INTERIOR BOARD OF LAND APPEALS

Timothy J. Bottoms

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TIMOTHY J. BOTTOMS

IBLA 97-528 Decided September 1, 1999

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing a protest against a decision to approve a tract survey. CA-942; Group No. 1179.

Affirmed.

1. Bureau of Land Management--Federal Employees and Officers: Generally--Surveys of Public Lands: Generally

   To the extent that cadastral surveyors employed by BLM conduct surveys of lands owned by the United States, a state licensing authority may not impose its requirements on such employees when they are engaged within the scope of their official duties.

2. Hearings--Rules of Practice: Hearings

   There is no right to a hearing before an administrative law judge on a protest against the approval of a survey.

3. Administrative Procedure: Burden of Proof--Rules of Practice: Appeals: Burden of Proof--Surveys of Public Lands: Generally

   Where lands in a grant or patent from the United States are described in terms of the rectangular survey system, the rights, title, or interests conveyed are defined by the corners of the Government survey upon which the description was based. When the original survey was fraudulent and evidence of controlling corners is therefore nonexistent, tracts surveyed by metes and bounds represent the position and form of the lands alienated on the basis of the original survey. Such tracts are located on the ground according to the best available evidence of their true original position and must conform to the configuration of the original entry and not widely diverge from its size. A protestant has the burden of establishing by the preponderance of the evidence that the tract survey does not accurately portray the lands conveyed.

APPEARANCES: Kenneth E. Falstrom, Esq., Santa Barbara, California, for appellant; John Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Timothy J. Bottoms has appealed the June 9, 1997, decision of the California State Office, Bureau of Land Management (BLM), dismissing his protest against its decision to approve the pending metes and bounds survey of Tract 38, T. 21 S., R. 5 E., Mount Diablo Meridian (MDM), Monterey County, California, formerly designated as certain aliquot parts of secs. 28, 29, 32, and 33, T. 21 S., R. 5 E., MDM.

The original survey of the subdivisional lines of T. 21 S., R. 5 E., MDM, was conducted in 1883 by Theo. Binge, Deputy Surveyor, who tied the township to corners M11 and M12 of the official plat of survey for the nearby Rancho Milpitas and set closing corners on the Rancho boundaries. Binge's survey, along with earlier surveys of the boundaries of the township, was depicted on the official plat of survey for the township approved on June 14, 1884.

On September 23, 1887, the General Land Office issued Homestead Entry Patent No. 2682 to Vincente Avila for 160 acres of land described as the W½SW¼ sec. 28 and the E½SE¼ sec. 29, T. 21 S., R. 5 E., MDM, "according to the Official Plat of the Survey of said Land." On December 17, 1900, Pedro Hidalgo received Homestead Entry Patent No. 7541 for 160 acres of land designated as the SE¼NW¼ and the W½NW¼ sec. 33 and the NE¼NE¼ sec. 32, T. 21 S., R. 5 E., MDM, as depicted in the official survey. Bottoms currently owns the land conveyed by both patents. This land is known as the Salsipuedes Ranch and is surrounded by lands included in the Los Padres National Forest, administered by the U.S. Department of Agriculture, Forest Service.

In 1924, an unknown surveyor, presumably on behalf of the Forest Service, attempted a retracement of portions of the section lines and parts of the boundaries of the patented lands. On April 17, 1924, approximately 1 week after the attempted retracement, F.G. Vivian submitted a special use application to the Forest Service seeking a permit to use approximately ½ acre of land in the NE¼SE¼ sec. 32, T. 21 S., R. 5 E., MDM, known as Camp Vivian, for a summer home. Vivian specified that improvements planned for the site included a "stone cabin 13' x 17' outside measurement, 8' high," a previously built latrine, and a barbed wire fence. The Forest Service issued the requested permit on August 19, 1924, and Vivian constructed a cabin on the site between 1924 and 1926.

By letter dated June 8, 1993, the Pacific Southwest Regional Office, U.S. Department of Agriculture, Forest Service, forwarded to BLM a May 17, 1993, request for cadastral survey prepared for the Forest Supervisor of the Los Padres National Forest. The request stated that the survey was needed to identify the boundaries of Federal lands in secs. 28, 29, 32, and 33, T. 21 S., R. 5 E., MDM, administered by the Forest Service in order to

resolve long term trespass questions, adding that the Forest Land Manager had been unable to field locate "previously existing survey corners."

On June 22, 1993, BLM issued Special Instructions, Group No. 1179, California, providing for initial field investigations sufficient "to either locate control required to identify [F]ederal interest land boundaries in secs. 28, 29, 32 and 33, or determine that the condition of the original surveys are such that a dependent resurvey would not protect bona fide rights." (June 22, 1993, Special Instructions at 2.)

In a report dated January 25, 1994, Gregory J. Aten, BLM's cadastral surveyor, concluded that the original surveys of the township (except for the survey of the Rancho Milpitas) were most probably fraudulent, and that a dependent resurvey would require locating a control point a great distance from the sections and most likely identify land boundaries that would impair valid bona fide rights. He recommended establishing the boundaries of the Federal interest lands by tract designations with a tie to corner M12 of the Rancho Milpitas, specifying that the configuration of the tracts should conform to the original 1884 township plat to properly reflect the acreages and orientations patented in the original conveyances. He also identified five alternatives for locating the boundaries of the patented land.

In a memorandum to Group File No. 1179, Jim McCavitt, Acting Chief, Branch of Cadastral Survey, California State Office, BLM, reported that he and other members of the cadastral survey group had participated, on that date, in a conference call with Aten discussing the issues raised by Aten's report. He stated that they decided that the best way to proceed with the survey would be to retrace the exterior boundaries of the tract and search for monuments, agreeing that if the retracement did not recover any monuments, Aten would ascertain the landowner's preferences for the location of the tract.

After completing the retracement and seeking and receiving input from Bottoms as to the boundaries of his land, Aten prepared a supplemental report dated June 13, 1995. After noting that no additional monuments or bearing trees had been discovered, the report identified three additional options for restoring the Salsipuedes Ranch borders based on the features Bottoms had pointed out. One of these options, "Alternative No. 8," positioned the tract based upon the location of the monument found at the record position of the CN 1/16 section corner of sec. 33 which had been referenced in the 1924 field notes of the unknown surveyor. Aten stated that he had taken Bottoms on a tour of the sites of the three alternatives, and that Bottoms had indicated to him that Alternative No. 8 most closely represented the property Bottoms believed that he had purchased.

Aten also noted that Bottoms had identified an area on the north boundary of Alternative No. 8, shown as cross-hatching on the investigation plat accompanying the report, as part of what he owned and an area on the south boundary, also denoted by cross-hatching, as land he never believed he owned. After observing that he had been unable to find a monument or set of monuments which indicated that a recognized boundary had ever existed, Aten recommended that Alternative No. 8 be selected as the best method for establishing the tract boundary.

On June 27, 1995, Aten prepared a memorandum to Group File No. 1179 summarizing the results of a conference call meeting with other cadastral survey group members. Aten stated that the group had considered eight alternatives for establishing the boundaries of the ranch, but concluded that none of the proposed alternatives protected the bona fide rights of the landowner well enough to be confidently adopted. He noted that Alternative No. 8 was the best alternative, but that it did "not include the entire stock pond or grassy park in the NW portion of the tract which the landowner believes was part of his property." Aten reported that, due to the lack of definite recognized boundaries and the fraudulent nature of the original survey which failed to establish survey lines by which an entryman could have attempted to locate his property, the group decided that the landowner should be given an opportunity to determine a point around which the tract could be located that would encompass the points of concern he had indicated were important to him. However, they established three criteria that had to be met for the resulting tract: (1) It had to conform to the acreage and configuration described in the official patent; (2) it had to include the main structures and improvements existing on the ranch; and (3) it had to be identified by the landowner as a satisfactory location of his boundaries that protected his bona fide interests in the land. Aten further represented that the group determined that if an agreeable location could not be delineated, BLM would adopt a site for the landowner which he could then protest.

In a memorandum to Group File No. 1179, dated July 5, 1995, Aten stated that he contacted Bottoms by telephone in Wyoming on July 5, 1995, to offer him the opportunity to identify an acceptable point around which his boundaries could be located. Aten stated that after a brief discussion Bottoms "agreed that a position could be arrived at over the phone." Aten represented that Bottoms verbally agreed that the north and east boundaries, "which he had previously indicated were acceptable positions, should be used to determine the NE cor. of the tract of land." Aten further stated:

> Use of this point locates his boundaries to include all of the grassy park and stock pond in the NW portion of the tract, the grazing land on the E portion of the tract of land, and a portion of the San Antonio River near the S bdy. of the tract of land. Tim gave his verbal agreement to this method of positioning his land. He was informed that when he returns he would be given an opportunity to sign a "Tract Survey Agreement" and per this conversation we would set the corners of the tract beginning this week.

In a memorandum to Group File No. 1179, dated July 6, 1995, Aten recounted that on that date he intended to commence setting the survey corners, but found that "the combination to the lock across [Bottoms'] bridge had been changed." Aten stated that he reached Bottoms by telephone in Wyoming, requested the combination, and that Bottoms refused because "he now is not happy with what we are doing at his ranch."

On July 21, 1995, BLM issued Supplemental Special Instructions No. 1, Group No. 1179, California, providing for the metes and bounds survey of Tract 38, T. 21 S., R. 5 E., MDM, as agreed upon during the June 27, 1995, conference call. The instructions stated that Tract 38 would represent the position and form of both Patent Nos. 2682 and 7541 which, because they were currently under one ownership, would be surveyed as one tract, and that the tract's location would be based on the surveyor's knowledge of the improvements, historical use, and previous landowner conversations about the boundaries. The instructions also indicated that secs. 19-35, T. 21 S., R. 5 E., MDM, would be canceled concurrently with the acceptance of the metes and bounds tract survey.

Aten completed the metes and bounds survey of Tract 38 on July 27, 1995, adopting the tract position initially agreed to and then repudiated by Bottoms. After meeting with Bottoms and awaiting, but not receiving, additional information from him, Aten advised Bottoms by letter dated March 28, 1996, that the survey was being transmitted to the California State Office, BLM, for final review and approval.

On August 27, 1996, Bottoms, his attorney, and land surveyor Hugh B. Simpson met with BLM to present an August 22, 1996, report prepared by Simpson outlining Bottoms' proposal for the boundaries of the Salsipuedes Ranch. The report, which included the specific proposal, sketches of the proposal superimposed over BLM's tract boundaries, and supporting documentation, explained that the proposal rejected BLM's tract boundaries because BLM had improperly failed to differentiate between the two separate patents and had ignored substantial collateral evidence indicating the patentees' intent. Consequently, the report stated, the proposal delineated two distinct adjacent tracts, denominated Tracts 38 (Avila) and 39 (Hidalgo). The report further noted that Tract 38 complied with the supplemental special instructions' directive that the location conform to the acreage and configuration described in the plat but was moved to the north and east. It asserted, however, that protection of the bona fide rights of the landowner required that Tract 39 either be increased in size by an additional 80 acres or reconfigured to include the cleared/cultivated area on the north and access to the water source on the south, as well as the 12' x 14' stone house situated on the north bank of the San Antonio River.

Bottoms stated that the location of his proposed Tract 38 had been determined by a careful review of the evidence on the ground of the claimant's attempt to define the boundaries relative to the long standing use of the land and included the improvements listed in the patent file. Although the patentee had bought the land and its improvements in February 1864, Bottoms noted that the improvements listed on the patent proof, which included a 100' x 60' adobe house, a 16' x 16' tool shop/blacksmith shop, a 22' x 30' log barn, a 20' x 16' dairy house, ranch fencing, about 8-10 acres cultivated land, and a dozen fruit trees, did not appear in the field notes of the 1884 official plat of the survey. He asserted that the original claimant had relied on the topographic detail shown on the official plat to outline the approximate boundary of his improved claim, and that, therefore, the position of the ridge line, creeks, and wagon road relative

to the section lines as shown on the plat would have confirmed his honest belief that his improvements were within the section land description.

Bottoms explained that his proposal for Tract 39 changed the configuration of the Hidalgo patent to conform to the evidence on the ground indicating the claimant's honest effort to identify the boundaries of the claim from physical evidence relating to the topographic detail shown on the 1884 official plat. He indicated that the topography shown on the plat placed the confluence of two rivers and a trail within the southern boundary of the patent and depicted the northern boundary as coinciding with the Avila claim. Bottoms maintained that Hidalgo would have reasonably believed that he had a rightful claim to the San Antonio River to water his cattle and built his 12' x 14' house on the north bank of the river. Bottoms added that the described tract boundaries conformed to the evidence in the patent file specifying that Hidalgo had built his house, a barn, 2 miles of wire fencing, trails, and roads and had cleared and cultivated 8-10 acres of land while utilizing the remaining rough, mountainous land for grazing his 2 to 10 head of stock.

By letter to Bottoms dated October 15, 1996, BLM informed him that it had determined that the pending resurvey, as currently monumented, best described the patents upon which his title rested and the bona fide rights originating with those patents. BLM stated that it had examined Bottoms' recommendation that the Hidalgo patent be reconfigured to essentially stack four "20 chain square" parcels into the shape of an "L" as viewed from the south instead of the original "Z"-shaped patented configuration. BLM acknowledged that the "L" shape was designed to embrace the existing stone cabin beside the San Antonio River above its confluence with the Salsipuedes Creek and the approximately 10-acre meadow or cleared area west of the Salsipuedes Creek just south of the structures on the Avila patented homestead, both of which Bottoms had assumed were the improvements listed in the patent entry file. Although Bottoms grounded his supposition that the existing stone cabin was the original homestead cabin, or at least a reconstruction of that cabin, on the fact that its internal measurements were 12' x 14', BLM pointed out that it had never considered the cabin to be the Hidalgo structure because the Forest Service had issued a special use permit for the site in 1924.

BLM explained that, following the August 27, 1996, meeting, it had researched the history of the cabin by contacting Harry F. Casey, grandson of F.G. Vivian, the original applicant for the special use permit, who had provided the agency with copies of the original application calling for the construction of a 13' x 17' cabin and later correspondence concerning the materials and labor required in constructing the improvements relating to the permit. BLM noted that Aten and BLM's area field unit chief, Charlie Dorman, had revisited the area to examine first hand various items and features documented in the proposal's supporting material and had interviewed both Harry F. Casey and Sam Avila, Jr., great grandson of Vincente Avila, who both provided affidavits, copies of which were enclosed with the letter.

BLM recounted that Casey and Sam Avila, Jr., who both had intimate knowledge of the area, had denied that the present cabin on the San Antonio

River was built on any existing foundation or some other remnants of a previous structure erected by Hidalgo and had also provided explanations for some of the items referenced by Simpson in his report. BLM concluded that the current stone cabin was not in anyway related to the Hidalgo homestead and that the tract, as monumented by Aten, best depicted and protected the bona fide rights pertaining to the two patents. It further stated:

> These parcels, lying contiguous with one another, incorporate the improvements of the Avila homestead, the approximate 10 acre clearing matching references in the Hidalgo patent file, and portions of the San Antonio River at its confluence with Salsipuedes Creek. This is one of eight alternative locations that Greg Aten developed as possible locations of the homesteads, which he discussed with you, and at one point in time felt was to your satisfaction in locating the limits for the Ranch.

(Letter at 2.) BLM also informed Bottoms of his right to file a formal protest, in accordance 43 C.F.R. § 450-2, against acceptance of the resurvey.

By letter dated November 14, 1996, Bottoms, through counsel, protested BLM's determination that the pending tract survey best described the patents upon which Bottoms' title rested and protected his bona fide rights, arguing that the boundaries of that survey did not extend far enough to the north and south to include original patentee improvements. Specifically, Bottoms complained that BLM had not acknowledged that the descriptions and landmarks on the official plat became part of both patents and that the patentees had therefore located their improvements and delineated their claims based on the physical features on the plat; that the supplemental special instructions' mandate that the tract conform to the acreage and configuration of the original patents and BLM's refusal to modify the tract's size or shape had failed to protect Bottoms' bona fide rights, satisfaction of which required the inclusion of the cleared/cultivated and improved areas on the northerly Avila parcel and the cleared/cultivated and improved areas on the southerly Hidalgo parcel, including access to the San Antonio River and the 12' x 14' stone house; that BLM had not consulted the original plat, the patent applications and certificates, the Monterey County tax and recorder records, the location of the improvements on the ground and evidence of the patentees' attempts to mark their boundaries, or the available historical sources to determine whether the boundaries it set safeguarded Bottoms' bona fide rights; that BLM had ignored the critical importance of access to the water of the San Antonio River for the survival of the Hidalgo patent; that BLM had not utilized the best available collateral evidence in determining the location of the patented lands or given appropriate consideration to the equities of the case; that BLM had improperly relied on the notes of the unknown surveyor in locating the tract; that BLM had arbitrarily and unreasonably determined that the existing 12' x 14' stone cabin was not the original stone cabin cited in the Hidalgo patent proofs but was an unrelated stone cabin constructed under the special use permit; and that BLM had refused to appropriately evaluate his proposal equitably to resolve the situation. Included with the protest were a declaration by Bottoms expanding on the issues raised and supporting maps, articles, and other documentation.

By letter dated February 19, 1997, Bottoms supplemented his November 14, 1996, protest by providing additional documentation addressing the construction of the 12' x 14' stone cabin. The documents included a declaration by Marjorie Gillett, a granddaughter of one of the former owners of the Hidalgo patent, stating that before 1924 she had visited a small stone cabin on the patent, which she placed near the San Antonio River in a flat area close to big boulders; Hugh Simpson's calculations that the amount of sand required for the construction of the stone cabin was approximately 4,000 pounds, not the 20,000 pounds claimed to have been used by Vivian; a report prepared by Magid Masonry, based on a review of photographs of the stone cabin, that approximately 3,780 pounds of sand would have been used in its construction; copies of various maps obtained from Forest Service National Archives purportedly showing a house located at the site of the existing cabin before 1924 but not in 1928; and a map prepared by Simpson depicting the necessary placement, size, and configuration of the two patented parcels to encompass the topographical features of the original plat and the improvements of the patentees.

Bottoms argued that this evidence demonstrated that the Vivian special use permit was either fraudulent or an authorization to refurbish the original Hidalgo homestead dwelling, and that BLM's refusal to include the cabin site within the boundaries of the tract survey was unsustainable. He reiterated that the only two alternatives for protecting his bona fide rights were to either reconfigure the tract or increase its size.

On June 9, 1997, the Acting Chief, Branch of Cadastral Survey, California State Office, BLM, issued the decision dismissing Bottoms' protest. Therein, he identified the two main points of contention raised by the protest: the survey's failure to include the finger-shaped projection of a grassy field extending to the northeast across the north boundary of the Avila patent, and its exclusion of the 12' x 14' stone cabin from the Hidalgo patent.

As to the grassy field, he agreed that the patentee was entitled to rely on those items of topography shown on the plat that actually existed on the ground and that Avila most probably had used the disputed area of the field. He observed, however, that use and occupation did not vest Avila with any right to the land, and that Bottoms' theory therefore rested on the question of whether the upper regions of the field were recognized at the time the patent was issued as being within the limits of the applied for lands.

The Acting Chief explained that the applicable rules required Avila to select lands according to the subdivisions reflected on the official plat and that retracing the procedure utilized by Avila plainly demonstrated that the NW corner of the land he described was south and west of the Salsipuedes Creek, a position so clearly shown on the plat that Avila had to have been fully aware of its location. In contrast, he noted, the grassy field did not appear on the plat and therefore could not have been used to locate the applied for subdivisions.

The Acting Chief added that Sam Avila, Jr., the last descendant of the original patentee to have lived on the ranch, had signed a notarized

statement indicating that he and his extended family had always understood that the NW corner of their property was on the west and south side of the creek, and that the pending survey showed the north boundary of the land with reasonable accuracy.

Accordingly, the Acting Chief rejected Bottoms' supposition that the original patentee had relied on the grassy field to identify the subdivisions which he had selected and had believed that the northeasterly extreme of the field was part of his homestead.

He also disagreed with Bottoms' assertion that the survey had improperly excluded the stone cabin from the Hidalgo Ranch. He found no support in the record for Bottoms' contention that Hidalgo had constructed the stone cabin along the San Antonio River, pointing out that the patent proofs did not specify that the homestead cabin was made of stone. The Acting Chief also noted that a copy of a story written by a young school teacher, submitted as part of the protest, which recounted a journey in 1891 from King City, California, over the Santa Lucia Mountains to the coast of California, indicated that the cabin of "Hidalgo" that the author had seen was made of adobe, not stone. As to the purported depiction of the cabin on the pre-1924 maps, the Acting Chief explained that the map symbol Bottoms had interpreted as representing a cabin actually denoted a telephone line.

After distinguishing the precedent underlying Bottoms' argument that BLM had erred in failing to consider equitable factors, the Acting Chief nevertheless addressed the equities in the case and concluded that they did not support the inclusion of the cabin and the grassy field within the boundaries of the surveyed tract. He pointed out that Bottoms had long known of Casey's interest in the stone cabin and had been aware of the special use permit before he bought the property, and that Jack and Martha Doyle, who had sold the Hidalgo Ranch to Bottoms, had signed a declaration stating that they had not at any time regarded the cabin site as being within the boundaries of the lands they had once owned nor had they ever suggested or implied to Bottoms that the cabin was in any way associated with the land. The Acting Chief added that Sam Avila, Jr., had also testified that he had never made any statements to Bottoms indicating a belief that the cabin was a part of the Hidalgo patent. Since no evidence existed that Bottoms or any of his predecessors-in-interest had ever used the cabin site or made any kind of a claim to the site, the Acting Chief observed that, even if the Manual of Instructions for the Survey of the Public Lands of the United States (1973) (Manual) authorized surveyors to judge the equities of a given situation, which it did not, performing this survey based entirely on equitable considerations, as opposed to evidence of the original entry, would still have led to the exclusion of the cabin site from the Hidalgo patent.

In dismissing the protest, the Acting Chief concluded:

> (1) that the pending survey did fully and properly consider all physical and collateral evidence related to the protested boundaries, (2) that the patent issued to Vincente Avila did not include the upper reaches of the disputed field, (3) that

> the patent issued to Pedro Hidalgo did not include the site of the existing stone cabin, (4) that the pending survey does not deny access to the San Antonio River, nor does it exclude any other water source or access to any such other water source which was included in the lands applied for by the patentee, nor does it exclude any structure or improvement from the said lands, (5) that the lines and corners of the pending survey do fully protect all bona fide rights vested in the original survey, (6) that the position thus taken is, for the reasons discussed above, in accord with the [Manual] and all pertinent case law relating to the subject considerations, and (7) that Mr. Bottoms has not carried his burden of showing by a preponderance of the evidence that the pending survey is in error.

(Decision at 5.) 1/

On appeal, Bottoms challenges BLM's decision on six grounds, arguing that: (1) BLM disregarded the official plat and the official map of Monterey County; (2) its survey instructions and resultant work were improper and inadequate and not undertaken by a licensed surveyor; (3) it improperly failed to include the Hidalgo homestead dwelling and the San Antonio River within the Hidalgo parcel; (4) it did not consider or rely on pertinent documents; (5) it depended on unreliable documents; and (6) it took inappropriate action on the protest.

Bottoms contends that BLM ignored the two official maps depicting the lands included within the Avila and Hidalgo patents, the 1884 official plat and the 1898 official map of Monterey County compiled from the official plat, both of which show important topographic features such as ridges, a wagon road, and the South Fork of the San Antonio River (shown as "Creek" on both maps) which still exist but were not included in the tract as currently surveyed. Bottoms maintains that because the original surveyor did not place any artificial monumentation on the ground, the patentees were entitled to rely on the topography reflected on the plat in locating their boundaries.

Bottoms complains that BLM refused to consider the topography shown on the plat and the evidence of improvements sworn to in the patent files and existing on the ground, which he considers the best indication of the boundaries of the patented lands. Specifically, he objects to BLM's omission of the San Antonio River and the cabin site from the surveyed Hidalgo parcel, asserting that the river is the most important physical feature

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1/ In dismissing the protest, the Acting Chief relied upon a Mar. 25, 1997, investigative report prepared by Jack W. Rabedew, the BLM California State Office protest and appeal specialist assigned to evaluate Bottoms' protest submissions, a copy of which was enclosed with his decision. That report provided a meticulous examination and response to every point raised by Bottoms and his counsel and to the documentary evidence submitted in support of the protest.

shown on the official plat which clearly places both its north and south banks well within the boundaries of the Hidalgo patent. He asserts that the existing cabin's location forms the only area within the possible boundaries of the patent with both enough level ground to support a small house, barn, and domestic garden and a year-round water source for humans and animals. 2/

He also disputes BLM's refusal to adopt his suggested placement of the NE corner of the Avila patent just south of the top of a ridge and at the terminus of a wagon road, as depicted on the original plat and buttressed by evidence of old fencing, gate hardware, rock piles, and other points on the ground. He contends that BLM's insistence on siting the NW corner of the parcel relative to Salsipuedes Creek is unfounded. Bottoms submits that BLM's failure to refer to the topographic ties called out in the field notes of the original survey and its improper merger of two distinct patents into one parcel do not protect his bona fide rights to the lands the original patentees occupied, improved, and intended to patent.

Bottoms criticizes the survey instructions on the grounds that they erroneously provided for a dependent resurvey despite BLM's inability to recover or determine the position of any of the corners of either patent which rendered the survey independent not dependent, improperly directed that the parcels conform to the size (160 acres) and shape described in the official patent and to be contiguous, and impermissibly produced a survey infringing on private rights by ignoring the patentees' intent in selecting lands and establishing improvements, their reliance on the topographic lines on the official plat, and their attempts to monument their patents, thus conflicting with various Manual provisions.

Bottoms insists the fraudulent nature of the original survey, coupled with the patentees' good faith reliance on the topography shown on the official plat, dictate that the survey rules be applied flexibly to ensure protection of the bona fide rights derived from the original survey, which in this case requires, he asserts, either an increase in the acreage of the patents or a modification of their configuration to encompass the lands he contends were intended to be patented, including the area just south of the ridge at his proposed NE corner and the cleared/cultivated and improved areas of the Avila parcel and the San Antonio River, the 12' x 14' cabin and improvements, and the cleared/cultivated and improved areas of the Hidalgo parcel. He also contends that BLM failed to pay appropriate attention to the facts and equities applicable to the parcels in violation of the principles set forth in Paul Chabot, 132 IBLA 371 (1995), and Theodore J. Vickman, 132 IBLA 317 (1995). Bottoms further argues that BLM's survey is a nullity because it was not performed by a licensed surveyor.

2/ Both in his protest and on appeal, Bottoms continually refers to BLM's refusal to include the San Antonio River within the surveyed tract. However, the plat for Tract 38 clearly shows that part of the San Antonio River, including its confluence with Salispuedes Creek, is within the boundaries of that tract.

Bottoms objects to BLM's failure to include the Hidalgo homestead dwelling and the San Antonio River within the Hidalgo parcel. He asserts that the homestead proofs show that a 12' x 14' house was constructed on the land and points out that a cabin with 12' x 14' interior dimensions currently exists on the north bank of the river in the area of the Hidalgo patent. BLM's determination that the existing cabin is not the original homestead dwelling is unsupportable, Bottoms maintains, given the unlikelihood that someone else, such as the special use permittee, would build a house with interior dimensions the same as those stated in the patent proofs on the only flat and suitable area along the river.

Bottoms notes that no remnants of another house on the land have been found, dismissing as speculation BLM's conjecture that Hidalgo could have built an adobe house on a 10-acre grassy area which Bottoms characterizes as a flood plain without an available water source. Bottoms submits that no other acceptable site on the patent exists, and that, therefore, the existing cabin, which was described in declarations provided by Gillett and by one Thomas Victor Garcia, must be located on the site of the original homestead house, especially since it lies less than 30 feet from the San Antonio River shown on the original plat as running from east to west through the patent.

Bottoms claims that BLM ignored pertinent documents in determining the boundaries of the patented lands. Specifically, he asserts that BLM disregarded the 1898 official map of Monterey County which shows the river running through the center of the lands patented to Hidalgo and upon which Hidalgo was entitled to rely. He also claims that BLM minimized the importance of the various Forest Service maps showing a structure on the Hidalgo patent at the site of the existing cabin prior to 1924. He criticizes BLM's discounting of Gillett's declaration, which he maintains conclusively establishes the existence of a cabin on the site prior to 1924.

As further support for the conclusion that the existing cabin is located at the site of the original homestead dwelling, he cites to a declaration from Thomas Victor Garcia, obtained on July 11, 1997, in which Garcia states that in about 1917, when he was about age 15, he first visited Pedro Hidalgo's small adobe house, which he recalled was located by a big stream and big boulders. Garcia stated that he later returned about 1924, and at the same location there was a small rock house and that Hidalgo showed him a "still" in the house.

Bottoms also identifies other documents he contends were ignored or improperly considered by BLM, including Simpson's total sand calculation, Magid Masonry's inspection report, and Simpson's maps depicting acceptable alternative placements of the tract.

BLM compounded its error, Bottoms avers, by improperly relying on questionable material, including the notes of the unknown surveyor which not only post-dated the homestead entries and thus were not adopted by the patentees, but also reflected poor and undependable work. Bottoms discounts the Casey, Avila, and Doyle affidavits cited by BLM, contending that they were not properly sworn, do not set forth any personal knowledge related to any point concerning the official plat, and shed no light on the evidence the original patentees used to establish their boundaries.

Bottoms further argues that BLM took inappropriate action on his protest. He objects to the protest procedures utilized, asserting that BLM should have treated the protest as a contest proceeding, answered his protest, and referred the matter to an administrative law judge for a hearing. Allowing Rabedew, a BLM employee who allegedly prepared and developed the challenged special instructions and thus was not an unbiased adjudicator, to prepare the investigative report upon which the appealed decision relied, Bottoms submits, clearly demonstrates the flaws in this protest proceeding. He maintains that because his protest challenged both the instructions and BLM's failure to properly follow the Manual, the matter should not have been handled internally but should have been referred to an administrative law judge for a hearing on the contested matters including the many factual disagreements.

In short, Bottoms insists that BLM unreasonably and wrongly refused to adopt his August 22, 1996, proposal which would have equitably and appropriately resolved this dispute by reconfiguring the parcels to include the topographic features relied upon by the patentees as well as their improvements and evidence of their attempts to monument the borders of their land.

As additional support for his arguments, Bottoms incorporates a report dated August 26, 1997, and signed by Simpson on September 11, 1997, which contains a point by point refutation of both the decision and Rabedew's investigative report. In addition to expanding on the issues Bottoms raises, including the speculation that some sort of conspiracy surrounded the issuance of the 1924 special use permit, the report identifies the specific evidence Simpson relied upon in setting Bottoms' proposed boundaries for the parcels.

In response, counsel for BLM submits a June 30, 1998, memorandum prepared by Rabedew, comprehensively addressing each point raised in the appeal documents. BLM first repudiates Bottoms' claim that the agency improperly relied on the work of the unknown surveyor, asserting that the work undertaken in 1924 was not a survey at all, but simply a record of that person's unsuccessful field attempt to locate evidence of the original survey, which had no influence on BLM's survey work.

BLM faults Bottoms' emphasis on the topography shown on the official plat as the source of the patentees' aliquot part descriptions of the lands they entered, pointing out that the 1884 survey was fraudulent and did not report the topography along the lines with any degree of accuracy so the relative positions of the features and the section lines shown on the plat reflect no more than rough approximations.

Addressing Bottoms' specific arguments concerning the boundaries of the Avila patent, BLM disputes Bottoms' claim that Avila depended on the ridge and terminus of a wagon road in situating the NE corner of his patent, noting that these features are not correctly positioned on the plat and that, in any event, the road does not terminate at that point but continues on through the patented land. More importantly, BLM submits that Bottoms' placement of that corner in his proposal conflicts with his

insistence that Avila relied on the ridge and road to locate his land by siting the corner ¼-mile south of the ridge, in a dip rather than near the top of that ridge, and ¼-mile east of the junction of the road and the ridge. BLM further denies that the gate, fencing, and pile of rocks identified by Bottoms evidenced Avila's attempt to monument his boundary, suggesting instead that the fence was constructed to protect crops and livestock and the rocks piled along the fence had simply been removed from the fields to facilitate cultivation. It adds that, rather than ignoring these items, BLM's surveyor asked Sam Avila, Jr., whether the fencing and rocks were associated with the boundaries, and he replied that he was unaware of any such significance, nor had his father or grandfather mentioned attaching any importance to them in that regard.

Furthermore, BLM points out that, according to a 1917 topographic quadrangle map titled "JUNIPERO SERRA," prepared by the U.S. Coast and Geodetic Survey, the northeasterly projection of the grassy field (which would be included within the patented lands if Bottoms' position for the NE corner were adopted) falls within lands which were under a grazing lease issued to Avila by the Forest Service, not within the Avila Ranch. In any event, BLM stresses that the 1884 plat clearly depicted the NW corner of the Avila patent as lying south and west of the Salsipuedes Creek, and that the placement of that corner to the north and east of the creek, dictated by Bottoms' proposed position for the NE corner, conflicts with his insistence that Avila relied on the topographic features shown on the original plat when selecting his lands.

As to the Hidalgo patent, BLM first dismisses Bottoms' argument that, in accordance with the original plat, the Hidalgo Ranch must be placed so that the San Antonio River flows through the east-west width of the ranch, rather than simply entering the ranch along the southern border, making a "U" turn and exiting the southern boundary a few chains later. BLM asserts that the ranch cannot be situated to conform to the position depicted on the plat because the fraudulent 1884 plat inaccurately located the position of the river and misrepresented its intermediate meanderings. Bottoms' proposed reconfiguration of the patented lands to create a shape that allows the river to traverse the east-west width of the ranch fails, BLM submits, not only because such reconfiguration is unauthorized, but also because Bottoms' proposal, which pushes the southern boundary of the ranch more to the south and west and enlarges the size of the "U" turn, more closely conforms to BLM's location and meanderings of the river than to those shown on the original plat.

BLM also disputes Bottoms' claim that Hidalgo was totally dependent on the river running the width of the ranch for access to water, pointing out that the only area suitable for cultivation, the upper flat, was nowhere near the river and must have been irrigated by wells, springs, and retention ponds to produce crops.

BLM agrees that it treated the two patented parcels as one tract for survey purposes, stating that it did not survey the line running between them because it fell completely on private land. Although seeing no advantage to separately surveying the parcels, which could leave a strip of public land between them if Bottoms' proposals were fully or partially

adopted, BLM nevertheless expresses its willingness to do so if Bottoms believes that surveying them as a single unit does not protect his bona fide rights.

BLM completely rejects Bottoms' contention that the Casey cabin site should have been included within the confines of the Hidalgo Ranch, reiterating that none of Bottoms' predecessors-in-interest ever asserted any claim to the cabin, and that none of the Avilas, including Sam Avila, Sr., who had assisted in building the existing cabin in 1924-26, ever considered the cabin site to be part of the Hidalgo Ranch. As to Gillett's statement that the cabin shown in a recent photograph was the cabin she had seen on the Hidalgo Ranch prior to 1924, BLM notes that the pictured cabin had been completely rebuilt from the floor up by Casey in 1954 and thus could not be the cabin she had seen when she was a child of approximately 10 years of age.

BLM points out that there were two Hidalgo Ranches, the ranch at issue here and one, now known as the Merle Ranch, located to the east at the junction of the two San Antonio Rivers, and suggests that the cabin mentioned by Gillett in her affidavit and the structures recalled by Garcia in his affidavit most likely were located on the other Hidalgo Ranch, i.e., the Merle Ranch. BLM further observes that Garcia's statement refers to the structure he saw in 1917 as a "small adobe house," thus undercutting Bottoms' insistence that the existing stone cabin must be the original homestead dwelling because Hidalgo, whose nickname was "Piedras," the Spanish word for "rock," would certainly have built his house out of stone. BLM also emphasizes that, Bottoms' repeated assertions to the contrary notwithstanding, the 14' x 16' exterior dimensions of the existing cabin are not the same as those of the 12' x 14' dwelling set out in the patent documentation.

BLM denies that the site of the existing cabin is the only area within the boundaries of the Hidalgo patent capable of supporting the claimed improvements, arguing that, to the contrary, the cabin site is too small to hold the house, 2 miles of wire fencing, and 8 to 10 cultivated acres identified in the patent proofs, a conclusion reinforced by a May 27, 1998, letter from Casey included with BLM's Answer. BLM maintains that the best, and most likely, site for the homestead dwelling, barn, fencing, and 8-10 acre cultivated area is the southern portion of the upper flat, outside the Avila patent, near the fork in the trail, an area which, according to BLM, does not lie within a flood plain and which Bottoms concedes was cultivated by Hidalgo. That no remnants have been discovered in this area does not negate the likelihood that this was the site of Hidalgo's improvements, BLM submits, given the numerous possible scenarios explaining the dearth of any remains, the manifest advantages of siting a cabin at a fork in the trail, the virtual impossibility of farming the area while residing on the disputed cabin site, and the lack of any ruins anywhere else within the patented area.

BLM repeats that the maps Bottoms relies upon as showing the cabin in its existing location prior to 1924 do not depict a cabin at that location but rather represent the map-maker's symbol for a telephone line at the disputed spot, observing that the symbol does not cross the telephone

line, agrees sequentially with the alternately facing appendages on either side of the symbol, falls equidistant between the two nearest appendages on either side of it, and appears identical to the two roughly triangular-shaped appendages on either side of it. The removal of the symbol after 1928 emanated from the realignment of the telephone line, BLM adds.

BLM categorically denies that the 1924 Vivian special use permit was fraudulently issued, or that BLM is currently conspiring with the Forest Service and Casey to deprive Bottoms of the cabin site and details what it considers to be the absurdity of Bottoms' conspiracy theory arguments. BLM also refutes Bottoms' contention that various items found along his proposed boundary lines represent his predecessors' attempts to monument the perimeters of their land, questioning whether an old well, cut oak tree stumps, telephone wires and insulators, stones laid out in a "+" formation, fencing parallel to a road, and parts of an old stove, a mug in a tree, an old bed, and a large piece of iron truly evidence someone's attempt to line up a collection of items to mark the boundary of the ranch.

Turning to the administrative issues raised by Bottoms, BLM contends that the pending tract survey did not in any way hinge on the work of the 1924 unknown surveyor, but was executed in a manner which would include all the improvements made by the patentees, as well as major topographic features, and complied with the Manual provisions requiring such surveys to agree with the original entry, have regular boundaries, and encompass an area not widely inconsistent with that shown on the plat.

BLM also rejects Bottoms' claim that the tract survey is void because Aten, whose license was issued by the State of Colorado, is not licensed by the State of California, asserting that applicable law does not require such licensing. It further denies that Rabedew, the protest specialist assigned to review Bottoms' protest, was instrumental in developing the special instruction and thus had a conflict of interest that precluded him from impartially evaluating the protest. BLM insists that it properly addressed Bottoms' objections pursuant to the applicable rules governing protests and fully protected all of Bottoms' rights. BLM concludes that the tract survey fully complied with all relevant precedent and Manual directives.

[1] As an initial matter, we reject Bottoms' contention that the survey is void because Aten was not licensed by the State of California. The law is clear that, insofar as the Federal Government employs surveyors to fulfill statutory functions, a State licensing authority may not impose its requirements on such employees when engaged within the scope of their official duties. Thom Seal, 132 IBLA 244, 246-47 (1995), and cases cited. The Federal Government has the power to make surveys, correct surveys, and make resurveys of lands owned by the United States. United States v. Aikins, 84 F. Supp. 260, 264 (S.D. Cal. 1949), aff'd sub nom. United States v. Livingston, 183 F.2d 192 (9th Cir. 1950). In this case, Aten was clearly exercising the authority vested in the Federal Government in undertaking a metes and bounds survey of Tract 38. Thus, the fact that Aten may not have been licensed by the State of California affords no basis for challenging the resultant survey. See Thom Seal, 132 IBLA at 247.

[2] We also reject Bottoms' claims that inappropriate action was taken by BLM on his protest. The protest regulation at 43 C.F.R. § 4.450-2 provides: "Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." (Emphasis added). Bottoms first implies that the protest regulation is not applicable because the elements of a contest exist in that "BLM and USFS [Forest Service] makes [sic] contentions affecting the legality and validity of the entry under the patent claims of appellant's predecessors in interest." (Statement of Reasons at 46.)

The regulation relating to Government contests, 43 C.F.R. § 4.451-1, provides that the Government may initiate contests "for any cause affecting the legality or validity of any entry or settlement or mining claim." There is no entry, settlement, or mining claim involved in this case. Bottoms' predecessors-in-interest made homestead entries; however, those entries ripened into patents for the lands in question. This case does not involve a question of the validity of the Avila and Hidalgo entries. The elements of a contest are not present in this case.

The purpose of the protest regulation is to allow individuals who are unhappy with actions proposed to be taken by BLM to express their objections to BLM to that action, and to allow BLM to consider those objections prior to making its final decision. That is what happened in this case. However, Bottoms argues that BLM should have referred his complaint to an administrative law judge for a hearing, rather than resolving the protest internally. The protest regulation does not establish procedures for BLM to follow in its adjudication of a protest. It merely states that "such action thereon will be taken as is deemed appropriate in the circumstances." Herein, BLM considered Bottoms' objections and decided to proceed with the filing of the plat of survey. BLM did not err in failing to send the protest to an administrative law judge for a hearing. In fact, this Board has held that there is no right to a hearing before an administrative law judge on a protest against a survey. R.A. Mikelson, 26 IBLA 1, 4-5 (1976). Moreover, we find no merit to Bottoms' charge that the protest proceeding was tainted by bias on the part of the protest and appeals specialist.

Bottoms has also requested that this Board refer his case to an administrative law judge for a hearing. While this Board has the discretion under 43 C.F.R. § 4.415 to refer a case to an administrative law judge for a hearing, we decline to do so in this case. 3/ Any due process rights asserted by Bottoms have been satisfied without an administrative hearing before an administrative law judge by his opportunities to submit documentary and other evidence to BLM and this Board. Although Bottoms and BLM urge varying interpretations of various pieces of evidence in the record, we find no necessity for a hearing in this case.

3/ By order dated Aug. 25, 1998, the Board took Bottoms' Aug. 10, 1998, request for a hearing or oral argument on his appeal under advisement. We also deny Bottoms' request for oral argument before this Board.

[3] The Secretary of the Interior is authorized to consider what lands are public lands, what public lands have been or should be surveyed, and what surveys of public lands should be extended or corrected. David Viers, 143 IBLA 209, 217 (1998); John W. and Ovada Yeargan, 126 IBLA 361, 362 (1993); John D. Carter, Sr., 90 IBLA 286, 290 (1986); see 43 U.S.C. §§ 2, 52, 751-53 (1994). In this case, BLM proceeded under Special Instructions and Supplemental Special Instructions, Group No. 1179, California, to determine the boundaries of Federal lands in secs. 28, 29, 32, and 33, T. 21 S., R. 5 E., MDM, within the Los Padres National Forest administered by the Forest Service. In order to do so, BLM was required to delineate the boundaries of the lands in those sections previously patented to Avila and Hidalgo over which the United States no longer had jurisdiction.

As a general rule, where patented lands are described in the conveyance in terms of the rectangular survey system, the rights, title, or interest conveyed are defined by the corners of the Government survey upon which the description was based. See John D. Carter, Sr., supra; Robert R. Perry, 87 IBLA 380, 384 (1985). Here, however, since the original survey was fraudulent and evidence of controlling corners nonexistent, the boundaries of land conveyed in the homestead patents could not be accurately located through a dependent resurvey tied to the original survey. See Paul Chabot, 132 IBLA at 379; Theodore J. Vickman, 132 IBLA at 326; John D. Carter, Sr., supra. Therefore, BLM conducted a metes and bounds survey of the tract to represent the position and form of the lands alienated on the basis of the original survey, utilizing the best available evidence of their true original positions to located the tract on the ground. See Leland Q. Phelps, 134 IBLA 124, 128 (1995); see also Manual at §§ 6-39 through 6-49.

As summarized above, numerous field investigations uncovered no boundary monuments for the patented lands. Under such circumstances, the Manual directs the surveyor to utilize the available collateral evidence as the best indication of the original position of the claim, including asking the landowner to point out the boundaries of the claim. Manual at §§ 6-42, 6-43. Nevertheless, the landowner may not delineate his claim however he chooses; rather, "an acceptably located claim must have a form agreeing with the original entry, approximately regular boundaries, an area not widely inconsistent with that shown on the plat, and a location as nearly correct as may be expected from the existing evidence of the original survey." Id. at § 6-43. Furthermore, the Manual explicitly prohibits the surveyor from

> chang[ing] materially the configuration of a tract as shown by its original description in order to indemnify the owner against deficiencies in area, to eliminate conflicts between entries, or for any other purpose. If improvements have been located in good faith, the tract survey should be so executed, or the conformation to the lines of the survey so indicated, as to cover these improvements and at the same time maintain substantially the form of the entry as originally described. No departure from this rule is allowed.

Id. at § 6-45.

The record demonstrates that Aten frequently consulted with Bottoms who identified various points he considered possibly important to marking of the boundaries of the ranch, and that the ultimate placement of the tract adopted in the pending tract survey reflected the position Bottoms had originally considered acceptable. See June 13, 1995, Report at 2-4; July 5, 1995, Memorandum to Group File No. 1179. Bottoms subsequently revoked his initial agreement with the tract position and proposed new boundaries for the tract which moved the Avila parcel to the north and east and changed the configuration of the Hidalgo parcel to include more of the San Antonio River and a stone cabin on the north bank of the river. BLM rejected Bottoms' proposed tract location partially because it changed the configuration of the patented lands. Although Bottoms objects to BLM's rigid insistence that the surveyed tract retain the configuration and size described in the patents, we find that BLM appropriately complied with the applicable Manual mandates. None of the limited circumstances the Board has recognized as justifying a departure from a strict application of resurveying principles is present here since the record discloses no long-accepted, monumented survey lines upon which Bottoms or his predecessors relied in good faith in locating improvements. See Longview Fibre Co., 135 IBLA 170, 183-84 (1996).

Additionally, although Bottoms argues that, despite the fraudulent nature of the original survey, the original patentees reasonably relied on the relationship between the topography and the survey lines shown on the 1884 plat when describing the boundaries of their claims, a comparison of the location and course of the San Antonio River shown on the 1884 plat with those shown on the recent maps amply demonstrates the questionable reliability of the topographic details shown on the 1884 plat. See also Vickman, 132 IBLA at 327. Furthermore, Bottoms' emphasis on those topographic items which support his position for the tract, coupled with his indifference to those which do not, undercut his contention that topography must control the placement of the patented lands regardless of the configuration described in the original patent documents. We also reject Bottoms' complaint that BLM's insistence that the tract conform to the size and shape of the original patents violates the principles set out in Chabot, 132 IBLA at 382, and Vickman, 132 IBLA at 329, directing that cases involving fraudulent surveys "be approached with due attentiveness to the facts and equities as they appear in the record."

Our review of the record discloses that BLM gave the requisite attention to the facts and equities of this case and properly applied the Manual's mandates. We therefore find no error in either the survey instructions or the resultant survey work. 4/

4/ As to Bottoms' assertion that BLM should have surveyed each patent as a separate tract, we note that the boundary between the two parcels lies completely on private land over which BLM has no jurisdiction. See John D. Carter, Sr., 90 IBLA at 290. Additionally Bottoms has not explained how surveying the parcels as one tract has adversely affected his bona fide rights or how separate tract surveys would better protect those rights. Accordingly, we find no error in BLM's surveying of the patented lands as one tract.

Bottoms, as the party objecting to the tract survey, has the burden of establishing by the preponderance of the evidence that the tract survey does not accurately portray the lands conveyed. See Peter Paul Groth, 99 IBLA 104, 111 (1987); John D. Carter, Sr., 90 IBLA at 292; Stoddard Jacobsen, 85 IBLA 335, 342 (1985). 5/ We conclude that he has failed to meet that burden.

Bottoms' proposed shifting of the Avila patent to the north and east to include the grassy field ignores the evidence placing the NW corner of that patent to the south and west of Salsipuedes Creek and the Forest Service notation on the 1917 U.S. Coast and Geodetic Survey quadrangle map placing the disputed field within the Avila grazing lease, not the Avila patent. Bottoms' speculation that Avila situated the NE corner of his land just to the south of the top of a ridge and at the terminus of a wagon road is belied by his own placement of that corner over ¼-mile south of the bottom of a steep side hill of the ridge and ¼ mile to the east of the wagon road which, instead of terminating at that point, continues on through the patented lands. Similarly his selective adoption of a rock pile and gate and fencing remnants as indications of Avila's attempt to mark his boundaries, coupled with his dismissal of the significance of similar items not coinciding with his preferred position for the parcel, undermine the persuasiveness of his arguments, especially given the ambiguous nature of the claimed boundary markers. Therefore, Bottoms has not shown by a preponderance of the evidence that BLM erred in refusing to adopt his placement of the Avila parcel.

Bottoms' challenges to BLM's refusal to include more of the San Antonio River and the cabin site within the Hidalgo parcel are similarly unpersuasive. As noted above, because the position and meanders of the San Antonio River depicted on the 1884 plat vary considerably from its actual location and sinuosities on the ground, no possible placement of the Hidalgo parcel exists which would include the portion of the river shown on the plat. Additionally, contrary to his current insistence that the boundary of the Hidalgo patent must be moved further south to embrace a larger segment of the river, the record indicates that in June 1995 Bottoms had requested that Aten move the southern boundary of tract further north because he did not believe that he owned the land to the south. See June 13, 1995, Report at 3, 4. Comparing the diagram accompanying the June 13, 1995, report with the September 19, 1996, preliminary plat of Tract 38 as surveyed reveals that the surveyed tract incorporates Bottoms' suggested location for the southern boundary of the tract.

Moreover, BLM's placement of the southern border of the tract clearly does not deny Bottoms access to the river, and Bottoms has not

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5/ Although in John D. Carter, Sr., the Board held that the applicable standard of proof was clear and convincing evidence, the appropriate standard of proof in survey cases is the preponderance of the evidence standard. Peter Paul Groth, supra; Stoddard Jacobsen, supra.

shown that additional river access was necessary to the viability of the Hidalgo patent, especially since the only area capable of supporting the acreage claimed to have been cultivated in the patent proofs does not lie adjacent to the river.

We further find no error in BLM's rejection of Bottoms' contention that the existing stone cabin located near the north bank of the San Antonio River is the original homestead dwelling (or was built on that cabin's foundation) and therefore should have been included within the surveyed tract. Bottoms does not refute, and the record amply confirms, that none of his predecessors has ever asserted a claim to the cabin or ever considered the cabin site part of the Hidalgo parcel. Nevertheless, Bottoms insists that because the inside dimensions of the existing cabin coincide with the dimensions of the cabin identified in the Hidalgo patent proofs, this stone cabin must be the original homestead dwelling or have been built on its foundation. This leap in logic requires that we ignore not only the fact that the 14' x 16' outside dimensions of the stone cabin differ from the 12' x 14' dimensions ascribed to the homestead dwelling, but also the existence of the 1924 special use permit issued by the Forest Service authorizing the use of that land for a summer home and the evidence documenting the construction of the cabin between 1924-26. Although Bottoms alleges a far-ranging conspiracy associated with issuance of the special use permit, we must reject such an assertion as pure speculation.

None of the evidence Bottoms supplies convinces us that BLM erred in refusing to include the cabin site within the surveyed tract. Our careful scrutiny of the maps submitted by Bottoms as support for the existence of a cabin at the disputed site before 1924 leads us to conclude that, contrary to Bottoms' position, the symbol on the maps at the cabin site does not denote a house but rather, as BLM points out, represents a telephone line, a conclusion reinforced by the disappearance of the symbol from the maps concurrently with the rerouting of the telephone line.

The persuasiveness of Gillett's statement that she saw a stone cabin at the site prior to 1924 as proof that the existing cabin is the homestead dwelling is somewhat diminished by her identification of the cabin shown in a photograph taken after the cabin had been completely rebuilt in 1954 as the cabin she had seen before 1924. The fact that there was another Hidalgo Ranch about 2 miles to the east of the disputed ranch also opens the possibility that the cabin Gillett saw was located on the easterly ranch. In any event, her statement does not suffice to establish that the existing stone cabin is the original homestead dwelling constructed in 1894. This is especially true given the statements in Garcia's affidavit that he saw an adobe house on the Hidalgo land in 1917, and that it was about 1924 when Hidalgo pointed out a small rock structure on the land housing a still.

Therefore, even assuming that Gillett and Garcia refer to the disputed Hidalgo patent, which Hidalgo sold in 1904, and not the easterly ranch, the stone cabin Gillett saw in 1924 could not have been the original homestead dwelling built in 1894 because it was not there when Garcia

visited the site in 1917. Bottoms' own evidence thus undermines his claim that the existing stone cabin is either the original cabin or was built on that cabin's foundation.

Additionally, the record does not support Bottoms' contention that the existing cabin site is the only area within the possible boundaries of the Hidalgo parcel capable of supporting the improvements claimed in the patent application, but, to the contrary, reveals the numerous shortcomings of that site due to its small size and difficult terrain and the existence of more suitable sites on the upper flat near the Avila parcel. We therefore conclude that Bottoms has not met his burden of showing that BLM erred in rejecting his proposed location and reconfiguration of the patented lands and in approving the tract survey.

To the extent not specifically addressed herein, Bottoms' other arguments have been considered and rejected.

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.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge