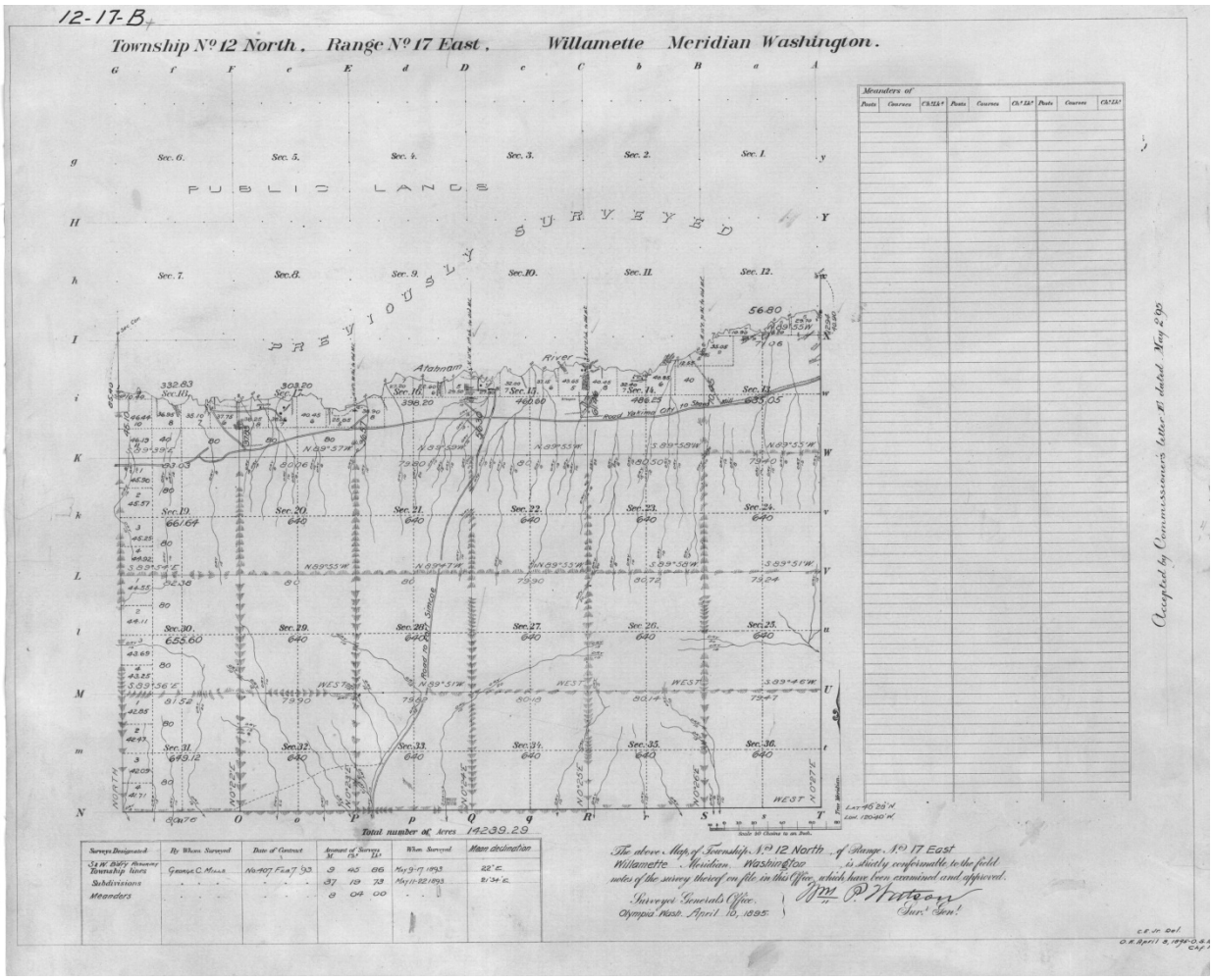
Charles and Sharon Vetsch
Brad and Kelli Vetsch
180 IBLA 82

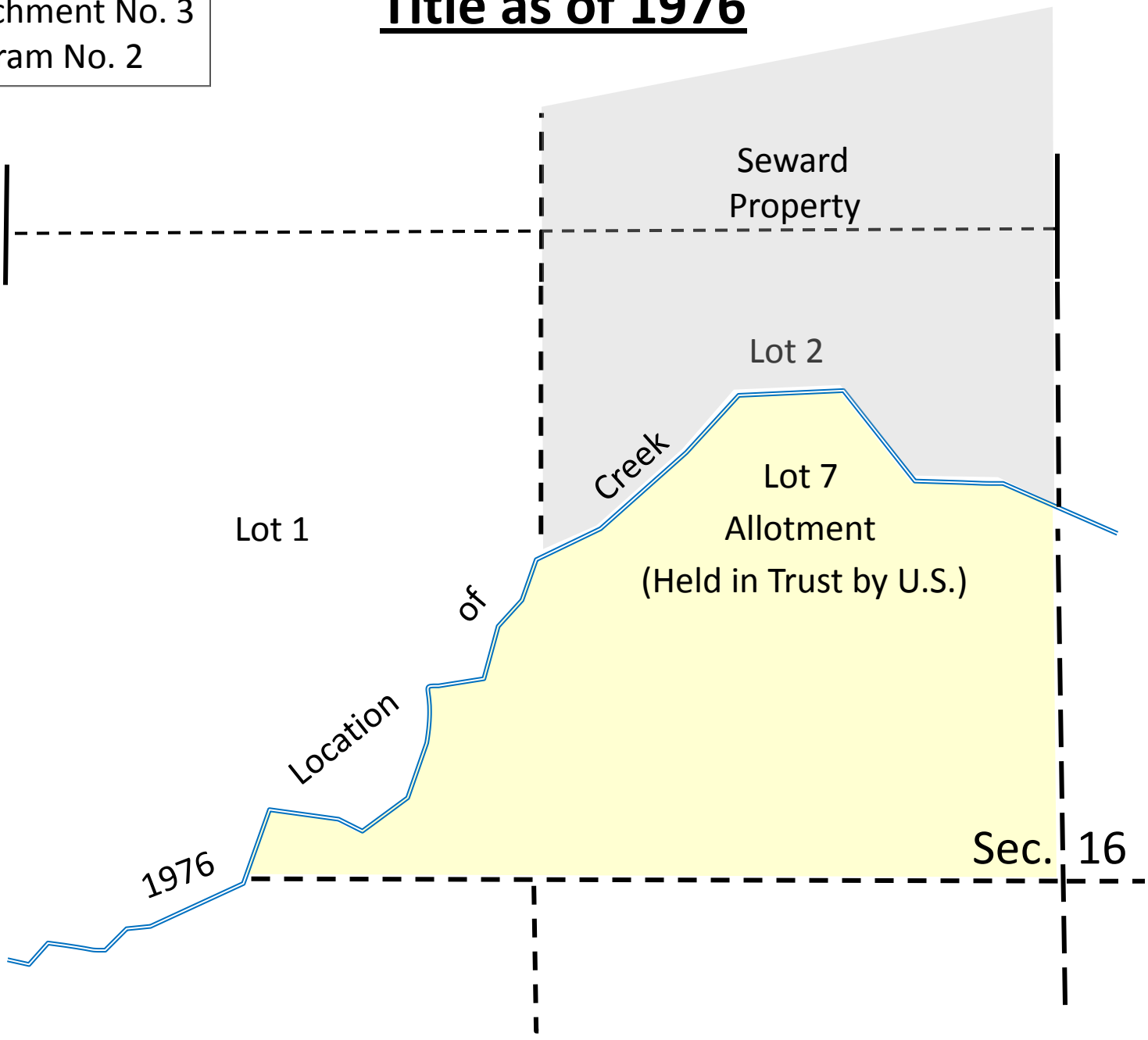
This case involves the north boundary of the Yakama Indian Reservation in Washington State. The boundary is defined in the 1855 Treaty as "thence westerly along said Attah-nam River to the forks". The Attah-nam River is now named Ahtanum Creek. Both banks of the creek were meandered in the original surveys. In 1976 (1976-87 survey) an investigation and survey identified several avulsions along the creek, but in this area creek movement was determined to be due to erosion and accretion. An informative traverse of both banks was surveyed and reported in the field notes of the 1976-87 survey. Subsequent to the 1976-87 survey the land owner to the north of the creek moved the creek southerly and claimed the land between the old channel and the new, manmade channel. The dispute centers on ownership of the land between the two channels and the location of the boundary of the Reservation. This case has a good discussion of what constitutes "positive evidence" of an avulsion.




Location 1
Section 16 T12N., R17W
2002 Photo
Original Govt. Lot 2
PRIVATE LAND
LOT 4
LOT 3
LOT 2
YAKAMA INDIAN RESERVATION
Original Govt. Lot 7
1976-87 Informative Traverses
file: 2002 exhibit1A.mxd

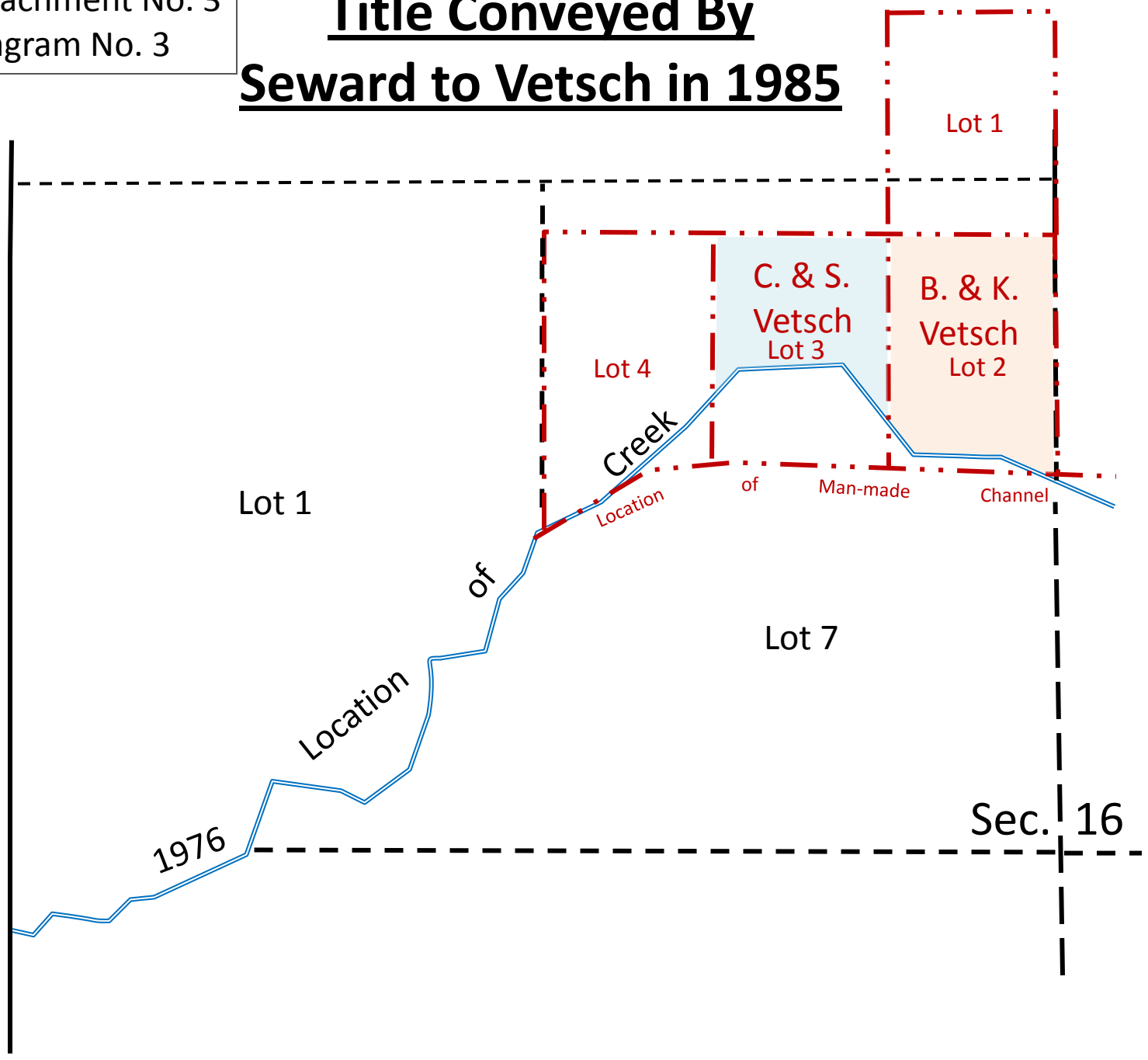
Attachment No. 3
Diagram No. 2

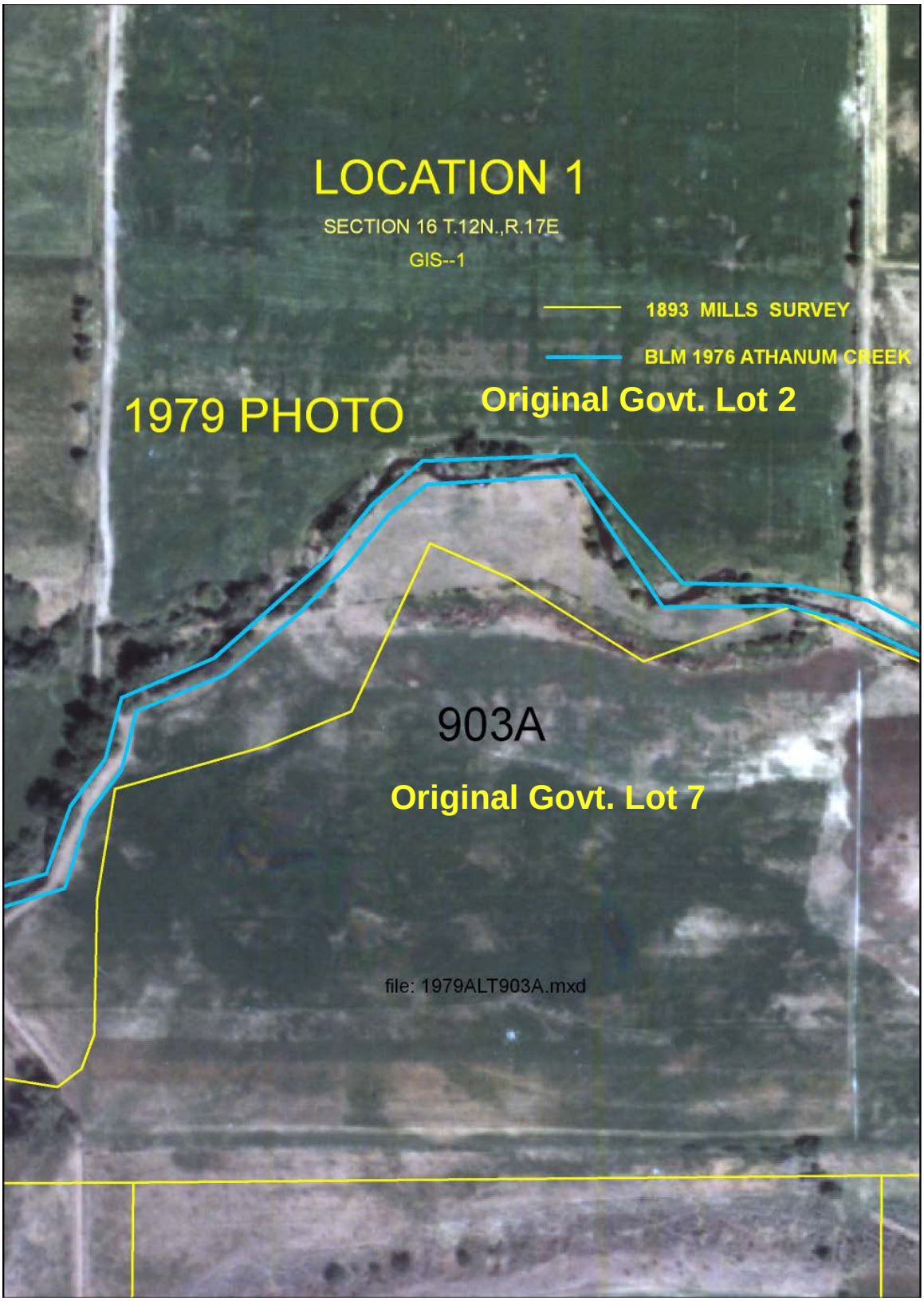
Title as of 1976



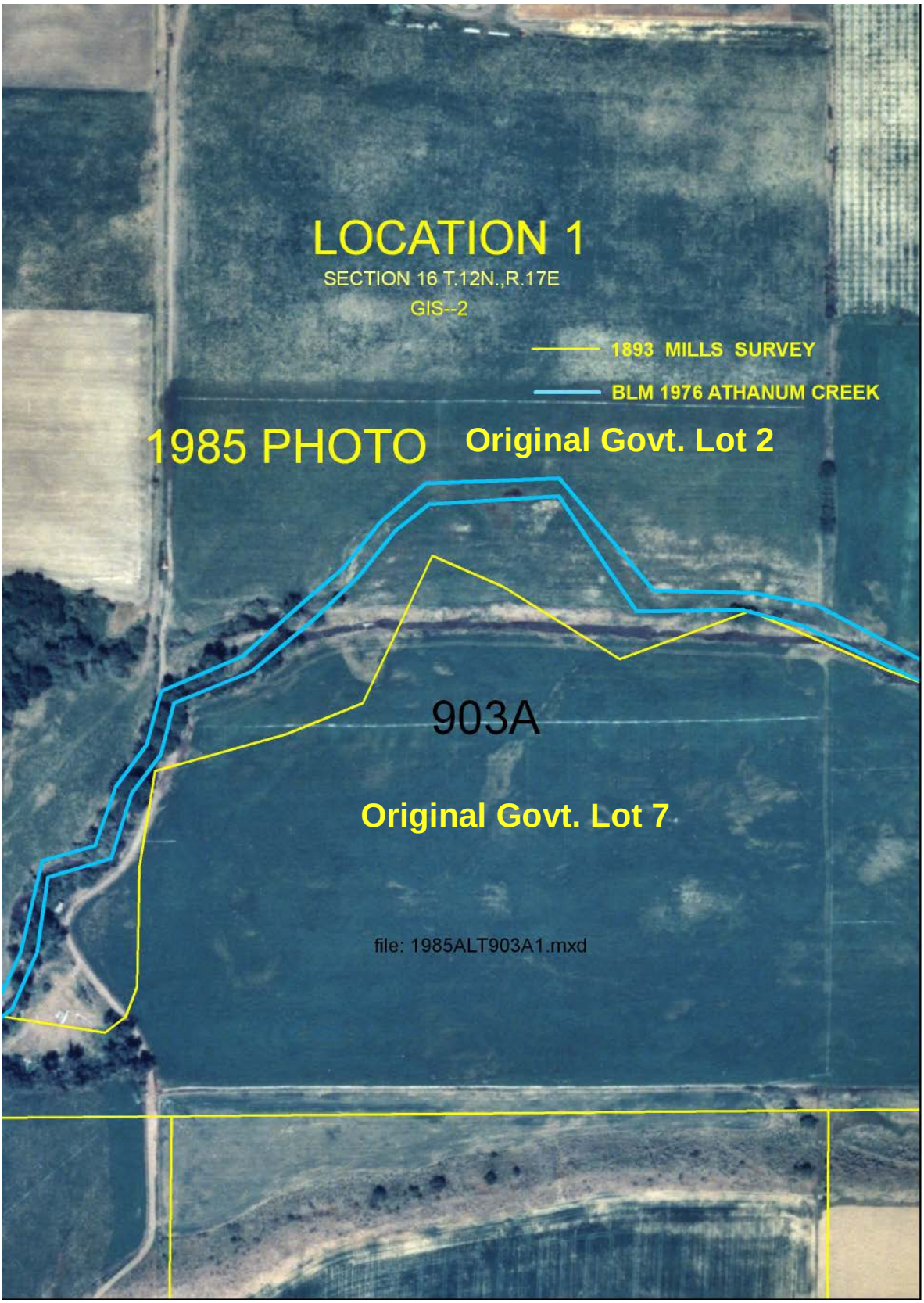
Attachment No. 3
Diagram No. 3

Title Conveyed By Seward to Vetsch in 1985




LOCATION 1
SECTION 16 T.12N.,R.17E
GIS--1
1893 MILLS SURVEY
BLM 1976 ATHANUM CREEK
1979 PHOTO
Original Govt. Lot 2
903A
Original Govt. Lot 7
file: 1979ALT903A.mxd


LOCATION 1
SECTION 16 T.12N.,R.17E
SOURCE PHOTO
1985 PHOTO
Original Govt. Lot 2
Original Govt. Lot 7


LOCATION 1
SECTION 16 T.12N.,R.17E
GIS--2
1893 MILLS SURVEY
BLM 1976 ATHANUM CREEK
1985 PHOTO
Original Govt. Lot 2
903A
Original Govt. Lot 7
file: 1985ALT903A1.mxd

CHARLES AND SHARON VETSCH

180 IBLA 82 Decided: September 24, 2010

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CHARLES AND SHARON VETSCH
BRAD AND KELLI VETSCH

IBLA 2010-72 Decided: September 24, 2010

Appeal of a decision by the State Director, Oregon State Office, Bureau of Land Management, dismissing a protest to the acceptance of a corrective dependent resurvey, a dependent resurvey, and a metes and bounds survey of the fixed and limiting boundaries for a portion of the Yakama Indian Reservation. Group No. 591, Washington.

Affirmed.

1. Avulsion--Survey of Public Lands: Generally

The *Manual of Instructions for the Survey of the Public Lands of the United States 1973* requires "positive evidence" of avulsion, which must be direct, affirmative, and definite but does not include circumstantial evidence, conjecture, or indirect evidence if susceptible to differing interpretations. Aerial photographs and similar evidence of channel location are positive evidence of avulsion if they show changes over a relatively short period of time that are inconsistent with erosion and accretion.

2. Surveys of Public Lands: Generally

A landowner's bona fide belief concerning the boundary between his lands and public lands is not necessarily the same as a bona fide right that must be protected in a survey under 43 U.S.C. § 772 (2006). A belief based on a deed that relied on an unofficial survey, not evidence of the original survey, does not constitute a bona fide right under Federal law.

APPEARANCES: J. Jay Carroll, Esq., Yakima, Washington for appellants; Mary J. M. Hartel, Chief Cadastral Surveyor of Washington, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Charles and Sharon Vetsch and Brad and Kelli Vetsch have appealed a December 15, 2009, decision by the State Director of the Oregon State Office, Bureau of Land Management (BLM), dismissing their protest of a proposed decision to accept a corrective dependent resurvey, a dependent resurvey, and a metes and bounds survey of the fixed and limiting boundaries for a portion of the Yakama Indian Reservation that was executed by John D. McCauley, Cadastral Surveyor, under Group 591, Washington (Decision). Their protest specifically challenged the metes and bounds survey, which was based on a proposed finding that the northern boundary of the Yakama Indian Reservation in section 16, T. 12 N., R. 17 E., Willamette Meridian, Yakima County, Washington,[1] is defined by the position of Ahtanum Creek before it avulsively moved to its present location in the N½ SW¼ NW¼ of that section. For the reasons discussed below, we affirm BLM's decision.[2]

BACKGROUND

The June 9, 1855, treaty between the United States and various confederated tribes and bands of Indians, denoted as the Yakama Nation, reserved to them lands from "the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains." Treaty with the Yakama (1855 Treaty), 12 Stat. 951, 952 (1863). Thus, the Attah-nam River, now named Ahtanum Creek and sometimes referred to as Athanum Creek, defined the northern boundary of the Yakama Reservation, which was to "be set apart and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated Tribes and bands of Indians." *Id.*

Over the years, a number of surveys were made of the township's subdivision lines and the meanders of both the north and south banks of Ahtanum Creek. Deputy Surveyor Jesse Richardson meandered the left (north) bank in 1867, and Deputy Surveyor George C. Mills meandered the right (south) bank in 1893. BLM

[1] All sections references used herein are to this township.

[2] The record on appeal includes a series of attachments submitted with BLM's Answer, hereinafter referred to as "BLM Attachment X." BLM Attachment 5 is a looseleaf notebook containing a report by McCauley entitled "Investigation of Changes in the location of the Main Channel of Ahtanum Creek Across Sections 15 and 16 of T. 12N., R. 17E., Willamette Meridian, Washington" (McCauley Report), and 71 tabbed documents (hereinafter, "BLM Tab Y"): Tabs 1-4 are the report's appendices; Tabs 5-44 appear to have been compiled when preparing that report; and Tabs 45-71 postdate the McCauley Report.

Attachments 6 (Richardson), 7 (Mills). Various sections were later surveyed and subdivided by Indian Allotting Agents, but the only remaining records of their surveys are township diagrams. *See* BLM Tab 1 at 11. More recently, Cadastral Surveyors Ronald W. Scherler and Thomas E. Caster conducted a dependent resurvey in 1976 that included adjusted record meanders of the right bank of Ahtanum Creek and an informative traverse of both its left and right banks in sections 12 through 18.

The Department's Office of the Special Trustee (OST) later received information suggesting that Ahtanum Creek may have avulsively moved sometime after the Scherler survey, which precipitated a request by the Superintendent, Yakima Agency, Bureau of Indian Affairs (BIA), for an investigation. *See* BLM memoranda dated May 4, 2006, and Aug. 26, 2005; e-mail to OST on August 24, 2004. By memorandum dated November 2, 2005, BLM directed McCauley to investigate "the movement of Ahtanum Creek through sections 15 and 16" by reviewing aerial photographs, historic maps, and other records and by interviewing affected parties to determine the "method of the creek[']s movement." BLM Tab 45. McCauley completed his investigation by issuing a report on March 22, 2006, which determined that avulsive changes had occurred at three locations and recommended that an official survey be conducted "to locate and document the avulsive changes" and to monument the "Fixed and Limiting Boundary" of the Yakama Indian Reservation. McCauley Report at 9.

BIA requested the resurvey recommended by McCauley, which BLM responded to by issuing Special Instructions (Group 591) on September 22, 2006. *See* BLM Tabs 46, 69; McCauley Report at 9. These instructions were for a dependent resurvey of subdivision lines, retracing adjusted record meanders on the right bank of Ahtanum Creek through sections 15 and 16, an information traverse of its left and right banks, and a metes-and-bounds survey of the fixed and limiting boundary of the Yakama Indian Reservation in sections 15 and 16. BLM Tab 46. This work was assigned to McCauley. *See* BLM Tab 47.

During the course of that resurvey, McCauley reported he had "recovered original corners and corners established by the United States Indian Allotting Service in the vicinity of the corner of sections 15, 16, 21, and 22" and that Scherler had "erroneously accepted" that corner on the April 1, 1994, official plat of survey. BLM Tab 48. BLM suspended that plat and then issued Supplemental Special Instructions on July 11, 2007, to include as part of Group 591 a corrective dependent resurvey of the line between sections 15 and 16, a survey of new meanders of the right bank of Ahtanum Creek through sections 15 and 16, and a resurvey of all necessary control lines. BLM Tabs 48, 49.

After McCauley completed his work, BLM sent copies of his field notes and plat to Appellants and their attorney and published a notice in the *Federal Register* stating that this plat would be officially filed in 30 days. 74 Fed. Reg. 53294 (Oct. 16, 2009). Appellants' attorney responded by letter dated November 19, 2009, stating:

> As I tell my kids all the time, it is what it is. The creek is where it is. The Treaty with the Yakama Nation defines the boundary of the Reservation as Ahtanum Creek. The Treaty does not fix that boundary at the time of the signing of the Treaty. The BLM does not have the right to re-create what it thinks the boundary should be. The boundary is Ahtanum Creek, where it might be. If you have some sort of evidence that Ahtanum Creek has been artificially manipulated, my clients would love to hear it. My clients certainly engaged in no such endeavor. They purchased this property with the knowledge and understanding that the creek was the boundary of the property that they were purchasing.
>
> If the BLM is intending to use this survey to "establish" the boundaries of the Yakama nation as of the date of the survey, such an attempt is both legally and factually insufficient. My clients object.

BLM treated this letter as a protest that raised three issues: the location of the Reservation's boundary; BLM's authority to survey and define that boundary; and the sufficiency of the record facts relied upon by BLM. *See* Decision at 1-2.[3]

The State Director responded to each identified issue as follows:

- While BLM agreed the 1855 Treaty did not fix the Reservation boundary along Ahtanum Creek where it was then located, it disagreed with the assertion that this meant the boundary was wherever the creek is:

  > [I]t is not necessarily true that "The creek is where it is." When a stream moves due to an avulsive act,[4] the law addresses how

[3] BLM enclosed copies of the McCauley Report, a BIA memorandum dated March 25, 1987 (BIA Memorandum), and aerial photographs with its decision.

[4] The *Manual of Instructions for the Survey of the Public Lands of the United States 1973* (*Survey Manual*), § 7-71, at 172 states: "'Avulsion' is the sudden and rapid change of channel of a boundary stream, or a comparable change in some other body of water forming a boundary, by which an area of land is cut off." *See also Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912), and cases cited. Washington (continued...)

> the change will affect boundaries. "It is equally well settled, that where a stream, which is a boundary, from any cause, suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.'" *State of Nebraska v. State of Iowa,* 143 U.S. 359[, 361 (1892)].

Decision at 1

- The State Director responded to counsel's claim that BLM "does not have the right to re-create what it thinks the boundary should be," by stating that 25 U.S.C. § 176 (2006) grants BLM "full legal authority to survey or resurvey the boundaries of Indian lands" and that this survey was conducted in accordance with the *Survey Manual*, Special Instructions, and Supplemental Special Instructions.[5] Decision at 2.

- As to the sufficiency of the record, the Director averred that the proposed decision is "clearly" supported by aerial photos showing "the creek moved

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[4] (...continued)
courts have long followed a virtually identical rule:

> [W]hen a stream, which is a boundary, from any cause suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank, the boundary does not change with [the] changed course of the stream, but remains as it was before. This sudden and rapid change is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual and perceptible only after a lapse of time.

Harper v. Holston, 119 Wash. 436, 441, 205 P. 1062, 1064 (1922); *see Rose v. Riedinger*, 13 Wash. App. 222, 534 P.2d 146, 150 (1975); *Parker v. Farrell*, 74 Wash. 2d 553, 445 P.2d 620, 622 (1968); *Hirt v. Entus*, 37 Wash. 2d 418, 422, 224 P.2d 620, 623-24 (1950). Avulsion can result from natural forces or can be caused by artificial or man-made endeavors. *See e.g., State of Arkansas v. State of Tennessee*, 246 U.S. 158, 173 (1918); *Palo Verde Valley Color of Title Claims*, 72 I.D. 409, 411 (1965).

[5] 25 U.S.C. § 176 (2006) provides: "Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."

> from its natural channel to a new channel between 1979 and 1985." Decision at 2.[6] He added that BIA documents "provide positive evidence that the change was the result of the water being diverted into a man-made channel," and that while a 1985 survey by a registered surveyor, Douglas S. Gray, erroneously located the Vetches' boundary along that man-made channel, it appears they "had no part in diverting the creek from its natural bed to the man-made channel; they simply bought the land based on the Gray survey." *Id.*

The decision then concludes: "The facts prove that a man-made avulsion did take place, the avulsion does not change the boundary, and our survey has properly located the northerly boundary of the Reservation and the Indian lands." Decision at 2. The Vetsches timely filed their notice of appeal and statement of reasons (SOR).

To clarify who, why, and what is at issue, we note BIA records show Orville Seward leased Allotment 903A (Government Lot 7) between 1972 and 1987, which was "immediately south and across the Creek from property owned by Mr. Seward," and that Gray's 1985 survey was executed for Seward. McCauley Report at 3, 4; see BLM Tabs 29-31. Gordon E. Bueling, BIA Agricultural Engineer, described the Gray survey in a memorandum dated February 21, 1990, as subdividing "Government Lots 1 and 2 north of the Creek into 4 new Lots," with Lots 2, 3, and 4 using "the relocated channel as their south boundary." McCauley Report at 4; *see* BLM Tab 33. McCauley reported that Seward was named by BIA "as the person having altered the creek[']s location." McCauley Report at 4 (citing the BIA and Bueling Memoranda). Bradley Vetsch thereafter acquired Lot 2 from Seward by warranty deed, which he reconveyed to himself and his wife, Kelli, on November 15, 1994; Charles and Sharon Vetsch acquired Lot 3 from Seward by warranty deed dated April 7, 2005. BLM Tabs 36, 37, 41. Thus, if the southern boundary of their lots is the new location of Ahtanum Creek, the Vetches would retain roughly 5.5 acres of what had been part of Allotment 903A; but if it is bounded by the location of the creek before it moved, they will lose acreage they thought they acquired from Seward. *See* SOR at 3.

DISCUSSION

A party challenging the proposed filing of a plat on resurvey has the burden of demonstrating by a preponderance of the evidence that the resurvey is not an

[6] The Director explained: "[T]he 1985 photograph clearly shows both the man-made channel and the abandoned channel. Notice that the man-made channel is straight for approximately 1000 feet while the natural channel in the 1985 photograph and along the rest of the creek is a series of S-shaped curves. These S-shaped curves are what you would normally expect to see with this size stream, soil type, and gradient." Decision at 1-2.

accurate retracement and reestablishment of the lines of the original survey. *Howard Vagneur*, 159 IBLA 272, 278 (2003); *Mark Einsele*, 147 IBLA 1, 11 (1998); *Rodney Courville*, 143 IBLA 156, 163 (1998), and cases cited. An appellant may meet this burden by showing, *inter alia*, that the resurvey was not executed in conformity with the *Survey Manual*. *See, e.g.*, *James R. and Charlene K. Hasenyager*, 176 IBLA 252 (2008). The Vetsches do not dispute the manner in which McCauley executed this resurvey, but challenge the metes and bounds survey of the fixed and limiting boundary of the Yakama Indian Reservation in section 16, which is based on BLM's finding that the Ahtanum Creek avulsively moved between 1976 and 1985 and its resulting determination that the Reservation boundary remained where it had been before that avulsion occurred. They raise three principal issues on appeal: whether the record supports BLM's finding of an avulsive change; whether such a finding on resurvey can affect their bona fide rights under Federal law; and whether an equitable exception to the avulsion rule under State law applies to this case. Each is discussed separately below.

I. The Record Supports BLM's Finding of an Avulsive Change

Appellants contend "there is no evidence" of avulsive change, claiming that merely because "the course of the creek may have changed between 1976 and 1985 does not, without more, make for an avulsion." SOR at 6. The *Survey Manual,* § 7-73, at 172 unequivocally states: "An avulsive change cannot be assumed to have occurred without positive evidence. When no such showing can be made, it must be presumed that the changes have been caused by gradual erosion and accretion." In *Quinton Douglas*, 166 IBLA 257, 264 (2005), a case that also involved boundaries under the 1855 Treaty, we interpreted and applied the "positive evidence" requirement by stating: "Such evidence must be direct, affirmative, and definite, such as eyewitness testimony that an event occurred, and does not include circumstantial evidence, conjecture, or indirect evidence subject to different interpretations." We necessarily apply that same standard here.

[1] BLM contends the aerial photographs between 1939 and 1979 show the creek "in essentially the same location" and that the 1985 photos "show the remains of the natural channel and the creek flowing in the man-made channel," a lack of vegetation along the new channel indicating it "had not been in this location very long," and that the land between the old and new channel is substantially unchanged. Answer at 6. While aerial photographs are circumstantial evidence of what occurred, they are "positive evidence" of avulsion if not susceptible to a different interpretation, as by depicting changes that could have been caused by gradual erosion and accretion. *See Quinton Douglas*, 166 IBLA at 264-65. The appearance of lands immediately south of Ahtanum Creek in 1979, their appearance after the creek was relocated into a new, straight channel, as depicted by 1985 aerial photos, and the relative short period that elapsed between those snapshots in time belie any

suggestion that this new channel was the result of erosion and accretion. *Compare* BLM Attachment 10A, 10B (1979 photos) *with* BLM Attachment 12A, 12B, 12C (1985 photos). Since Appellants proffer no evidence to the contrary or a different interpretation of these photos, we find they are positive evidence of avulsion and, therefore, affirm BLM's determination that an avulsive change occurred between 1979 and 1985.[7]

II. Appellants' Bona Fide Rights Under the 1909 Act Were Unaffected by this Dependent Resurvey.

Appellants' contend their rights were adversely affected on resurvey and that they may have a takings claim if the Reservation boundary along Ahtanum Creek is accepted because it would reduce the acreage they thought they owned. SOR at 4-5 (quoting *Mannatt v. Unites States*, 48 Fed. Cl. 148 (2000)). Although the Federal Courts have authority to adjudicate takings claims, this Board does not. We review Departmental decisions and determine the rights of appellants to the property at issue, a necessary prerequisite to their seeking relief or compensation elsewhere. *See Maurice Tanner*, 141 IBLA 373, 384 (1997); *Mannatt v. Unites States*, 48 Fed. Cl. at 152, 155-56; *see also United States v. Freeman*, 179 IBLA 341, 343 (2010) (on remand to determine the validity of a mining claim before the Court of Claims could adjudicate whether there was a taking of that claim). Our review in this case is of BLM's decision to accept the McCauley resurvey and whether that resurvey properly determined that an avulsive change occurred or otherwise impaired the Vetsches' bona fide rights under the Act of March 3, 1909, 35 Stat. 845 (1909 Act), 43 U.S.C. § 772 (2006). Having concluded that an avulsion occurred, *see* discussion, *supra*, we now turn to the Vetches' claimed impairment of their bona fide rights under the 1909 Act.

The 1909 Act authorizes the Department to execute resurveys of the public lands, but since Congress recognized they could result in new boundaries affecting the rights of those then occupying the land, it acted to protect them by specifying that no resurvey "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."

35 Stat. 845; 43 U.S.C. § 772 (2006). The Department's view on what are bona fide rights and how they would be protected was first articulated in the *Manual of Instructions for the Survey of the Public Lands of the United States*, Chap. VI

[7] Although BLM found this avulsion was man-made, appellants do not challenge that finding and recognize that the evidence considered by McCauley showed "the course of the Ahtanum creek was altered by the lessee of Indian property." SOR at 8. They speculate that Seward may have done so to more easily irrigate the lands he controlled and contend that they had nothing to do with those stream alterations. *Id.* BLM does not dispute or disagree with their position on appeal. *See* Answer at 8.

at 279-310, June 14, 1930, and has remained largely unchanged since.

[2] Bona fide rights are those arising out of good faith location at the time of patent or entry or good faith occupation based on evidence of the original survey (*e.g.*, its corner monuments). *See Survey Manual*, §§ 6-12 to 6-16, at 147-48. Directly applicable to this case is our recent decision in *Tracy V. Rylee*, 174 IBLA 239 (2008), wherein we held:

> A landowner's bona fide *belief* concerning the boundary between his land and public land is not the same as a bona fide *right* that must be protected in a survey under 43 U.S.C. § 772 (2000). Although a person may have a bona fide *belief*, based on an understanding with a predecessor-in-interest that a fence marks a boundary, a bona fide *right* within the meaning of 43 U.S.C. § 772 (2000) is based on good faith reliance on evidence of the original survey. *See Longview Fibre Co.*, 135 IBLA [170,] 183-84 [(1996)]; *see also United States v. Reimann*, 504 F.2d 135, 139-40 (10th Cir. 1974). The Rylees' bona fide *belief* that the fence, barn, and diversion dam are on their property is simply not a bona fide *right*. *See Robert W. Delzell*, 158 IBLA [238,] 258-59 [(2003)].

174 IBLA at 251. While the Vetsches believe they acquired the lands surveyed by Gray in 1985, as later described in their deeds from Seward, Gray's survey was not an official survey that is binding on the Department and there is no suggestion in this record that he or they relied on any evidence of the original survey. To the contrary, it appears Gray was not required to and did not then consider any official surveys in preparing his 1985 plat. These circumstances simply do not give rise to any cognizable bona fide rights under the 1909 Act. Whatever rights and recourse they may have under state law are for an appropriate court to decide, not this Board. *See also* discussion, *infra*.

III. The Equitable Exception to the Avulsion Doctrine Claimed by Appellants under State Law Does Not Apply in this Case.

Appellants' final claim is that under *Strom v. Sheldon*, 527 P.2d 1382, 12 Wash. App. 66 (1975) (*Strom*), an equitable exception to the avulsion doctrine exists under State law that should be applied in this case. SOR at 6-8. *Strom* does not represent a radical departure from well-settled law on what constitutes an avulsion, *see* n.4, *supra*, but a judicial response to avoid an inequitable result under the unique

facts of that case. Regardless of its possible applicability as a matter of State law, *Strom* simply does not apply under the circumstances of this case.[8]

The Stroms sued to quiet title in lands on their side of a nonnavigable boundary stream. Although the defendants' predecessor-in-title had moved that stream in 1954, they claimed the land between the stream's former and current location was theirs under the avulsion rule and denied the Stroms access to those lands and that stream. Applying the rule of avulsion, the trial court quieted title in the defendants, which deprived the Stroms of any access to the stream. The Court of Appeals identified the question presented as whether a property owner can claim the protection of the avulsion rule after moving a nonnavigable boundary stream onto his property by artificial means. 527 P.2d at 1383. Finding legal support for the proposition that "a person may not induce an artificial change in water boundaries, and then claim for himself whatever advantage that change has produced," the appellate court answered its own question in the negative. 527 P.2d at 1386. It then reversed the trial court because "it was defendants' predecessor himself who caused the shift in the course of [the boundary stream]" and it would be inequitable to deny the Stroms their riparian rights to that stream under a strict application of the avulsion rule to the facts of that case. *Id.*

We do not question the Vetches' good faith belief that they acquired and paid fair market value for the 5.5 acres here at issue, and recognize their continued access to water and the Ahtanum Creek could be affected by locating the Reservation boundary where the creek was before it was moved.[9] For *Strom's* equitable exception

[8] Federal law controls whether Indian lands were affected by accretion or an avulsion, but State law may be "borrowed as the federal rule of decision" so long as doing so would not frustrate or adversely affect federal policy, functions, or interests. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979). It is less than clear whether *Strom* establishes a substantive rule of decision that could be borrowed and become Federal law in Washington, or is simply a judicial response to reach an equitable result under the facts of that case. We need not resolve that question because we find *Strom* dissimilar from the facts and circumstances here presented and it appears, if anything, to augur against the position advanced and relief sought by the Vetches. *See* discussion, *infra*.

[9] We express no opinion on whether and to what extent the Vetches' water and access rights, if any, have been affected because such issues are for the courts to decide under applicable State law and precedent. We also note the record suggests that their predecessor-in-title, Seward, was directed to relocate the creek to its former location but no action was then taken. To the extent the parties may agree to do so now, the Vetches' concerns could be addressed without resorting to potentially

(continued...)

to apply, there must be evidence that the party (or his predecessor-in-title) who would otherwise benefit under the avulsion rule precipitated or caused that avulsive event. A case comparable to *Strom* would be here presented if the allotment lessor were responsible for moving Ahtanum Creek and then denied access to Seward and/or the Vetches, but such is not this case. Rather, the Vetches seek to benefit from the actions of others (presumably Seward), to the disadvantage of a lessor that has taken no such action,[10] a circumstance apparently precluded under the equitable considerations identified in *Strom*. Thus, even if *Strom* established a substantive rule of decision that could be borrowed as Federal law, we are unpersuaded that its equitable exception applies under the facts and circumstances here presented.

In sum, we affirm's BLM's finding that there was an avulsive change to Ahtanum Creek and its conclusion that the Reservation boundary along that creek is where it was located before that change occurred. We find no evidence in the record that the Vetches' bona fide rights under the 1909 Act were impaired on resurvey or that an equitable exception to the avulsion rule applies or should apply in this case. To the extent the parties have made other arguments that have not been expressly discussed herein, they have been considered and rejected as without basis in law or fact.

[9] (...continued)
protracted and expensive litigation.

[10] Seward (and the Vetches) would not gain, and the Reservation would not lose any acreage under the avulsion rule; but if the accretion rule applied under the *Strom* "exception," Seward and his successors-in-title would benefit by the Reservation then losing the 5.5 acres between the current and former channel of Ahtanum Creek. We need not speculate on what a state court could or might do, as it suffices for our purposes to conclude that neither the facts of this case nor *Strom* suggest, let alone require, that an equitable exception to the avulsion rule be here recognized for the benefit of the Vetches.

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 December 15, 2009, decision by the State Director, Oregon State Office, is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Bruce R. Harris
Deputy Chief Administrative Judge