable doubt on his probability results.

Further, given the likely dense nature of the timber stands in the areas of the disputed corners at the time of the original survey in 1855, there was very likely a number of groupings of trees that might, at one time, have been identified as the original bearing trees. Unfortunately, it seems clear that the trees in the areas of the disputed corners were already falling victim to fires and logging prior to Gould's 1933 survey (1933 Field Notes at 9, 13). It seems very likely that no traces of those trees would have lasted until 1983/84. Again, that is borne out by Olson's work. See Longview Fibre Survey at 21, 22, 29. Thus, there is no reason to conclude that any one grouping, which somehow survived the passage of time, is the original bearing trees. Thus, we do not find the results of Olson's work as sufficient proof that the trees identified are the original 1855 bearing trees.

This was also BLM's opinion. Although BLM has generally concluded that, in the absence of the original monument, it is not always necessary to have original scribe marks on bearing trees, a corner will be considered found based on a "pattern of tree remains" only if that evidence is "substantiated by collateral evidence such as original line blazes, topography calls, testimony, other records, etc." United States v. Champion Papers, Inc., 361 F. Supp. 481, 486-87, 490 (S.D. Tex. 1973). The "need for corroborative evidence is \* \* \* in direct proportion to the uncertainty" regarding a monument or its accessories, including whether a particular grouping of trees is in fact the original bearing trees (Survey Manual § 5-6 at 130).

BLM may identify a bearing tree without any scribing or marks. See Mr. & Mrs. John Koopmans, 70 IBLA 75, 86, 87-88 (1983). As appellant notes, the Survey Manual provides: "The species, size and exact position of the bearing trees are of vital importance, as this data will generally serve to identify a bearing tree without uncovering the marks, or even to identify two or more stumps after all evidence of the marks has disappeared" (Survey Manual § 4-87 at 122-23). See also Walter G. Robillard and Lane J. Bouman, A Treatise on the Law of Surveying and Boundaries (Treatise) § 14.07 (5th ed. 1987), at 341. In the present case, Olson determined the "species" of the bearing trees he identified. In each case, the tree was determined to be a fir. <sup>17/</sup> Although this matches the record,

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<sup>17/</sup> BLM was unable to determine, based on observation, the species of the purported bearing tree in the NW quadrant of the NE corner of sec. 32 (Answer at 5). Olson, concluded, apparently without the benefit of any wood analysis, that there was "no doubt" that it was a fir tree (Longview Fibre Survey at 20). In the absence of such proof, we cannot accept Olson's conclusion.

the 1855 notes indicate that the area was densely forested, and Olson noted that forest was predominantly composed of fir trees (Longview Fibre Survey at 41). Thus, the species of the tree remains does not necessarily identify the trees as the original bearing trees.

The other two factors are problematic, at best. The "size" of the bearing trees identified by Olson cannot be determined with any degree of accuracy. BLM found the trees to be of indeterminate size (Memorandum to the State Director from the District Manager, dated Jan. 3, 1984, at 4). Olson did not assert that the trees were of any particular size but merely stated that the remains would match the sizes reported by the Trutches (Olson Survey Plat (Sheet 2 of 2); Longview Fibre Survey at 20-21, 28). There is every reason to expect that the trees grew for some time after 1855, in the absence of any evidence of fires or logging, as was shown to have happened with the bearing trees for the E<sup>1</sup>/<sub>4</sub> corner sec. 32. It is reasonable to expect that the remains would match trees of various sizes, thus not pointing to any particular size. Also, in each case, it would have been impossible to determine the size of the trees at breast height since, at best, little of the tree remained at that height. Even if the size could have been estimated, in the absence of any evidence of when a tree died, we have no way of knowing, based on size, whether it was in fact an original bearing tree.

Further, in no case can the "exact position" of any of the bearing trees identified by Olson be determined. This is evident in the discrepancies between Olson's and BLM's reports of the locations of the various trees. We note that the discrepancy is on the order of from 0 minutes to 3 degrees and from 0.03 to 6.85 links, in the case of the NE corner sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner sec. 29.

We conclude that, given the inconclusive nature of evidence regarding the species of the bearing trees identified by Olson, the lack of any reliable evidence regarding their size, and the problems with determining their exact positions together with the likelihood that a number of other groupings of trees matching the record might, at one time, have been identified, the evidence generated by Olson does not determine the position of the original NE corner sec. 32 and E<sup>1</sup>/<sub>4</sub> corner sec. 29.

[3] We conclude that BLM, in its 1991 dependent resurvey, properly considered the corners lost. In such cases, corners are subject to reestablishment by proportionate measurement. See Wilogene Simpson, 110 IBLA 271, 280 (1989); Survey Manual § 5-16 at 132 ("In questionable cases it is better practice, in the absence of \* \* \* collateral evidence, to turn to the suitable means of proportionate measurement"). The question becomes whether BLM properly refused to relocate the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 by reportioning the corners based on Olson's recovery of the original 1855 E<sup>1</sup>/<sub>4</sub> corner of sec. 32.

In utilizing proportionate measurement to reestablish a lost corner, BLM is instructed to use known corners "nearest" to the lost corner as control corners (Survey Manual § 5-26 at 134). See also Treatise § 17.14,

at 448; Longview Fibre Co. v. Johnston, 238 P.2d 722, 725 (Or. 1951). <sup>18/</sup> When Gould undertook to reestablish the NE corner of sec. 32 by double proportionate measurement in 1933, he used the known corners nearest to that corner, i.e., the SE corner of sec. 32 and the NE corner of sec. 29 (for north-south control) and the NE corner of sec. 32 <sup>19/</sup> and the NE corner of sec. 33 (for east-west control). The E<sup>1</sup>/<sub>4</sub> corner of sec. 29 was then reestablished by single proportionate measurement, using the NE corner of sec. 32 (as reestablished) and the NE corner of sec. 29.

In 1933 the E<sup>1</sup>/<sub>4</sub> corner of sec. 32 was considered lost since no remaining evidence of the corner had been recovered. However, with the recovery of the original 1855 E<sup>1</sup>/<sub>4</sub> corner of sec. 32, in its November 7, 1991, Supplemental Special Instructions, BLM deemed the Gould resurvey to be in error to the extent that it had not used this corner to delineate the section line between secs. 32 and 33. BLM, thus, undertook to correctively resurvey that line.

In the course of that resurvey, BLM declined to correct the error in the Gould resurvey by reportioning the NE corner of sec. 32, and then the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, and appellant challenges that decision. It is well established that a survey that has already been accepted will not be overturned, especially after a long lapse of time, except upon clear proof of fraud or gross error amounting to fraud. See Connaghan v. Maxus Exploration Co., No. 86-CV-0128-B (D. Wyo. Feb. 4, 1992) (citing Peter Paul Groth, supra); Peter Paul Groth, 99 IBLA at 111; Crow Indian Agency, 78 IBLA 7, 11 n.5 (1983); George S. Whitaker, 32 I.D. 329, 331 (1903); Treatise, § 28.02 at 849. There is no suggestion that Gould committed

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<sup>18/</sup> In the case of a lost section corner in the interior of a township, such as the NE corner of sec. 32, BLM is instructed to use the method of "double proportionate measurement," which involves using the nearest known corners north and south and east and west of the lost corner since lines were originally run to the lost corner from all those directions. See Survey Manual §§ 5-25, 5-26, and 5-28, at 134. In the case of a lost quarter-section corner, such as the E<sup>1</sup>/<sub>4</sub> corner of sec. 29, BLM is instructed to use the method of "single proportionate measurement." See Survey Manual §§ 5-30 and 5-31, at 136. Where such a corner is on a section line in the interior of a township, such measurement will be between the adjoining section corners "after the[se] corners have been identified or relocated" (Survey Manual § 5-38 at 138). Thus, if it were to be reset, the NE corner of sec. 32 would first be relocated by double proportionate measurement, and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 would then be reestablished by single proportionate measurement between that corner and the existing NE corner of sec. 29.

<sup>19/</sup> Gould also did not find the corner common to secs. 29, 30, 31, and 32 (NW corner of sec. 32) in 1933 and set it by proportion.

fraud in reestablishing the two disputed corners by proportionate measurement. The only question is whether, by doing so without having used the original E $\frac{1}{4}$  corner of sec. 32, he committed gross error. We conclude that he did not. Olson was only able to relocate that corner after some effort. The corner was reestablished solely on the basis of two bearing trees that were only snags or stumps at the time of the 1983/84 resurvey, and may have been so in 1933. The marks on both trees were severely "overgrown" at the time of the 1983/84 resurvey (Olson Survey Plat (Sheet 2 of 2); Longview Fibre Survey at 8, 9; Survey Manual § 4-65 at 119), and that may well have been so in 1933. We have no reason to find that Gould did not make a diligent effort to uncover evidence of the original survey. Having done so, we must conclude that he did not commit gross error in failing to locate the original E $\frac{1}{4}$  corner of sec. 32, or in reestablishing the NE corner of sec. 32 by proportionate measurement using the SE corner of sec. 32, which he reasonably believed at that time was the nearest known corner to the south.

In some instances, bona fide rights are protected only where BLM departs from a rigid application of resurveying principles to ensure that long-accepted survey lines are not disturbed, so that property boundaries are stabilized and title is secured. As BLM says: "After a long period of time, when acquired rights and boundary recognition have become established, boundaries should become fixed" (Answer at 9). See also Treatise § 4.16, at 91 ("Lines long accepted should not be lightly cast aside for greater conformity to recent surveys"). Where an entryman or claimant has located improvements or taken other action in good faith reliance on evidence of the original survey and thus bona fide rights are found to exist, a resurvey is required by 43 U.S.C. § 772 (1988) to take this into account.

The lines of the original 1855 survey, as resurveyed by Gould in 1933, were outstanding for almost 60 years at the time of the 1991 resurvey by BLM. Thus, undoubtedly, entrymen, claimants, and private landowners had relied on the intermediate lines in acquiring and later transferring title. <sup>20/</sup> BLM concluded that this had occurred (Nov. 16, 1991, Memorandum to the Chief, Cadastral Office Section, from the Chief, Cadastral Surveyor at 2; Answer at 8, 9). Appellant disputes the existence of any reliance, but it appears that appellant purchased its interests in secs. 28 and 32 in the 1950s (Answer at 9). In addition, appellant admits that private surveys in sec. 28 have tied to Gould's 1933 E $\frac{1}{4}$  corner of sec. 29 since 1969 (SOR at 2; Longview Fibre Survey at 3-4).

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<sup>20/</sup> By contrast, Gould did not monument the E $\frac{1}{4}$  corner of sec. 32 he reestablished by proportionate measurement in 1933 (Nov. 6, 1991, BLM Memo; Nov. 21, 1991, memorandum of telephone conversation with Tuers).

Further, there is no question that such reliance would have been in good faith since official United States monuments, representing the official location of the original 1855 corners (as officially determined by Gould in 1933 by proper legal methods) were to be found on the ground. Thus, BLM could properly have determined that these landowners had bona fide rights that must be protected in any additional resurvey, by avoiding a rigid application of the rules of proportionate measurement. <sup>21/</sup> This was in keeping with the principle of protecting bona fide rights based on an original survey, pursuant to 43 U.S.C. § 772 (1988). As the court said in United States v. Reimann, 504 F.2d 135, 139-40 (10th Cir. 1974):

[I]t would be inequitable to permit the government \* \* \* to accept a survey[,] \* \* \* recording it with knowledge that it would be relied upon by patentees, and then grant the government the right to later correct its error, ex parte, to the detriment of those who did in fact, and in good faith, rely upon it.

We agree with BLM's assessment that a second reportioning would not reestablish the Trutch's 1855 corners. In these limited circumstances, in view of the length of time that the 1933 corners have been acknowledged and the fact that lands have been acquired and title transferred based on those corners, BLM properly decided not to reportion again.

Moreover, we find ample precedent for upholding BLM's action here in Salt Wells Live Stock Co., A-26367 (May 9, 1952). Therein, the Department decided not to again resurvey land where the original resurvey had accomplished its purposes "with approximate and reasonable accuracy" and to do so would adversely affect private rights that had relied, for over 35 years, on that resurvey: "Confusion would be bound to follow any such action. Such a result is to be avoided in a situation where a resurvey of the tract is not necessary to protect the Government's interest." Id. at 4, 5. That is the situation here.

Appellant contends that it had bona fide rights based on Olson's corners (SOR at 7). It argues that, in undertaking its logging operations starting in 1987, it justifiably relied on Olson's 1983/84 resurvey to the extent that it denoted the location of two existent corners, i.e., the NE corner of sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29. See SOR at 1, 2, 7. We cannot say that appellant acquired bona fide rights in reliance on Olson's

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<sup>21/</sup> It should be noted private ownership rights to lands in sec. 32 would be diminished if BLM reportioned, as the corner would be placed farther to the west than the corner as set by Gould in 1933. It appears that appellant owns interests in lands in secs. 28, 32, and 33, surrounding the corner on three sides, so that, in this case, it would gain in secs. 28 and 33 what it lost in sec. 32. That, however, does not diminish the validity of the principle of preservation of longstanding interests based on good-faith reliance on the corners duly established by a resurvey.

1983/84 resurvey of the disputed corners, as we now hold that that resurvey did not recover the original 1855 corners, and thus appellant did not rely on evidence of the original survey. In any case, due to the intervening 1933 resurvey, Olson's corners could not be considered the official United States corners unless and until they were again accepted by BLM, which is now the official surveyor on the behalf of the United States. See 43 U.S.C. § 772 (1988); 43 CFR 9180.0-3(a); Cox v. Hart, 260 U.S. 427, 436 (1922); United States v. Cowlishaw, 202 F. 317, 321 (D. Or. 1913); Treatise § 4.15, at 91 ("If a private surveyor restores a lost corner, it is not conclusive, but only evidentiary in nature"). Appellant was required to await another resurvey by BLM or, if necessary, to successfully challenge the 1933 resurvey before beginning logging operations. In the absence of any acceptance of Olson's corners by BLM, appellant relied on them at its peril. See United States v. Doyle, 468 F.2d 633, 635 (10th Cir. 1972); First American Title Insurance Co. v. BLM, 9 OHA 17, 56 n.22, 98 ID. 164, 184 n.22 (1991) (approving First American Title Insurance Co. v. BLM, 110 IBLA 25, 32-33, 34 (1989) (reliance by private landowners on unapproved BLM survey)); Vern Johnston Logging Co., A-28760 (Aug. 8, 1962) at 2 (reliance by private landowner on private survey).

Nor are we persuaded that there is any reason to now disturb the 1933 resurvey to legitimize appellant's recent activities. At the time of its logging operations in 1987, the only outstanding official United States survey of the line running from the SE corner of sec. 32 to the NE corner of sec. 29 was the 1933 Gould dependent resurvey. Moreover, the monuments of that resurvey for the NE corner sec. 32 and the E<sup>1</sup>/<sub>4</sub> corner of sec. 29 were indisputably still on the ground. Olson had recovered these corners during his 1983/84 resurvey (Longview Fibre Survey at 20, 28) and appellant does not dispute that it had reported locating Gould's NE corner of sec. 32 in 1976 (Answer at 9; Supplemental Reply Brief at 1-2). During its logging operations, appellant clearly ignored those monuments.

Thus, we conclude that appellant did not have, either at the time of the 1991 BLM resurvey or at any time before, any bona fide rights that extended west of the line between secs. 28 and 29, as that line had long been marked on the ground by Gould. There was simply nothing for BLM to take into account in the way of what might be termed appellant's bona fide rights other than to the extent that it was deemed to have relied on the official United States corners reestablished by Gould in 1933. Cf. Sweeten v. United States Department of Agriculture Forest Service, 684 F.2d 682 (10th Cir. 1982).

Accordingly, 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.

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David L. Hughes  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge