

INTERIOR BOARD OF LAND APPEALS

Rodney Courville

143 IBLA 156 (March 17, 1998)

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Editor's Note: Reconsideration denied by Order dated Sept. 21, 1998; appeal filed, Civ. No. 98-890-C-M3 (M.D. La. Oct. 28, 1998); dismissed, (April 18, 2000).

RODNEY COURVILLE

IBLA 95-372

Decided March 17, 1998

Appeal from a Decision of the State Director, Eastern States Office, Bureau of Land Management, dismissing protest of the dependent resurvey. ES-046131.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners. To succeed on appeal, the party challenging the filing of a plat for a dependent resurvey must meet his burden of establishing by a preponderance of the evidence that the dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

APPEARANCES: Warren E. Byrd, II, Esq., Baton Rouge, Louisiana, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Rodney Courville (Courville) has appealed from a Decision dated March 3, 1995, by the Director, Eastern States Office, Bureau of Land Management (BLM), dismissing his protest of the dependent resurvey (resurvey) of the west boundary of T. 7 S., R. 9 E., Louisiana Meridian, Louisiana. The BLM's resurvey was performed at the request of the U.S. Fish and Wildlife Service (FWS) in order to define the boundaries of the Atchafalaya National Wildlife Refuge. The BLM's resurvey was performed between October 9, 1990, and August 27, 1992. It was approved by the Eastern States Chief Cadastral Surveyor (CCS) on May 24, 1993.

Courville owns property in Iberville Parish, Louisiana. In his statement of reasons (SOR) Courville asserts that as a result of BLM's resurvey, approximately 33 acres of his property, abutting the western section line of sec. 96, T. 7 S., R. 9 E., are in conflict with a survey performed by Wallace Hargrave in 1972 on behalf of Appellant. (SOR at 3.)

On June 9, 1994, Courville wrote to the Southeast Regional Solicitor's Office requesting "confirmation of the starting point indicated by a 2[-inch] pipe set by Fenstermaker at the southeast corner of T. 7 S., R. 8 E." Referring to BLM's field notes, Courville alleged in his letter that "no attempt was made to confirm the original location of the southwest corner of T. 7 S., R. 8 E." Fenstermaker was a local surveyor who surveyed a portion of T. 7 S., R. 8 E. in 1936.

The field notes of BLM's dependent resurvey state in part:

Beginning at the cor. of Tps. 7 and 8 S., Rs. 8 and 9 E., monumented by C. H. Fenstermaker, in 1936, with an iron pipe, 3 ins. diam., firmly set, projecting 24 ins. above the ground and in a concrete base, 28 ins. below the ground. There is no remaining evidence of the orig. cor.; however, this monument appears to have been placed with due regard to the location of the orig. survey, and is accepted as the best attainable evidence of the orig. cor. position.

An amplified explanation of this Fenstermaker corner is contained in a July 6, 1994, letter by Eastern States' CCS, to the senior land surveyor, FWS. ^{1/} In his letter, the CCS notes that in addition to the Fenstermaker iron pipe set in 1936, the firm of MEL, Inc., set a monument in 1988 which "was located 46 degrees 50 min. W., 98.7 links distance from Fenstermaker's monument." The CCS explained further that though a diligent search was made for direct evidence of the original township corner and accessories, including an examination of the original topographic calls of record, no such evidence was found. Consequently, an extensive examination of the records of the two local monuments was made. The CCS's letter continues:

The plat of C. H. Fenstermaker's survey is inconclusive as to how his 1936 position for the township corner was developed. On the contrary, the methodology report of MEL, Inc. explains how their 1988 position for the township corner was developed. What was not addressed however, was why C. H. Fenstermaker's township corner was not utilized, especially considering that other corners of Fenstermaker's were utilized by MEL, Inc. to determine their 1988 position for the township corner.

After careful consideration of all the evidence and facts of the situation BLM concluded that there is no remaining evidence of the original township corner. The monument set by C. H. Fenstermaker in 1936 was judged to have been placed with due regard to the location of the original survey, and having been in existence for more than 50 years prior to the monument

^{1/} The letter was in response to an inquiry, lodged with the FWS on behalf of Courville, concerning BLM's dependent resurvey.

set by MEL, Inc., it was accepted as the best attainable evidence of the original corner position.

On September 19, 1994, Courville notified the CCS that he was in disagreement with the boundaries set by BLM's resurvey. The CCS invited Courville to file an official protest with an explanation of why he thought BLM's resurvey was in error.

In December, Courville filed with the CCS a November 22, 1994, letter by Wallace Hargrave (Hargrave letter). In that letter, Hargrave describes the survey he performed in 1972 using the "original Township plat of Township 7 S, Range-9-E." Hargrave explains that no one had challenged his survey until 1988 when the FWS contracted with MEL, Inc., to survey properties purchased by the U.S. Corps of Engineers and BLM from Iberville Land Company.

Hargrave asserts that the MEL, Inc., survey, which established the range line between Rs. 8 and 9 using iron pipes set by Fenstermaker, failed to "properly ascertain [that range line] because it begins in a completely different Township than where the Courville property is located." Hargrave states that beginning a survey in a completely different township is not the best method to ascertain a line if that "line can be determined from within the Township where the property is located, which is what my survey is based on." Hargrave faults BLM's resurvey for establishing the range line "without regards to doing or recreating the radiating Sections off Bayou Maringouin * * *." Hargrave asserts that BLM's resurvey is erroneous and unreliable because it utilizes the Fenstermaker iron pipe "which was arrived at by starting * * * in a completely different Township, and coming across three miles of Atchafalaya Swamp."

In the Decision before us on appeal, the State Director (SD) observes that in 1988, MEL, Inc., performed a partial boundary survey of numerous parcels in Tps. 7 S., Rs. 8 and 9 E., for the FWS. Several of these parcels are located adjacent to the range line between Rs. 8 and 9 E. The specific area of dispute between the MEL, Inc., survey and the Hargrave survey is the location of this range line between sec. 29, T. 7 S., R. 8 E., and sec. 96, T. 7 S., R. 9 E. (Dec. at 3.) The SD states that the conflict between these surveys results "in an overlap in departure position (east - west) of approximately 5 chains (330 feet)." Furthermore, the surveys "disagree in latitudinal position (north - south)" with a hiatus of 2.6 chains (172 feet) in the north and an overlap of 3.3 chains (218 feet) in the south. (Dec. at 4.)

The Decision recites that on January 12, 1989, a meeting was held to discuss the disagreement in the location of the boundary line between the Courville property and that of the FWS. Among those attending the meeting were Rodney Courville and family members, representatives of the FWS and several registered land surveyors, including Wallace Hargrave. At the meeting, Hargrave was asked if, when he set the western boundary of sec. 96

(a portion of the range line between Rs. 8 and 9 E.) he found anything and "whether or not he ran north or south to see if he had located Section 96 in the correct north-south position." Hargrave answered that "he found a north-south painted line which he felt proved he had correctly located the westerly boundary of Section 96 and that he did not run north or south to check his north-south position." (Dec. at 4.)

At the meeting, questions were raised why the survey of MEL, Inc., "had angle points on the range line," which "[p]resumably * * * should have been a straight line." From the SD's perspective, it was also "not understood why MEL, Inc. had not used the Fenstermaker monument." (Dec. at 5.)

Having summarized the highlights of the meeting, the SD explains that the discrepancy between these "local" surveys was probably due to the burying of "fragmentary evidence of the original monuments and accessories" by periodic inundation and depositing of layers of silt within the Atchafalaya basin coupled with the difficulties of reestablishing the corners of an original survey conducted 150 years previously. (Dec. at 5.)

Critiquing the Hargrave survey, the SD asserts that Hargrave, "without qualification to the original corner begins his survey at the supposed southeast corner of Section 80 on Bayou Maringouin." The SD observes that Hargrave's bearings are those of the original survey "and his basis of bearing, be it magnetic, grid or true meridian, is unqualified." While many of Hargrave's distances stem from the original survey, others inexplicably do not, his distance along the west boundary of sec. 96 being 65.88 feet (one chain) long of record.

Next, the SD notes that Hargrave made no mention of physical evidence relating to original monuments or topographic calls of record: "The path of the original survey he chose to traverse by record crossed Bayou Black four times, and nowhere in Mr. Hargrave's survey is there a correlation between the actual location of the bayou and the position of the section boundaries as he has established them." (Dec. at 6.)

The SD states that BLM found no evidence of the painted line reported by Hargrave. He notes, moreover, that "Hargrave's plat makes no mention of the painted line he observed." In addition, as Hargrave admitted at the meeting, he did not run to the north or south of this line. The SD asserts that in the absence of retracements north and south along the range line and comparisons to other corners and calls of the original field notes, Hargrave's painted range line "does not constitute evidence of the original survey" and can be regarded as nothing more than mere speculation. (Dec. at 7.)

Next, the SD observes that MEL, Inc., "using for control a combination of three monuments they had reestablished in conjunction with two other local monuments they had found, computed a series of four 'modeled computer traverses' to establish positions for their monuments along the disputed range line." (Dec. at 7.) The SD states that the "methods and procedures

employed by MEL, Inc., in the restoration of boundaries and corners of the original public land surveys" were not in accordance with the Manual of Instructions for the Survey of the Public Lands of the United States (1973) (Manual). (Dec. at 8.)

In particular, the SD states that BLM's resurvey begins at the corner of Tps. 7 and 8 S., Rs. 8 and 9 E., which is the southwest corner of the township in which Courville's property is located. (Dec. at 8.) The BLM's resurvey ends at the corner of Tps. 6 and 7 S., Rs. 8 and 9 E., the northwest corner of the township in which Courville's property is located. (Dec. at 10.) The BLM's point of beginning corner is the corner monumented by Fenstermaker in 1936. While Fenstermaker's survey is inconclusive as to how this corner was developed,

his plat depicts his survey of a portion of the south boundary of Township 7 South, Range 8 East following an old marked blazed line to the corner of Townships 7 and 8 South, Ranges 8 and 9 East on the east margin of Bayou Des Glaises. This along with the relation to original topographic calls in three directions, including the call to Bayou Maringouin, led to the judgment that it had been placed with due regard to the location of the original survey, and having been in existence for more than 50 years, was accepted as the best attainable evidence of the original corner position.

(Dec. at 8.) In support, the SD quotes from the Manual at sec. 5-9 (pp. 130-32), defining an obliterated corner as a point where there are no remaining traces of the monument or its accessories, but the location of which has been perpetuated or may be recovered beyond a reasonable doubt. Section 5-16 (pp. 131-32) provides that topographic calls may assist in recovering the locus of such a corner.

The SD then recites MEL, Inc.'s procedure for establishing a different position for the southeast corner of T. 7 S., R. 8 E. The SD notes that MEL, Inc., failed to explain why it did not use Fenstermaker's township corner "especially considering that other Fenstermaker corners were employed to determine a new township corner position." (Dec. at 9.) The SD concluded that nothing in MEL, Inc.'s record indicates that MEL, Inc., or anyone else, recovered direct evidence of the original corner at the corner thus established by MEL, Inc., and that the MEL, Inc., position for this corner was "never related by direct evidence of the original corner." This is contrary to sec. 5-5 (p. 130), of the Manual which provides that 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." Section 5-5 (p. 130) of the Manual provides, in addition, that a corner is not lost if its location can be established through dependable witness testimony. The SD found, moreover, that even if considered lost, MEL, Inc., had failed to reestablish the corner position according to sec. 5-26 of the Manual, which

prescribes the double proportionate methodology for restoring a lost corner for four townships. (Dec. at 9.)

Replying to Hargrave's charge that BLM arrived at its township corner position for Tps. 7 and 8 S., Rs. 8 and 9 E. by running lines from a "completely different township," the SD notes that Hargrave fails to "recognize the precedence of certain lines over others within the public land survey system," and the fact that this corner is common to four townships for each of which it is a "controlling point." (Dec. at 10.) The SD explains that there is no precedence of one township over another and that the "mere running of record lines from within the subdivisions of a particular township to the township exterior, when attempting to fix the common line between the two, is improper." (Dec. at 15.) In support, the SD quotes from sec. 5-24 (pp. 133-34) of the Manual, which provides in part that ordinarily township exteriors take precedence over subdivisional lines, and from sec. 5-28 (p. 134), which provides for the use of double proportionate measurement for the establishment of lost interior corners of four sections, and the reestablishment beforehand, of the controlling corner on the township boundary if such a corner is lost.

The SD explains further that the corner of Tps. 6 and 7 S., Rs. 8 and 9 E. was determined at the projected intersection of abandoned fence lines, extending north and east and the centerline of a canal, extending south. Within a 4-chain locus of this corner, four local monuments were tied in and evaluated. (Dec. at 10-11.) Because retracements and research failed to disclose any relevance between these monuments and the original surveys, these monuments were rejected. The BLM therefore concluded that the original corner was obliterated and that abandoned fence lines and a canal centerline were the best evidence of its original location. (Dec. at 11-12.) The BLM utilized

original topography calls and longstanding local monumentation in various combinations of one, two, three and four[-]way control, [to] define a small locus for the original township corner. This small locus falls roughly between the position defined by the intersection of the abandoned fences and the canal, and the position determined by Evans-Graves in 1984. [2/] The MEL Inc. position is slightly farther south and east of said locus.

(Dec. at 11.) The SD notes that neither Courville nor Hargrave have objected to BLM's determination of this corner. (Dec. at 12.)

The SD recites that the original survey of the range line began at Tps. 6 and 7 S., Rs. 8 and 9 E. and was run south with posts set at

^{2/} The SD explains that Evans-Graves Engineering, Inc., of Baton Rouge, Louisiana, prepared a plat with the annotation "Set Conc. Mon" at the corner of Tps. 6 and 7 S., Rs. 8 and 9 E. (Dec. at 3.)

1/2-mile intervals. According to the SD, the field notes of the original survey contain four topographic calls to bayous which BLM observed and considered, whereas MEL, Inc., and Hargrave did not consider these calls in their surveys. As a consequence, the two closest calls of record, as established by Hargrave on the west boundary of sec. 96, disagree with these original topographic calls by as much as 10 chains. (Dec. at 14-15.)

The SD further observes that without conclusive evidence of the original range line monuments, these monuments "were deemed lost and properly reestablished by proportionate measurement based on an irregular boundary adjustment. The resultant location of the range line is corroborated by its favorable relation to the four original topographic calls." This procedure conforms to the Manual, sec. 5-21 (p. 133). (Dec. at 15.)

Having discussed other points made in the Hargrave letter, the SD dismissed Courville's protest based on his conclusion that Courville had failed to prove, by substantial evidence, that BLM's resurvey was in error. 3/

On appeal, Courville argues that BLM's resurvey "is unreliable based on general and acceptable methods of surveying." (SOR at 2.) 4/ Courville restates the objections to BLM's resurvey originally stated in his protest (the Hargrave letter) and asserts that BLM should have accorded more deference to Hargrave's professional opinions. He charges that BLM failed to "recognize the importance of originating the survey in the same Township, Range and Section in which the subject property was located." (SOR at 3-4.) Apart from this general allegation, however, Appellant has not referred us to any methodology, principle, or authority to support his contention, and nowhere does he articulate the nature and effect of the perceived deficiency.

Courville further asserts that the historic Iberville Parish plats of record, upon which the Hargrave survey was based "must be given preference and priority over the [G]overnment's dependent resurvey." (SOR at 4.) Finally, Courville contends that BLM must be required to conduct another survey to confirm the Hargrave survey. (SOR at 5.)

[1] The Secretary of the Interior is authorized to consider what lands are public lands and 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. Paul Chabot, 132 IBLA 371, 375-76 (1995); John W. & Ovada

3/ Hargrave also asserted in his letter that "[b]ased on my knowledge of prescription in Louisiana, it is logical that prescription runs in favor of Mr. Courville * * *." Hargrave cites no authority for this thesis. In any event, the theory of prescription has not been advanced as an argument on appeal before this Board and therefore requires no discussion.

4/ The SOR is not paginated.

Yeargan, 126 IBLA 361, 362 (1993); Elmer A. Swan, 77 IBLA 99 (1983); see 43 U.S.C. §§ 2, 52, 751-53 (1994).

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 plat 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 6-4 at 145; John W. & Ovada Yeargan, supra; Crow Indian Agency, 78 IBLA 7, 10 (1983).

A dependent resurvey seeks to restore what purports to be the original conditions of the official survey according to the record, based, first, upon identified existing corners of the original survey and other recognized acceptable points of control, and second, upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey. Titles, areas, and descriptions should remain unchanged in a typical dependent resurvey. Jean Eli, 78 IBLA 374, 376 (1984). Therefore, the cadastral surveyor's primary responsibility when conducting a dependent resurvey is to act as a "detective" who gathers all available information and uses his best effort to determine the location of all the original corners. John W. & Ovada Yeargan, supra, at 363.

In an appeal from a protest against acceptance of the filing of a plat of a dependent resurvey, the appellant 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. John & Ovada Yeargan, supra, at 363; James O. Steambarge, 116 IBLA 185, 188 (1990). Peter Paul Groth, 99 IBLA 104, 111 (1987); Stoddard Jacobsen, 85 IBLA 335, 342 (1985).

Because the authority to conduct surveys and resurveys is vested in the Secretary of the Interior, who in turn has delegated this authority to BLM, surveys such as the one performed by MEL, Inc., and Hargrave do not constitute official surveys of the United States because they were not performed by or for BLM. Dan Ogle, 131 IBLA 129-30 (1994); see Wilogene Simpson, 110 IBLA 271, 275 (1989), and cases cited; Manual, secs. 9-2 and 9-3, at 191. Therefore, contrary to Courville's argument, Hargrave's survey did not establish the location of the corners or the range line connecting them.

Courville's appeal contains neither concrete examples nor citations of authority for his proposition that BLM's resurvey is not in agreement with "general and acceptable methods of surveying." A guiding principle in this area of the law is that BLM, in conducting a survey of the public

lands, is constrained to follow the Manual. Indeed, a dependent resurvey in which BLM does not follow the Manual constitutes gross error and must be canceled. See Domenico A. Tussio, 37 IBLA 132 (1978).

In this case, the SD's Decision contains a detailed explication of BLM's resurvey. The Hargrave challenges, pertaining to the starting point of BLM's survey and the establishment of corners, were considered and rejected based on the authority of the Manual, and Appellant has not shown or even argued that BLM failed to conduct the resurvey in accordance therewith. No specific assignments of error have been levelled at the SD's disposition of those challenges in his dismissal of the protest and no evidence to dispute BLM's resurvey has been submitted. ^{5/} We conclude that the Decision appealed from is firmly supported by the field notes and by procedures prescribed by the Manual.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

T. Britt Price
Administrative Judge

^{5/} The Board's rules of practice require the filing of an SOR which affirmatively points out error in the decision from which the appeal is taken. Mustang Fuel Corp., 134 IBLA 1, 4 (1995), and cases there cited. Where an SOR fails to present new issues and fails to point out how the decision from which the appeal purports to be taken erroneously decided the issues before it, an appeal is subject to dismissal because the failure to file an adequate statement may be treated the same as the failure to file any statement. See Burton A. and Mary H. McGregor, 119 IBLA 95, 98 (1991); 43 C.F.R. §§ 4.402 and 4.412(c). However, dismissal of an appeal for deficiencies in the SOR is within the discretion of the Board, and each case will be examined individually to determine the appropriateness of a dismissal. See Mullins Coal Co. v. OSM, 96 IBLA 333, 335 (1987).