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GILBERT AND LOGIE NOLAN

A-30905

Decided AUG 8 1968

Surveys of Public Lands: Generally -- Surveys of Public Lands:
Dependent Resurveys,

Where in the course of a dependent resurvey a mound of stone is found in a position consistent with that of the original corner which is reasonably well correlated with other original corners found in the township, it will be accepted as the original corner in preference to a more remote corner despite the fact that the latter appears to have been used as a corner in the positioning of fences built many years ago and accepted as the boundary by some landowners in the area.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30905

Gilbert and
Logie Nolan

: Survey Group 533-California

: Protest against dependent
: resurvey dismissed

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gilbert and Logie Nolan have appealed to the Secretary of the Interior from a letter-decision dated September 27, 1967, by the Chief, Division of Engineering, Bureau of Land Management, which dismissed their protest against a dependent resurvey and subdivision of sections 23 and 26, T. 43 N., R. 12 E., M.D.M., California.

The Nolans have partial interests in several tracts of land covered by Indian trust patents issued in 1907 for aliquot parts of sections 26 and 35, same township and range. The land description in these trust patents is based on the plat of survey approved on February 14, 1872. The plat represents the original survey of T. 43 N., R. 12 E., executed by W. F. Ingalls in 1871 and is the only record of an official Government survey performed in the township. In 1964, Modoc Recreational Estates, a private developer which had acquired all the land in sec. 26 in which the Nolans had no interest,^{1/} as well as other land in the area, had a survey made of its land. The survey performed by Joseph S. Westvold, a licensed surveyor, established the boundaries of the Modoc lands so that they impinged on lands claimed by the Nolans and others. Following complaints by the Nolans to the Bureau of Indian Affairs, the Bureau of Land Management through its Division of Engineering carried out a dependent resurvey and subdivision of secs. 23 and 26 in November 1966. The Bureau survey supported the Modoc survey on all points in contention.

The Nolans then protested the acceptance of the resurvey. They contended that the true boundaries of their land coincide with

^{1/} The NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the E $\frac{1}{2}$ less the SW $\frac{1}{4}$ SE $\frac{1}{4}$.

old fence lines which "for generations" have been accepted by the adjacent property owners.

The crucial issue in the dispute is the location of the SE corner of section 26, the corner common to sections 25, 26, 35 and 36. There are two possible points. One is a mound of stones containing a weathered, scribed juniper post at the intersection of an east-west fence line with the remains of an old fence to the north. The other is a mound of stones lying approximately 194 feet west and slightly to south of the first 2/. The dependent resurvey accepted the latter mound as the true original corner.

The Nolans insisted in their protest that the former is the correct one. They stated that they had consulted Philip D. Windrem, a licensed surveyor, who concluded that the Bureau of Land Management dependent resurvey had shown improper judgment in the selection of section and $\frac{1}{4}$ corners in section 26. They then concluded that the rejected corner is identical in appearance to the accepted NE corner of section 26 and denied that a mound of stones ever existed at the accepted SE corner. They pointed out that old fence lines in the area are consistent with the location of the corner they favor. They also say that the position of the rejected corner is more consistent with an undisputed portion of the original exterior boundary of the section. They also urge that a "stone mound" along the north boundary should have been accepted as the N $\frac{1}{4}$ corner and that if it were it would demonstrate that another ancient north-south fence which passes by this point is a true boundary consistent with the Nolans' view of the correct boundaries and corners. They also contended that the accepted corner cannot be reconciled with the location of several 1/16 corners in the SE $\frac{1}{4}$ sec. 26 consisting of juniper stakes in mounds of stones scribed with the numbers of Indian allotments. They said that the Indian allotments must have been surveyed and that, whether the survey was formal or informal, it should be accepted now as it has been by those interested in the boundaries for many years.

In its letter-decision dismissing the protest and accepting the plat, the Bureau of Land Management pointed out that the 1871 survey was the only official survey performed in the township. It rejected the 1/16 corners scribed with numbers of Indian allotments because they were unofficial and unrecorded. It upheld the corner adopted by the resurvey on the ground that its location is well correlated with other original corners found in this township. It stressed that the Nolan corner would result in

2/ The tie from the second mound to the first is stated as "N81°34'E 2.932 chains."

a variation of some 2 degrees in the bearing of the east boundary of the section from the original bearing, while the bearing from the accepted corner varies only 2 minutes from the original. It noted that if neither corner were accepted and the corner was established by double proportionate measurement, the corner would fall about 40 feet farther west to the further disadvantage of the Nolans. Finally it rejected all evidence of fence lines in the area as representing true property lines and as substantiating the location of the original corners.

In their appeal to the Secretary the Nolans assert that the dependent resurvey rejected substantial evidence of the 1871 boundaries, thus altering lines long accepted by local residents, and, more particularly, erred in its choice of the two possible corners common to sections 25, 26, 35, 36. They say the resurvey also rejected an old monument at the $N\frac{1}{4}$ corner of section 26, four $1/16$ corner monuments in the $SE\frac{1}{4}$ dating from a survey made about 1908, and numerous fences and fence lines placed on these corners and long accepted as the correct boundaries by local residents.

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original position according to the best available evidence of the positions of the original corners. United States v. Sidney M. and Esther M. Heyser, 75 I.D. 14, 18 (1968).

The Bureau of Land Management accepted the more westerly corner as the more probable location of the original corner primarily because its location is well correlated with other original corners found in the township. In fuller explanation of its reasoning the Chief, Division of Engineering, has commented:

"If the Nolan corner were used, considerable distortion of the section lines would result in the area around the SE cor. of sec. 26 which is not in notable evidence anywhere else in the area of these resurveys. The distance along the south boundary of sec. 25, between two found original corners, would be 76.33 chs. as compared with an original distance of 80.29 chs., a difference of 3.93 chs. or 259 feet. The bearing between the two found original corners, from the SE cor. of sec. 26 to the NE cor. of the same section, would be $N. 2^{\circ} 02' W$ as compared with a North original bearing."^{3/}

^{3/} Memorandum to Assistant Solicitor, Branch of Land Appeals, from Chief, Division of Engineering, June 4, 1968.

He also notes that a large percentage of the corners in the area were recovered from evidence of the original corners,^{4/} a circumstance which indicates that the 1871 survey was executed with a fair amount of reliability.

While these comments are very persuasive, their weight would not overcome credible evidence that the Nolan corner was actually the original one and the Nolans assert that on the evidence the wrong section corner was chosen. They point out that the field notes of the 1871 survey state that the surveyor set a stone of certain size for the corner in a mound of stone and that the Nolan corner has an unmarked rock of approximately record size, while the accepted corner has not. While the presence of an unmarked stone of approximately record size in a mound of stones may be of some significance, the absence of any markings on it to identify it as the stone placed by the surveyor lessens its significance.

Next the appellants stress the fact that several ancient fences in the area are laid out along lines consistent with the Nolan corner while there is no indication that any fences were ever built to the accepted corner. This situation only indicates that the fences were laid out in accordance with the surveys made of the Indian allotments around 1908, but does not establish that the corner used in these surveys was the original one. If there were no other corners which could be the original corner, such evidence would be much more convincing. The discovery of another mound of stones in a position which could also establish it as the original corner forces the surveyor to decide which is the true corner. Here, as we have seen, the accepted corner is well correlated with the other original corners in the areas.

The statements of the Nolans that they accepted the fences as proper boundaries and of Mr. Frances Ballard, another long time resident, that he accepted a fence along the west side of his tract as the west boundary of his land (the NE $\frac{1}{4}$ of sec. 26) are at best only further indications that another survey had been made, but does not establish that this survey was based on the recovery of the original SE corner. For the same reason, the 1/16 corners in the SE $\frac{1}{4}$ which were apparently set by the one who surveyed the Indian allotments and which were rejected by the Bureau of Land Management are only other indications that a survey was made after the 1871 one but do not irrefutably establish the Nolan corner as the original SE corner where another possibly correct corner exists.

The Nolans also charge that the Bureau cavilled that acceptance of their corner would lead to a bearing from it to the

^{4/} The area comprises sections 13, 14, 24, 25, 35, and 36, T. 43 N., R. 12 E., and sections 18, 19, 30, and 31, T. 43 N., R. 13 E. Evidence of 25 original corners, excluding the one in controversy, was found in this area.

field notes, while the accepted corner yields a bearing only 2 minutes from true north, and yet accepted a deviation of $1^{\circ}48'E.$ on the line from the SW corner to the $W\frac{1}{4}$ corner. The SW corner, the one common to secs. 26, 27, 34 and 35, was established by proportionate measurement when no evidence of the original corner could be found. The bearing the Nolans refer to is on the line running from the corner as thus set to the found $W\frac{1}{4}$ corner. Since proportionate measurement is the standard method of establishing a lost or obliterated corner and a found corner must be accepted, the fact that a bearing deviation somewhat greater than others results from the determination of the two corners does not justify accepting an even greater deviation in different circumstances.5/

The Nolans also point to the Geological Survey topographic map, Big Sage Reservoir, California (1962 Series), of the area as showing that many of the original bearings were off at least as much as 2° . Many of the lines on the map are dashed, not solid, showing that the section lines are only approximate. Moreover the Geological Survey does not contend that its maps depict the land lines in their exact locations.

The Nolans correctly note that the bearing from the original $W\frac{1}{4}$ corner to the original NW section corner is $1^{\circ}08'W.$, which is in the same general direction as the other north-south fence lines and the east section line rejected by the Bureau of Land Management. Since there is no definite pattern of excessive NW bearings along the longitudinal lines of the township, this is an isolated example.

The Nolans next state that the dependent resurvey established the $N\frac{1}{4}$ corner by proportionate measurement after rejecting a nearby mound of stones similar to the one it accepted as the SE corner. While it is not clear what lesson is to be drawn from that allegation, the Chief, Division of Engineering, has stated that the field surveyor says that the "mounds of stones" are not similar. The mound at the SE corner appears to have been constructed whereas the one near the $N\frac{1}{4}$ corner appears to be a natural rock outcrop with one loose unmarked stone on its top. About two feet east of the loose stone there is an old fence corner. The field surveyor did not deem the loose unmarked stone worthy of consideration as evidence of the original $\frac{1}{4}$ corner.

The Nolans allege that the dependent resurvey violates the rule that points long accepted are not to be disturbed, particularly where their rejection would adversely affect improvements

5/ The SW corner of section 26, as established by the Bureau, is 40.48 chains east of the $S\frac{1}{4}$ corner for section 27. The field notes of the 1871 survey gives the distance as 40.18 chains. The Nolans' position for the SW corner of section 26 would place it 41.44 chains east of the $S\frac{1}{4}$ corner of section 27.

or introduce new complications. The general rule is sound, but here there was no unanimous agreement among all landowners interested in the location of the SE corner and there are two possible locations. In such a situation the field surveyor must choose the corner he believes to be more conclusive.

The Nolans also say that they as Indians should be given the same protection as non-Indians as to land boundaries and that under the law of California the long accepted fences would fix the correct boundaries of their land. The Nolans as citizens of California and the United States can enforce whatever rights they have to their trust lands despite the acceptance of the dependent resurvey. Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

Finally the Nolans say the Modoc survey challenges boundaries of other private land owners whose lands are not covered by the dependent resurvey. It is not clear how the Department's interpretation of its own survey would be binding in a dispute between other landowners in an area outside the scope of the dependent resurvey. As the Department stated in recent case involving a protest against the acceptance of a dependent resurvey:

"Reliance by private parties on a given corner location may be considered together with other evidence in considering where the proper location of an original corner is; however, such reliance cannot overcome other evidence which demonstrates that another corner location is the correct location of the original corner. The only function of the Department here is to determine the boundary of public lands in accordance with the original surveys. Courts are proper forums for resolving boundary disputes among private parties stemming from reliance on different corner locations."

Rubicon Properties, Inc., A-30748 (May 6, 1968), p. 13.

Neither party is bound by the Department's concept of the correct location of the original monument. Each may pursue whatever remedies are available to him to establish his claim to the land in dispute upon the basis of his own interpretation of the location of the disputed corner or upon any other pertinent legal theory.

Summarizing the physical evidence that has been developed, it appears that the Nolans base their claimed location of the SE corner of section 26 on the fact that it is marked by a mound of stone which contains an unmarked stone of the dimensions described in the 1871 survey field notes for the stone that was set as the

section corner; that the mound of stone also includes a scribed juniper post like the one in the accepted NE corner of section 26 and like the posts in the 1/16 corners in the SE $\frac{1}{4}$ of the section which were established in a survey of the Indian allotments around 1908; that the claimed SE corner is marked by the intersection of an east-west and a north-south fence line; that the latter line and other north-south fence lines in section 26 run in a direction consistent with the accepted line between the established W $\frac{1}{4}$ corner and NW corner of section 26.

The weakness, as we see it, of this evidence is that it is predicated upon the assumption that a formal survey was made of the allotments around 1908 and that this survey accurately followed the 1871 survey. But there is no record of the survey or as to who made it. Thus there is no credible evidence as to its accuracy. The scribed juniper post that appears in the Nolans' claimed corner position may have been placed there by the 1871 surveyor who set a post for the NE corner of section 26; but it is equally, if not more, possible that it was set by the person who set the four 1/16 corner posts in the allotment surveys in 1908.^{6/} In the sketch made by surveyor Windrem submitted in support of the Nolans' protest, it is stated that all scribed posts are juniper and appear to be of similar age.

The fact that after the purported allotment survey in 1908 fences were built in accordance with the survey does not, of course, substantiate the accuracy of the survey. The fact that the north-south fence lines comport with the direction of the line between the W $\frac{1}{4}$ corner and the NW corner is of some significance but a limited one. This is so because, first, the Nolan corner would require a deviation in the bearing of the east line of section 26 of 2°02'W. from the true north bearing given in the 1871 survey instead of the 0°04'E. deviation made by the dependent resurvey. Secondly, the Nolan corner would give the south boundary of section 26 a length of 82.63 chains as contrasted with the 80.21 chains shown on the 1872 plat (an excess of 160 feet) and the 80.68 chains shown on the dependent resurvey plat. Correspondingly, as pointed out earlier, the Nolan corner would shorten the south boundary of section 25 from the 80.29 chains shown on the 1872 plat to 76.33 chains, a difference of 259 feet. Thirdly, the Nolan corner would require a change in bearing of the east line of section 35 of 2°47'E. from the true north bearing shown by the 1871 survey. In short, the Nolan corner would significantly distort the shapes of sections 25, 26, 35, and 36 whereas the dependent survey would make only minor changes.

^{6/} The 1871 field notes mention only the setting of a stone for the SE corner of section 26 whereas they state that a post was set for the NE corner of the section.

In conclusion then our review of the record leads us to the conclusion that the Nolans' protest was properly dismissed. Accordingly when this case is returned to the land office, the approved plat of the resurvey will be officially filed in the land office.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

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