

A REVIEW OF IBLA 88-278

By Landon Blake

Introduction

In this article I review the IBLA decision IBLA 88-278 from the year 1990. In this decision, the IBLA renders a decision in a boundary dispute between a private timber company, Boise Cascade, and the BLM along the boundary of a Forest Service parcel in Idaho. The boundary dispute focused on the location of the $\frac{1}{4}$ corner common to Sections 12 & 13, and the correct method for restoring the corner.

This case contains interesting lessons about the evaluation of evidence, essential elements of expert testimony, the value of retracement surveys, and the proper method for establishing the position of corners in the PLSS.

This is a continuation of a series of articles I've been writing to review cases by the Interior Board of Land Appeals. You can read the last article in this series published in the California Surveyor Magazine at:

1899

Surveyor Gradon sets the 1/4 corner stone.

1936

Reay claims to have seen pipe with brass cap near the corner.

1959

Reay claims to have last seen the pipe and brass cap.

1970

Surveyor Ferguson resets the 1/4 corner using a single proportion.

1981

Potter performs a private resurvey. He established the 1/4 corner at the record distance.

IBLA

A REVIEW OF IBLA 88-278

<https://www.californiasurveyors.org/calsurveyor/CalSurv184.pdf>

Timeline

Here is a summary of the events in the timeline of this boundary dispute:

1899: US Deputy Surveyor Herman Gradon establishes the $\frac{1}{4}$ section corner between Sections 12 and 13 as part of the original GLO survey of the township.

1936: Local resident David Reay claims to have seen a pipe with a brass cap near the $\frac{1}{4}$ corner position used by Potter. He claims a Forest Service civil engineer on a road project called the pipe a “section corner”.

1959: David Reay claims to have last seen the pipe with a brass

1982

Surveyor Thompson performs a dependent resurvey for the BLM. He sets the $\frac{1}{4}$ corner using a single proportion.

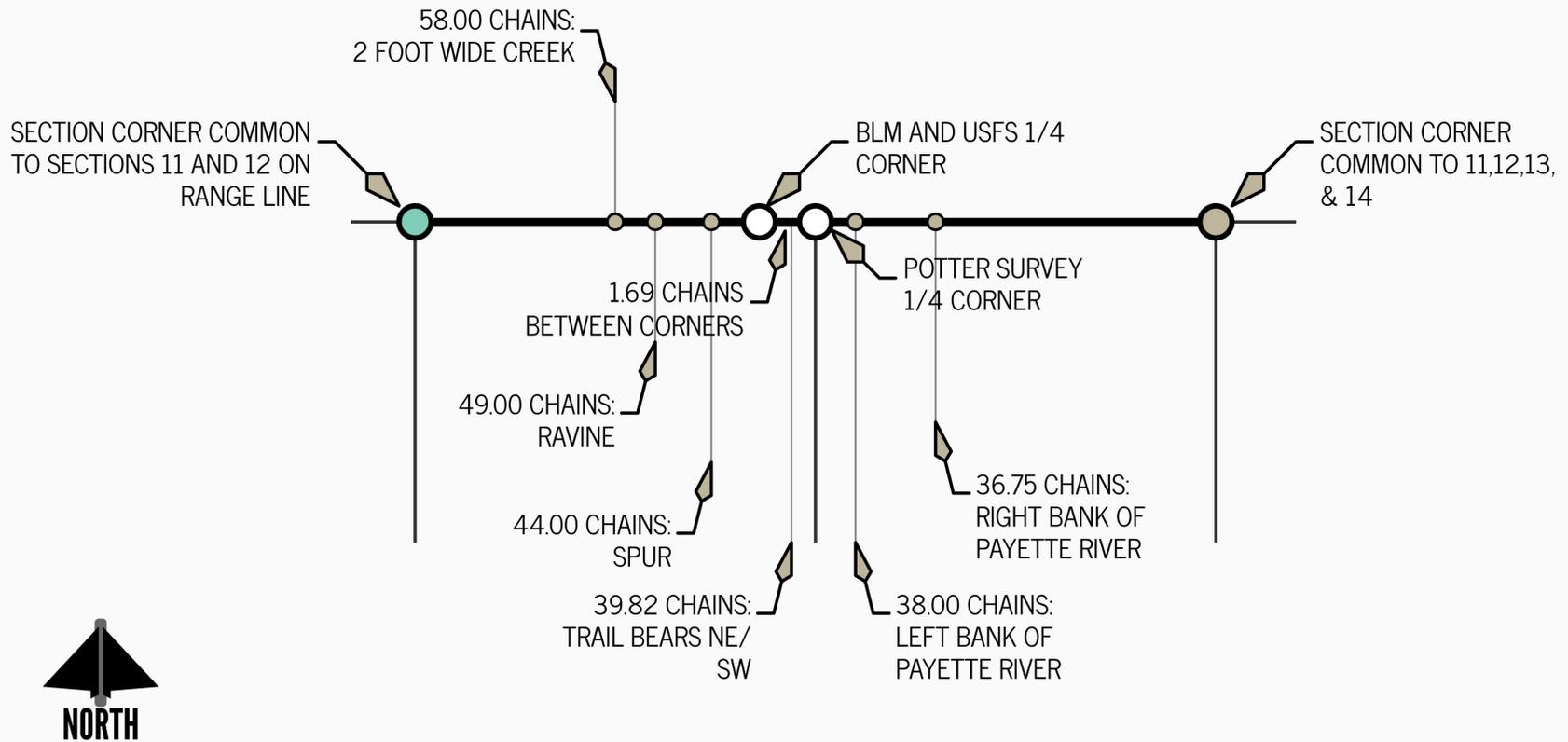
????

Surveyor Frey performs a resurvey of the center line of Section 13. He sets mark on an incorrect centerline.

1983-09-23

Boise Cascade appeals a decision by the Idaho Director of the BLM affirming the dependent resurvey.

A REVIEW OF IBLA 88-278



A REVIEW OF IBLA 88-278

cap near the $\frac{1}{4}$ corner position used by Potter. It has now moved approximately 50 feet downslope.

1970: Idaho licensed land surveyor John Ferguson establishes the $\frac{1}{4}$ section corner between Sections 12 and 13. His survey was performed on behalf of the US Forest Service. (The court decision isn't clear on the method Ferguson uses to do this, but it tells us the Ferguson position for this corner is in the same depression as the BLM resurvey corner monument.)

1970: TF Roark, a local land owner, disagrees with the US Forest Service position for the $\frac{1}{4}$ corner.

1981: Idaho licensed land surveyor James Potter surveys the section line common to Sections 12 and 13. His survey was performed on behalf of a private land owner. He establishes the $\frac{1}{4}$ section corner common to Sections 12 and 13 at the record

distance of 37.85 chains from the section corner common to Sections 11, 12, 13 and 14. He sets a pipe and aluminum cap at his $\frac{1}{4}$ corner. The court decision doesn't tell us if Potter searched for or found the Ferguson corner monument set in 1970.

1982: A dependent resurvey is conducted by Robert Thompson for the BLM. Thompson determines that the $\frac{1}{4}$ corner common to Sections 12 and 13 is lost. He reestablishes the corner using the single proportionate method and adjacent section corners, and sets a new corner monument. He finds the monument set by Potter to mark the $\frac{1}{4}$ corner, but he rejects it.

Unknown: A private survey is conducted by Idaho licensed land surveyor John Fry. He sets at least 13 markers and blazes on a line that runs approximately along the section line established by Potter.

A REVIEW OF IBLA 88-278

September 29, 1983: The Boise Cascade appeals a decision by the Idaho State Director of the BLM to dismiss a protest against a BLM dependent resurvey of Section 13, Township 10 North, Range 4 East, Boise Meridian Idaho.

Undisputed Facts

Both Boise Cascade and the BLM agree on the following facts in this boundary dispute:

- 1) The original monument set by Gradon to mark the $\frac{1}{4}$ corner common to Sections 12 and 13 was a stone 15 inches by 12 inches by 4 inches, set 10 inches into the ground and marked " $\frac{1}{4}$ " on the north face of the stone.
- 2) None of the retracing surveys found evidence of the stone Gradon set.

Sidebar: Broad Legal Questions

This IBLA decision highlights a couple of broader legal questions:

- 1) What elements are required in witness testimony to make a corner obliterated instead of lost?
- 2) When is it acceptable to use topographic features identified in the original GLO field notes to restore a corner or support a corner position?
- 3) When is evidence in the field of a marked line suitable to support a corner position?

A REVIEW OF IBLA 88-278

3) If the corner is to be considered lost, the method of single proportioning used by BLM is the correct way to establish the corner.

Boise Cascade Claims

Boise Cascade bases its request to overturn the 1982 BLM dependent resurvey's determination that the $\frac{1}{4}$ corner common to Sections 12 and 13 was lost, and not obliterated, based on the following claims:

1) The $\frac{1}{4}$ corner position held by Potter is supported by the topographic calls in the original GLO field notes.

2) The $\frac{1}{4}$ corner position held by Potter is supported by the testimony of two witnesses.

3) The $\frac{1}{4}$ corner position held by Potter is supported by other evidence, including 13 blazes and line markers.

"Filed survey maps in our GIS will be related to property corners, property corner monuments, and segment definitions of the linear boundary."

"Our filed survey map features will be created using existing parcel geometry. The filed survey map geometry will be digitized over the parcel features in the GIS. The attribute data will be entered by a GIS analyst using data shown on PDF copies of the actual filed survey maps. "

A REVIEW OF IBLA 88-278

BLM Claims

The BLM asserts the $\frac{1}{4}$ corner common to Sections 12 and 13 is lost, not obliterated, and that the dependent resurvey properly ignored Potter's position for the corner and reestablished it by single proportion. It bases its assertion on the following claims:

- 1) The topographic calls are not of definite features, and can't be reliably used to reestablish the $\frac{1}{4}$ corner position.
- 2) The testimony of the two witnesses is not reliable.
- 3) The blazes and marks set by private surveyors along the contested boundary line aren't reliable evidence of the original corner location.

Narrow Legal Questions

Here are the narrow legal questions raised in this case:

Sidebar: Answer to Broad Legal Questions

Let's briefly consider the answer to the broader legal questions raised in this dispute.

Question #1: What elements are required in witness testimony to make a corner obliterated instead of lost?

To establish a corner as obliterated your witness testimony needs to include direct observation of the original corner monument or an accessory to the corner. The IBLA states in this decision that: "Neither witness statement provides evidence of the actual location or existence of the original corner."

Witness testimony also needs to connect logically to the other information in the record, including maps and notes. In this case, the testimony of both witnesses lacked good connections to the record. The IBLA said in its decision:

A REVIEW OF IBLA 88-278

- 1) Can the $\frac{1}{4}$ section corner common to Sections 12 and 13 be established by reference to topographic calls in the original field notes?
- 2) Can the $\frac{1}{4}$ section corner be established by the witness testimony?
- 3) Can the evidence of marks on other surveys be used to support the position of the $\frac{1}{4}$ section corner common to Section 12 and 13 set on the Potter Survey?
- 4) Is the $\frac{1}{4}$ section corner lost or obliterated? If the corner is lost, was it properly reestablished by the BLM using the single proportionate method?

The IBLA's Decision

In this section we will review the IBLA's decision on the narrow legal questions raised in this dispute.

"The 'witness tree' reported by Roark is not mentioned in any other survey....Reay's evidence is problematic, assuming as it does that the monument set in 1899 had sometime before 1937 been perpetuated by a stake with a brass cap."

Based on the information in the IBLA decision, we see the witness tree Roark mentioned near the corner isn't adequately described to be identified as a tree called for as an original corner in the GLO field notes or shown on other surveys. The pipe and brass cap identified by Reay wasn't shown as being established in any of the survey records.

Question #2: When is it acceptable to use topographic features identified in the original GLO field notes to restore a corner or support a corner position?

This IBLA decision made it clear there are 3 ways to avoid the misuse of topographic calls to restore a corner (determine a corner is lost and not obliterated). These are:

A REVIEW OF IBLA 88-278

Question #1: Can the $\frac{1}{4}$ section corner common to Sections 12 and 13 be established by reference to topographic calls in the original field notes?

No.

In this particular case, the IBLA found the corner couldn't be restored based solely upon reference to the topographic calls in the original GLO field notes. This is because it found that:

1) The topo call for the ravine and the spur (or ridge) in the original field notes are not well defined features.

2) The topo call to the bank of the Payette river was well defined, but was subject to change and alteration. The direction of the river was shown on the original survey as southerly, but is now southwesterly. The location of the riverbank is also subject to change from frequent land-slides.

1) The use of topographic calls to determine a corner position must result in a position with a "definite locus in a small area".

2) The evidence related to the corner position shouldn't be "susceptible of more than one reasonable interpretation".

3) The calculated position of the corner shouldn't be contradicted by evidence of a higher class or by other topographic calls.

Question #3: When is evidence in the field of a marked line suitable to support a corner position?

This IBLA decision doesn't directly answer this question. However, we can infer the following from the decision:

1) If you are going to rely on a marked line to support a

A REVIEW OF IBLA 88-278

3) The other evidence offered by Boise Cascade was strong enough to supplement the topographic calls in the original field notes, and the topographic calls aren't enough on their own to restore the $\frac{1}{4}$ corner.

The IBLA plainly said: "Standing along, the topographic calls from the original survey provide little support for Potter's corner position."

Question #2: Can the $\frac{1}{4}$ section corner be established by the witness testimony?

No.

The IBLA finds major problems with the witness testimony regarding the corner location provided in this case. These problems include:

1) Neither witness had personally seen the original corner

corner position, you must understand the origin of the survey that set the marks.

2) The surveyor that set the marks needs to have executed a proper retracement survey.

It is clear from this case it is not acceptable to rely on marks from an improper retracement survey as evidence of your corner position.

A REVIEW OF IBLA 88-278

monument described in the GLO field notes.

2) The first witness claimed to have seen a bearing tree that served as an accessory to the original corner monument. However, he didn't describe the tree or its location. This missing information prevented its evaluation as a bearing tree to the original corner monument.

3) There is no record of the $\frac{1}{4}$ corner being replaced by a brass cap monument, which the second witness claimed to have seen at the location of the corner over the course of several years.

Question #3: Can the evidence of marks on other surveys be used to support the position of the $\frac{1}{4}$ section corner common to Section 12 and 13 set on the Potter Survey?

No.

Sidebar: The Surveys

There are five (5) surveys mentioned in this decision.

The Original GLO Survey

The Original GLO Survey covering Section 12 and 13 was performed in 1899 by Gradon just west of the Payette River.

The 1970 United States Forest Service

In 1970 Surveyor Ferguson sets the $\frac{1}{4}$ corner common to Sections 12 and 13 using the proportionate method. This places the $\frac{1}{4}$ corner 1.69 chains west of the record distance from the section corner common to Sections 11, 12, 13 and 14. We aren't told in the IBLA decision what type of search Ferguson made for the original monument.

The 1981 Private Resurvey By Surveyor Potter

In 1981 Surveyor Potter establishes the $\frac{1}{4}$ corner common to Sections 12 and 13 using the record distance from the

A REVIEW OF IBLA 88-278

The IBLA finds the marks have no relation in the record to the original survey, and aren't from a reliable retracement survey. It finds no evidence presented by Boise Cascade to refute the BLM's claim that the marks were set in error by John Fry during his survey. (BLM asserts that Fry actually started his survey at the $\frac{1}{4}$ corner set by the Forest Service, not the Potter corner. They also assert the marks he set in his survey were along an erroneous line that was supposed to be the north/south $\frac{1}{4}$ section line of Section 13.)

A Review of the Court's Decision

I have mixed feelings about the IBLA decision in this case. (Most of this unease comes from the lack of information in the actual IBLA decision. See the sidebar on unanswered questions for more information.)

On the one hand, I believe that it was a mistake for Potter to ignore the corner set using the proportionate method by the

section corner common to Sections 11, 12, 13 and 14. The IBLA decision doesn't tell us if Potter found any evidence of the original $\frac{1}{4}$ corner monument or the $\frac{1}{4}$ corner monument set by the US Forest Service.

The 1982 BLM Dependent Resurvey

A dependent resurvey is performed by BLM Surveyor Thompson. Surveyor Thompson determines the $\frac{1}{4}$ section corner common to Sections 12 and 13 is lost. He resets it in the vicinity of the US Forest Service corner using the single proportionate method. The IBLA decision doesn't indicate if Thompson found Potter's corner, the US Forest Service corner, or how thoroughly he looked for evidence of the original $\frac{1}{4}$ corner monument. It also doesn't indicate what evaluation of topographic calls Thompson made before restoring the $\frac{1}{4}$ corner using the single proportionate method.

A REVIEW OF IBLA 88-278

Forest Service before he arrived on the scene. This Forest Service monument was already established, and it fit reasonably well with the topographic calls in the original GLO field notes. It had also been in place for over a decade. I've spent a lot of time in steep mountain country, so I also agree with the BLM and Forest Service that land slides could have changed the course of the Payette River. The witness testimony given to support the Potter corner was also weak.

On the other hand, I find the BLM's argument that the topographic calls in this case are insufficient to pin down the corner location weak. In steep mountains, the same terrain that will cause land slides to alter the course of a river will restrict the changes to the bed of a small creek or limit the wandering of a trail route. If, I've done my math correctly, it also seems the BLM corner ends up on the wrong side of the topographic call for the trail. It seems like these topographic calls deserved further discussion in the IBLA decision.

The Fry Survey

John Fry made a private survey in Section 13 in which he tried to establish the north-south $\frac{1}{4}$ section line of the section. He started his survey at the $\frac{1}{4}$ corner monument set in the 1970 US Forest Service Survey, but made a mistake in his survey and ran south on an incorrect bearing. The blazes and marks he set on this incorrect line were used by Boise Cascade to support the $\frac{1}{4}$ corner location set by Potter.

A REVIEW OF IBLA 88-278

In the end, I'd side with the IBLA in this case. This isn't because I like the restoration of this corner by single proportion. Nor is it because I don't give the topographic calls in the original GLO notes heavy weight. It is because Potter chose to upend the existing boundary resolution in these two sections, when an official government corner monument had been in place for a decade and fit the topography reasonably well. This seems like bad surveying practice. If Potter didn't have some very compelling evidence omitted from the IBLA decision that provided the corner set by the Forest Service in 1970 was grossly in error, I think he made a bad call. (1.69 chains of difference between corners isn't a gross error in steep mountain country.)