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Interior Board of Land Appeals
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JAMES R. & CHARLENE K. HASENYAGER

IBLA 2007-138

Decided December 18, 2008

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Appeal from a decision of the State Director, Utah State Office, Bureau of Land Management, upholding a dependent resurvey, and finally dismissing a protest of the resurvey. Group No. 603, Utah.

Reversed and case remanded.

1. Surveys of Public Lands: Dependent Resurveys

A BLM decision upholding a 1983 dependent resurvey relocating lost corners by proportionate measurement will be reversed and remanded, when BLM, after accepting the resurvey, recovers the original corner positions and their original survey monuments in place, where adherence to the proportioned corners would impair the bona fide rights long established by reference to the original corners, contrary to 43 U.S.C. § 772 (2000).

APPEARANCES: James R. Hasenyager, Esq., *pro se*, and for Charlene K. Hasenyager; Christopher J. Morley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

James R. and Charlene K. Hasenyager have appealed from a January 31, 2007, decision of the State Director, Utah State Office, Bureau of Land Management (BLM) (Decision), upholding a 1983 dependent resurvey (Group No. 603, Utah) of T. 35 S., R. 3 E., Salt Lake Meridian (SLM), Utah, to the extent that it reestablished the NE corner and N quarter-corner of sec. 7 of the township, by proportionate measurement, and dismissed their protest of the resurvey. Appellants contend that the dependent resurvey was not performed in accordance with the *Manual of Instructions for the Survey of the Public Lands of the United States* (1973) (Survey Manual), and that BLM erred in upholding the dependent resurvey and declining to rely upon the subsequently recovered original corner monument for secs. 5, 6, 7, and 8.

Because we conclude that the proportioned corners must give way to the newly-recovered original survey corners, we reverse and remand the January 2007 decision.

I. Background

The NE corner and N quarter-corner of sec. 7 are situated less than a mile north/northwest of the Town of Escalante, Utah,¹ and were originally surveyed by William Lewman, U.S. Deputy Surveyor, between September 2, 1893, and April 11, 1894, when he surveyed the exterior and subdivisional lines of the township. The Surveyor General approved the survey on November 4, 1896.

Pursuant to Special Instructions, from September 23, 1980, to June 2, 1983, Gail E. Reynolds, a BLM Supervisory Cadastral Surveyor, dependently resurveyed certain exterior and subdivisional lines of T. 35 S., R. 3 E., SLM, Utah, for the purpose of “defin[ing] the boundary of coal lease areas and . . . identify[ing] boundary lines of natural resource lands adjacent to private land.” Special Instructions, dated Aug. 29, 1980, at 1. In the course of doing so, she reestablished, *inter alia*, the NE corner and N quarter-corner of sec. 7, and thus the section line between secs. 6 and 7. In the case of both of these corners, Reynolds accepted an existing monument erected by the Forest Service, U.S. Department of Agriculture, in 1979, as part of an administrative survey of the southern half of sec. 7, deeming it to be “a careful and faithful reestablishment of the position of the original corner[.]” Field Notes at 43, 44. The Forest Service surveyors had determined that the corners were “lost,” and had reestablished their location by the method of proportionate measurement.² See, e.g., *Volney Bursell*, 130 IBLA 55, 57 (1994); *Longview Fibre Co.*, 135 IBLA 170, 182 n.18 (1996). BLM’s Chief Cadastral Surveyor for Utah accepted the survey plat and field notes for Reynold’s dependent resurvey on November 7, 1983.

On March 9, 2005, the Hasenyagers, who own four parcels of private land within sec. 7,³ filed a formal protest challenging BLM’s 1983 dependent resurvey of

¹ The NE corner of sec. 7 is also the corner common to secs. 5, 6, 7, and 8, T. 35 S., R. 3 E., SLM, Utah. The N quarter-corner of sec. 7 is the corner roughly at the mid-point along the line between secs. 6 and 7 of the township.

² Since it does not have official survey authority, the Forest Service could not have formally “reestablished” the corners, in the sense of having performed an official resurvey of the corners. *Mark Einsele*, 147 IBLA 1, 12 (1998); *Benton C. Cavin*, 83 IBLA 107, 130-31 (1984).

³ Copies of Garfield County Corporation “Tax Roll Master Record[s],” dated Aug. 18, (continued...)

the NE corner and N quarter-corner of sec. 7. They objected to the positions of the corners established by the 1983 dependent resurvey based on the Forest Service's conclusion that the corners were lost and thus properly reestablished by proportionate measurement. They asserted instead that, in using proportionate measurement, BLM had used "an inappropriate" methodology." Protest at 1.

BLM dismissed the protest by decision dated August 18, 2005, concluding, *inter alia*, that during a May 2-5, 2005, field investigation, BLM had been unable to confirm the existence of "reliable and provable physical evidence supporting new locations for the[] [NE corner and N quarter-] corner[]," and that the Hasenyagers had failed to carry their burden to show that a corrective resurvey was justified. Decision, dated Aug. 18, 2005, at 9. The Hasenyagers timely appealed to the Board.

During the pendency of the appeal, BLM reconsidered the matter of the proper location of the NE corner and N quarter-corner of sec. 7, conducting a field investigation on December 5, and 8, 2005. Memorandum to Frank Profazier, Utah Cadastral Office Chief, from Larry Judd, Cadastral Surveyor, dated Dec. 9, 2005, at 2. Judd reported finding the original survey monument for the NE corner, but not the original monument or bearing tree for the N quarter-corner:

The corner of sections 5, 6, 7 and 8[] **was found** monumented with a sandstone 22x14x5 inches (record 24x12x4 inches) lying loose on a steep slope, plainly marked with 5 grooves on one edge and 5 very dim grooves on a face of the stone. The stone was cracked through the middle, and broke in two pieces upon handling. No mound of stone was found, and there is no indication that the stone has moved much, if any, on the steep slope.[⁴] The corner position matches reasonably

³ (...continued)

2006, in the record indicate that the Hasenyagers own, *inter alia*, the following four parcels of private land which appear to be entirely in sec. 7: 04-0022-0625, containing 53.47 acres, tied by bearing and distance to the N quarter corner of sec. 7; 04-0022-0626, containing 52.30 acres, tied by bearing and distance to the SW corner of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 7; 11-0024-0399, containing 12.12 acres, tied by bearing and distance to the NW corner of the SW $\frac{1}{4}$ sec. 7; and 11-0024-0056, containing 2.52 acres, tied by bearing and distance to the NE corner of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 7. They acquired these parcels by warranty deeds, dated June 26, 2000, Apr. 19, 2002, and Mar. 28, 2005, copies of which are also contained in the record.

⁴ BLM surveyors entertained the possibility, during both the December 2005 and a later July 2006 field investigation, that the monument had slid a short distance downhill. See Decision at 6. The record contains photographs of the two original

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well with record plat information to the north and south, and fits reasonably well with topographic calls to the south and east. *I see no reason to doubt the authenticity or found location of this corner and would accept it where found.* [Emphasis added.]

Id. Judd recommended “us[ing] proportionate measurement,” based on the position of the NE corner to establish the position of the N quarter-corner, suggesting a new search in the spring, when the ground was not frozen. *Id.* at 3. Both positions were said to be situated a short distance from the Forest Service monuments, which BLM had previously accepted, in its dependent resurvey, as the location of the corners. Letter to Hasenyager from Chief Cadastral Surveyor for Utah, dated Dec. 19, 2005, at unpaginated 2; Memorandum to Profazier from Judd, dated Dec. 9, 2005, at 3.

On December 19, 2005, BLM requested the Board to vacate its August 2005 decision, and remand the case to BLM so that it could “revisit” its decision in light of the “new evidence.”⁵ Memorandum to Board from Acting State Director, Utah, BLM,

⁴ (...continued)

monuments marking the NE corner and N quarter-corner, taken by BLM and/or the Hasenyagers. They indicate that BLM had to unearth the stones, to some degree, by digging in the ground. See Administrative Record (AR), Notebook (Correspondence Index for BLM), Tab 28 (Investigation Field Photographs), Photographs 8-13, 24-27; AR, Notebook (Correspondence Index for Mr. James R. Hasenyager), Tab 7 (Photographs attached to Letter to BLM from Hasenyager, dated Jan. 4, 2006). The NE corner monument, situated in an area with numerous other stones, was no longer upright, with its notches on the edge partially concealed by the earth. All of this likely rendered its recovery difficult. In the January 2007 Decision, the State Director reported, at page 7, that BLM had finally determined “that the Original Sandstone for the Corner of Sections 5, 6, 7, and 8[] had not slid, and had fallen over in place, and represents the true position as it was originally set in 1896.”

⁵ The Chief Cadastral Surveyor for Utah notified Hasenyager that the recovered monument had been erroneously overlooked by the 1983 resurvey, noting that “[t]his situation presents justification for a ‘Corrective Resurvey[.]’” Letter to Hasenyager, dated Dec. 19, 2005, at unpaginated 2. He stated that BLM would proceed with “great care and discretion,” since “[t]he corners that will need to be corrected have been in place for 20 plus years, and will affect private land owners, the State Park, [the] Forest Service Administrative Site, and the new Grand Staircase Escalante National Monument (the Monument) Visitors Center.” *Id.* at unpaginated 2, 3. In T. 35 S., R. 3 E., SLM, Utah, the Monument covers lands in secs. 1-5, 9-15, 22-25, 29-31, and 36, and the Forest Service Administrative Site covers lands in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. See Master Title Plat (T. 35 S., R. 3 E., SLM, (continued...)

dated Dec. 15, 2005. By order dated December 23, 2005, in *James Hasenyager*, IBLA 2006-20, we vacated BLM's August 2005 decision, and remanded the case to BLM.

BLM conducted a further field investigation on July 25-27, 2006, again finding the original monument for the NE corner and also recovering the original survey monument for the N quarter-corner of sec. 7. Decision at 7.

In the January 2007 Decision, the State Director upheld BLM's 1983 dependent resurvey of the NE corner and N quarter-corner of sec. 7, declining to undertake a corrective resurvey of the two corners, but acknowledging that BLM had accepted the two monuments recovered in December 2005 and July 2006 as the original survey monuments for the NE corner and N quarter-corner of sec. 7, established by Lewman in 1896, and deemed them to be located in their original positions. In upholding the 1983 dependent resurvey, the State Director sought to avoid injuring the bona fide rights of all who "relied on the monumentation and boundaries established by the [Forest Service] and accepted by BLM" since 1983. Decision at 8; *see also* Memorandum from State Director to Board, transmitting administrative record to the Board, dated Mar. 22, 2007. The Decision also explained that the resurvey had been performed in accordance with BLM's Survey Manual. *Id.* The Hasenyagers timely appealed.⁶

⁵ (...continued)

Utah), dated Jan. 11, 2007; Historical Index (T. 35 S., R. 3 E., SLM, Utah), dated Aug. 21, 2004, at 8, 9; Proclamation No. 6920, Sept. 18, 1996 (110 Stat. 4561); Plat (Forest Service Administrative Site), dated Mar. 4, 1981. We are not persuaded that the boundaries of the Monument and Forest Service Administrative Site are directly controlled by the NE corner and N quarter-corner. However, the State Park appears to encompass all of the lands in secs. 6 and 7 covered by Patent No. 43-63-0030, issued by the United States on Apr. 16, 1963, and other adjacent land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 7 along the section line between secs. 6 and 7, acquired from Carl S. and Patsy S. Cottam by Quit Claim Deed, dated Mar. 27, 2003. *See* AR Notebook (Correspondence Index for Mr. James R. Hasenyager), Tab 11 (Survey Map, dated Apr. 4, 2003). It appears that the boundaries of the State Park, at least to the extent that they delineate the State surface/Federal mineral estate lands in sec. 6 from the State surface/mineral estate lands in sec. 7, are directly controlled by the NE corner and N quarter-corner.

⁶ Departmental regulations require that, in order to have standing to appeal, one must be both a "party to a case" and "adversely affected" by the decision under appeal. 43 C.F.R. § 4.410(a); *Western Aggregates, LLC*, 174 IBLA 280, 288-89 (2008); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 4 (2004); *John D. Wayne*,

(continued...)

II. Arguments on Appeal

In their SOR, the Hasenyagers dispute BLM's decision not to undertake a corrective resurvey of the section line between secs. 6 and 7, including the NE corner and N quarter-corner of sec. 7. They argue that BLM's failure to do so maintains these boundaries "at the expense of" the private landowners whose boundaries are similarly tied to this section line, and cannot be justified where the resurvey was based on "faulty survey practices[.]" SOR at 9. They assert that BLM has thus failed to "respect the bona fide rights of [private] landowners who have acquired their property based on the original corner monumentation." *Id.*

The Hasenyagers also contend that BLM improperly reestablished the NE corner and N quarter-corner of sec. 7. They point to BLM's recovery of the original monument for the NE corner, and assert that BLM's dependent resurvey thus failed to locate the corner at its original position, as marked on the ground by that monument. *See* SOR at 4. They do not, however, directly acknowledge BLM's recovery of the N quarter-corner, asserting only that BLM failed to locate the corner at its original position, since the ties to topographic calls along the section line between secs. 6 and 7 in the resurvey differ "significantly" from the record calls. *Id.* at 2. The Hasenyagers argue that BLM's failure to locate the corners at their original positions is attributable to the fact that BLM failed to follow "proper retracement procedures" in resurveying the section line between secs. 6 and 7. *Id.* at 8. They state that, if BLM had properly followed Lewman's field notes, retracing the steps of the original surveyor, it would have recovered the original stone monument for the NE corner, as it did in December 2005, and it would have reestablished the N quarter-corner at its proper position relative to the original topographic calls.⁷ *Id.* at 4.

⁶ (...continued)

161 IBLA 140, 142 (2004). Although the Hasenyagers are parties to the case by virtue of having filed a protest, *John D. Wayne*, 161 IBLA at 142, their notice of appeal and Statement of Reasons (SOR) did not show that the second requirement was satisfied. The Board directed the Hasenyagers to show cause why the appeal should not be dismissed for lack of standing, and on July 14, 2008, appellants filed a Response to Order to Show Cause. BLM filed a Reply on July 22, 2008. Having carefully reviewed the parties' submissions, we have determined that the Hasenyagers have demonstrated standing to appeal.

⁷ The Hasenyagers argue that the BLM surveyors should have followed "Le[w]man's methodology," by running an offset line west from the NE corner of sec. 7, and then backtracking to the position of the N quarter-corner. SOR at 9. Now that the NE corner can be definitely reestablished at the position of the original monument, they argue that BLM must reestablish the N quarter-corner, starting from that

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They claim that BLM failed to follow such procedures, and then erred in refusing to correct the 1983 dependent resurvey, by reestablishing the NE corner at the situs of the original monument and reestablishing the N quarter-corner at its proper position: “To uphold the dependent resurvey knowing proper procedures were not followed nor correct positions found or retraced particularly in view of a finding of the original stone corner monument found in place when the field notes and related data were utilized as they should have been in 1983 is simply wrong.” SOR at 4-5.

III. Discussion

BLM, as the delegate of the Secretary of the Interior, is authorized, pursuant to the Act of March 3, 1909, 43 U.S.C. § 772 (2000), to resurvey the public lands, in order to reestablish the corners, and thus the lines, established by earlier official surveys. *Howard Vagneur*, 159 IBLA 272, 277 (2003).

A dependent resurvey is designed to retrace and reestablish the lines of the original survey, marking the boundaries of the legal subdivisions of the public lands, in their “true original positions,” according to the best available evidence. Survey Manual, § 6-4, at 145; *see, e.g., Howard Vagneur*, 159 IBLA at 277, 278. Generally speaking, it places the lines in the same position on the earth’s surface that they have occupied since the date of the original survey, thus fulfilling BLM’s duty, under 43 U.S.C. § 772 (2000), to protect the bona fide rights of private landowners and their successors-in-interest, whose property rights are tied to the original lines.⁸ *Sweeten v. U.S. Department of Agriculture*, 684 F.2d 679, 681-82 (10th Cir. 1982); *Howard Vagneur*, 159 IBLA at 277; Survey Manual, §§ 6-4, and 6-12 to 6-14, at 145, 147-48. Stated more fully in *J.M. Beard (On Rehearing)*, 52 L.D. 451, 453 (1928):

[T]he section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of the lands patented on the basis of the plat of the original survey. . . . In legal contemplation, and in fact, the lands

⁷ (...continued)

monument, by similarly “retrac[ing] Mr. Le[w]man’s steps[.]” *Id.* at 10. The need for such action, however, is obviated by the fact that BLM recovered the monument for the N quarter-corner in 2006.

⁸ The Act of Mar. 3, 1909, codified, *as amended*, at 43 U.S.C. § 772 (2000), provides, in relevant part, “[t]hat no . . . resurvey or retracement [of a survey of public lands] shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.” *See, e.g., Longview Fibre Co.*, 135 IBLA at 183.

contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

Further, as we said in *State of Missouri*, 142 IBLA 201, 213 (1998) (citing *John W. Yeargan*, 126 IBLA 361 (1993)): “The proper execution of the dependent resurvey serves to protect the bona fide rights of the land owners, because a properly executed dependent resurvey traces the lines of the original survey.” (Emphasis added.)

We have long recognized that original lines are to be reestablished in a dependent resurvey by recovering or restoring the original corners by any of three methods. *Howard Vagneur*, 159 IBLA at 277. First, an “existent” corner can be recovered by finding evidence of the monument and/or its accessories. Survey Manual, § 5-5, at 130. Second, an “obliterated” corner, where there are no remaining traces of the monument or its accessories, can be recovered where the corner’s location has been perpetuated, or where other acceptable evidence establishes its location. Survey Manual, § 5-9, at 130. Third, where a corner cannot be considered existent or obliterated based on substantial evidence regarding its location, it will be regarded as a “lost corner” to be restored by reference to one or more interdependent corners, and thus by the method of proportionate measurement. Survey Manual, §§ 5-20 and 5-21, at 133; see, e.g., *Kendal Stewart*, 132 IBLA 190, 194-95 (1995); *James O. Steambarge*, 116 IBLA 185, 191 (1990).

BLM is required, during the course of a dependent resurvey, to thoroughly and diligently search for any evidence of the original corners, including the monument and its accessories: “The retracement surveyor must act as a detective to gather, verify and consider *all available evidence*.” (Emphasis added.) SOR at 5-6 (citing, e.g., *John W. Yeargan*, 126 IBLA at 363). Further, it must do so by following the field notes of the original survey, in order to ensure that it has the best chance of recovering such evidence. See Survey Manual, §§ 5-6 and 6-26, at 130, 150; e.g., *Mark Einsele*, 147 IBLA at 16. Despite its efforts, however, BLM may never recover the original monument and its accessories, or may not recover them until after it has accepted the dependent resurvey, as was the situation in the case at hand.

We now consider the issue of whether BLM is obligated to correct an accepted dependent resurvey once the original monument has been recovered.

Whether Relocation of Proportioned Corner Would Disrupt Bona Fide Rights

The Hasenyagers argue that the best evidence of the position of an original corner is the original monument and its accessories, which were established in connection with the original survey. SOR at 7 (citing *United States v. Weyerhaeuser Co.*, 392 F.2d 448, 451 (9th Cir. 1967), cert. denied, 393 U.S. 836 (1968)). They

assert that, since the monument for the NE corner of sec. 7 has been recovered, BLM is required to adopt that monument as the corner: “The BLM cannot refuse to recognize the found original corner monument. It is the highest form of evidence available. It was found in place, therefore controls and cannot be rejected.” SOR at 10.

We agree that the original monument and/or its accessories are the best evidence of the position of an original corner. *United States v. Doyle*, 468 F.2d 633, 636 (10th Cir. 1972) (“The original survey as it was actually run on the ground controls”); *Howard Vagneur*, 159 IBLA at 288 (“[L]ines marked on the ground by monuments and/or accessories stand highest in the determination of the true boundaries of conveyed land”); *Mark Einsele*, 147 IBLA at 16 (“[T]he most dependable and highest form [of evidence of a corner] [is] the monument and its accessories”); *Longview Fibre Co.*, 135 IBLA at 177; *Frank Lujan*, 40 IBLA 184, 186 (1979); Survey Manual, §§ 4-1 to 4-2, at 105 (“The monumentation is intended to establish a permanent marking of the lines and to fix the corner positions so that the location of the surveyed lands may always be definitely known. . . . The corner monument is direct evidence of the position of the corner.”). Where there is no evidence that they have been moved from their original positions, the monument and/or its accessories will be adopted as the location of the original corner.

In declining to adopt the original monument as the NE corner of sec. 7, BLM relied on our decision in *Longview Fibre Co.*, 135 IBLA 170. In that decision, however, we did not conclude that BLM was justified in refusing to accept a newly-recovered original monument or accessory that marked the location of two corners (NE corner of sec. 32 and E $\frac{1}{4}$ corner of sec. 29), which had originally been deemed lost in a 1933 dependent resurvey. See 135 IBLA at 172-75. Rather, we held that BLM continued to be justified, in a 1991 dependent resurvey, in considering the corners to be lost, since the newly-recovered trees could not be positively identified as accessories to the original monuments. See *id.* at 177-81. In this respect, the present case differs from *Longview Fibre*, since here the newly-recovered stone *has been positively identified* as the original monument, and, therefore, the NE corner is no longer lost. The same is true of the N quarter-corner.

Nevertheless, other considerations at work in *Longview Fibre* may be instructive in the present appeal, and we consider them now. In *Longview Fibre*, a Federal surveyor had undertaken a dependent resurvey in 1933 to reestablish a lost corner by proportionate measurement and had relied on a control corner that he reasonably believed was the nearest known corner to the lost corner. In 1991, BLM recovered an original monument for a control corner that was closer to the lost 1855 corner than the control corner used in the 1933 resurvey. See 135 IBLA at 172-73. The later-found, closer control corner offered the prospect of more accurately

reestablishing the location of the lost corners.⁹ However, BLM decided not to perform a corrective dependent resurvey of the two corners in 1991. *Id.* at 174.

The Board held that BLM properly declined to upset the 1933 dependent resurvey because a second proportioning of the corners would not reestablish the lost corners in their true original positions. 135 IBLA at 183, 184; *see id.* at 176 (“[BLM] reaffirmed its position that to move the corners would not necessarily locate them at their original . . . position”). We concluded that BLM’s decision properly considered the fact that to upset the 1933 resurvey in favor of a new resurvey would impair, contrary to the principle of 43 U.S.C. § 772 (2000), the bona fide rights of other private landowners who had, in good faith, relied on the lines and monuments of the 1933 resurvey for close to 60 years. 135 IBLA at 184. We held that “[i]n some instances, bona fide rights are protected only where BLM departs from a rigid application of resurveying principles to ensure that long-accepted survey lines are not disturbed, so that property boundaries are stabilized and title is secured.” *Id.* at 183 (emphasis added). *Longview Fibre* was one such “instance.”

We turn to the question of whether this principle in *Longview Fibre* is applicable here.

Currently, the State holds a patent (No. 43-63-0030), issued in 1963, to the surface estate in lands north (and, to a certain extent, south) of the section line between secs. 6 and 7, and the remaining lands south of the section line are in the hands of successors-in-interest to two patents (Nos. 5785 and 5798), issued in 1897. At the time of patent, the boundary lines of the patented lands were controlled by the 1896 original survey, since it was the survey in effect at that time, which established the section line between secs. 6 and 7. When BLM dependently resurveyed that line in 1983, BLM reestablished, by proportionate measurement, the NE corner and N quarter-corner of sec. 7 in their supposed “true original positions,” thus presumptively protecting all of the bona fide rights tied, by the original 1896 survey, to the section line. *William D. Brown*, 137 IBLA at 33-34; *John W. Yeargan*, 126 IBLA at 370; *Wilogene Simpson*, 110 IBLA 271, 280 (1989).

After close to 24 years, we assume some reliance on the location of the resurveyed line between the two sections, though BLM has not specifically identified the nature and extent of that reliance. *See, e.g.*, Decision at 8; Letter to Hasenyager from Ernest D. Rowley, Licensed Land Surveyor, dated Oct. 7, 2005, at unpaginated 7 (“[I]t is true that some surveys and surveyor[]s have been accepting the[] [Forest Service] monuments as the section corners and using them in the

⁹ BLM noted that “reproportioning the [lost] corners using the original E¼ corner of sec. 32 would have shifted the NE corner of sec. 32 0.52 chains to the north and the E¼ corner of sec. 29 0.26 chains to the north.” 135 IBLA at 174.

preparation of their surveys”). The question then is whether it is appropriate to invoke *Longview Fibre* to protect such bona fide rights.

Whether BLM Must Relocate Proportioned Corner to Protect Bona Fide Rights

[1] Because of one basic factual difference, we do not find our holding in *Longview Fibre* to be controlling in the present circumstances. In that case, we decided not to adopt a newer proportioned corner, which would be determined on the basis of the closest control corners, over an older proportioned corner, which had not been established based on the closest control corners. Our decision declined to favor one proportioned corner over another proportioned corner, simply because the former better satisfied the technical requirements of the Survey Manual for proportionate measurement, where to do so would not, in fact, restore the corner at its true original position, and would disrupt property rights which had been in place for close to 60 years, thus violating bona fide rights protected in principle by 43 U.S.C. § 772 (2000). See 135 IBLA at 184.

Here, however, we are faced with a choice between proportioned corners, which have been in existence for close to 24 years, and the original corners set in 1896. Neither BLM nor the Hasenyagers question that the original monument in each case identifies the original corner position, and we find no evidence to the contrary. The corner at the location of the original monument was the corner in effect at the time of the 1897 and 1963 patent of public land on either side of the section line between secs. 6 and 7. The boundaries of the patented land were thus fixed by the original monuments set in the 1896 survey, and have remained fixed since that time, because the patentees took title to the land on the basis of the last official survey prior to patent as it was actually run on the ground, which survey was incorporated in the patent and necessarily has been incorporated in every succeeding transfer based on those patents.¹⁰ The State and the Hasenyagers continue to retain

¹⁰ *United States v. Reimann*, 504 F.2d 135, 138 (10th Cir. 1974) (“[O]nce patent has issued, the rights of patentees are fixed [T]he government is bound by the last official survey accepted prior to its divestment of title.”); *United States v. Doyle*, 468 F.2d at 636 (“The original survey as it was actually run on the ground controls”); *Robert R. Perry*, 87 IBLA 380, 384 (1985) (“A patentee of public land takes according to the actual survey on the ground”); *Elmer L. Lowe*, 80 IBLA 101, 105 (1984); *Frank Lujan*, 40 IBLA at 186 (“[T]he corner of a Government subdivision is where the United States surveyors in fact established it”); *Nina R.B. Levinson*, 1 IBLA 252, 260, 78 I.D. 30, 37 (1971) (“The [survey] plat, itself, with all its notes, lines, descriptions, and landmarks, becomes as much a[] part of the grant or deed by which the[] [lands] were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself”); *United States* (continued...)

title to their interests precisely as described in the patents from which their respective title is derived. As the First Assistant Secretary stated in *J.M. Beard (On Rehearing)*, 52 L.D. at 458, concerning the scope of bona fide rights based on an original survey, which are protected from impairment:

[The appellant] did not and could not acquire *bona fide* rights in any lands except in those contained in the S. ½ S. ½ Sec. 16, T. 2 N., R. 11 W., S. B. M., in its true original position, as defined by the *corners* of the original survey. The law is well established that no right, title, or interest is acquired by grant or patent from the United States to lands described in terms of the rectangular surveying system, *except* in the lands described in such grant or patent *as defined by the corners of the original Government survey* upon which the description is based.
[Emphasis added.]

We think that this is equally true when the United States patents both the surface and mineral estates, and when it patents only the surface or the mineral estate.

Bona fide rights were created, under 43 U.S.C. § 772 (2000), in the owners (and successors-in-interest) of the surface and surface/mineral estates in the 1897 and 1963 patents, by reference to the original monuments, which clearly denote where the original survey was “actually run on the ground[.]” *United States v. Doyle*, 468 F.2d at 636. To now conclude, based on the relatively recent 1983 resurvey, that the patents encompass different land than what has been the case since they were issued in 1897 and 1963 would clearly impair the bona fide rights acquired in reliance on the 1896 survey—rights which cannot, consistent with 43 U.S.C. § 772 (2000), be “impair[ed]” by the subsequent 1983 resurvey.¹¹ See *United States v.*

¹⁰ (...continued)

v. Heyser, 75 I.D. 14, 18 (1968) (“A patentee of public land takes according to the actual survey on the ground”); Survey Manual, § 6-15, at 147-48 (“The position of a tract of land, described by legal subdivisions, is absolutely fixed by the original corners and other evidences of the original survey and not . . . by the lines of a resurvey which do not follow the original. . . . Under fundamental law the corners of the original survey are unchangeable.”); Decision at 3 (“The position of a tract of land, described by legal rectangular subdivisions[,] is generally fixed by the original corners and other evidence of the original survey”); Memorandum to Board from State Director, dated Mar. 22, 2007, at 8 (“If the original corner monuments can be ascertained at the original positions, they control the survey”).

¹¹ In *Longview Fibre*, we recognized the need to protect “bona fide rights based on an original survey” in effect at the time of patent:

(continued...)

Doyle, 468 F.2d at 636 (“A precisely accurate resurvey cannot defeat ownership rights flowing from the original grant and the boundaries originally marked off”); *Dan Ogle*, 131 IBLA 129, 130-31 (1994); *Volney Bursell*, 130 IBLA at 57 (“[T]he establishment of a lost corner by proportionate measurement will be set aside . . . if an appellant establishes by a preponderance of the evidence . . . that the corner exists”); *Paul N. Scherbel*, 58 IBLA 52, 57 (1981) (“[P]roportionate measurement is the accepted method of reestablishing a survey corner unless outweighed by conclusive evidence of the original survey”). As the First Assistant Secretary stated in *R.J. Gilmore*, 46 L.D. 288, 289 (1918): “The object of this legislation [43 U.S.C. § 772 (2000)] is to provide merely for the restoration of the old survey. It does not authorize new or irregular surveys to mark out and define the boundaries of claims *other than according to the lines of the original surveys*, where in so doing conflicts between claimants would be involved.” (Emphasis added.)

To avoid a contrary result, BLM must now correct the 1983 dependent resurvey so that it does, in fact, “follow” the lines of the original survey. Survey Manual, § 6-15, at 147. BLM’s decision upholding a dependent resurvey relocating lost corners by proportionate measurement will be reversed and remanded, when BLM, after accepting the resurvey, recovers the original corner positions and their original survey monuments in place, where adherence to the proportioned corners would impair the bona fide rights long established by reference to the original corners, contrary to 43 U.S.C. § 772 (2000).

Conclusion

Our decision in *Longview Fibre*, which affirmed BLM’s decision not to overturn a 1933 resurvey, was expressly predicated on certain “limited circumstances,” specifically, the fact that a “second reportioning” of the lost corners, by corrective resurvey, “would not reestablish the [original] . . . 1855 corners.” 135 IBLA at 184. Such circumstances do not pertain here, since a corrective resurvey would indisputably reestablish the original 1896 corners.

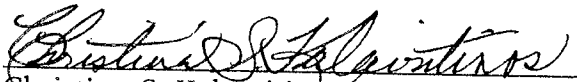
¹¹ (...continued)

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


135 IBLA at 184 (quoting *United States v. Reimann*, 504 F.2d at 139-40) (emphasis added). Here, we similarly protect bona fide rights based on the original 1896 survey, by finding that BLM erred in not correcting the 1983 resurvey.

It is said that the “purpose” of a dependent resurvey “is not to ‘correct’ the original survey by determining where a new or exact running of the line would locate a particular corner, but rather to determine *where the corner was established in the beginning.*” Survey Manual, § 5-1, at 129 (emphasis added). In the present case, we now know with certainty where the NE corner and N quarter-corner were “established in the beginning,” and have been shown no reason for ignoring the positions of those corners.

Accordingly, 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 reversed, and the case is remanded to BLM for further action consistent herewith.


Christina S. Kalavritinos
Administrative Judge

I concur:


T. Britt Price
Administrative Judge