

Robert W. Delzell

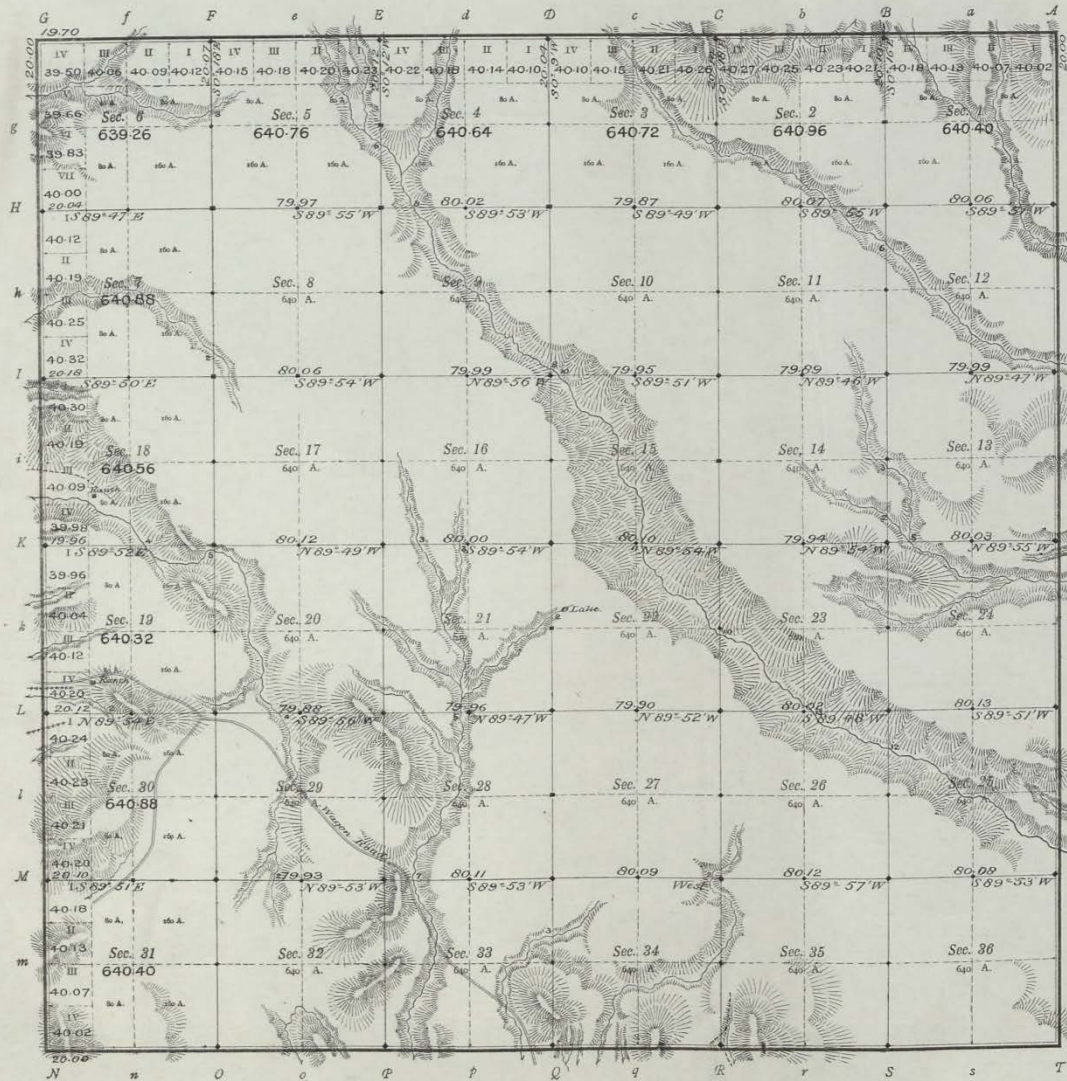
Betty Simpson

**158 IBLA 238**

This case has a good discussion of evidence evaluation and the difference between an obliterated corner and a lost corner. It demonstrates the importance of thoroughly documenting decisions in the record. Notice that each argument presented by Mr. Delzell was refuted by evidence found in the existing record. BLM's record shows that the field surveyor conducted a very systematic evaluation of the evidence at the subject corner including: 1) a careful examination of the purported corner stone; 2) evaluation of the original topographic calls; 3) interviews with local land owners; 4) interviews with local surveyors; 5) interviews with other witnesses and 6) examination of previous local surveys.

This case also provides some insight into the Board's interpretation of the judicial function of a surveyor, 1973 Manual, Sec. 5-13.

# Township No. 35 North, Range No. 5 West of the New Mexico Principal Meridian.



COST OF SURVEY.		SPECIAL DEPOSITORS	
\$	cts.	\$	cts.
Survey	600.14	M. E. Carran	600.00
Office work	25.00	(Office work)	25.00
		Not deposited	14
	625.14		625.14

All lines charged for at augmented rate

Variation 14° East.

Total Number of Acres, 23045.78

STATES DESIGNATED.	BY WHOM SURVEYED.	DATE OF CONTRACT.	AMOUNT OF SURVEY.			WHEN SURVEYED.
			N.	CH.	LN.	
STANDARD LINES.						
TOWNSHIP LINES.						
SEC. DIVISION LINES.	Gardner & Cleghorn	July 23 <sup>rd</sup> 1880	60	1	16	June 4-13 1882
CLAIMS.						
W. ESTABLISHED.						

Scale 40 Chains to an Inch.  
 The above Map of Township No. 35 North of Range No. 5 West of the New Mexico Principal Meridian, in Colorado, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

SURVEYOR GENERAL'S OFFICE,  
 Denver, Colo., May 29th 1883.

*W. H. Malcom*  
 Surveyor General of Colorado.

# TOWNSHIP 35 NORTH, RANGE 5 WEST, OF THE NEW MEXICO PRINCIPAL MERIDIAN, COLORADO.

## DEPENDENT RESURVEY AND SUBDIVISION OF SECTIONS

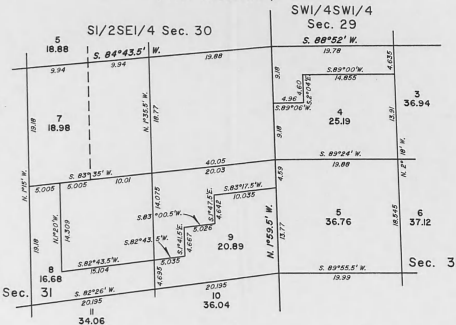
A history of surveys is contained in the field notes.

This plat represents the dependent resurvey of a portion of the south boundary and subdivisional lines designed to restore the corners in their true original locations according to the best available evidence, and the survey of the subdivision of certain sections, T. 35 N., R. 5 W., New Mexico Principal Meridian, Colorado.

Except as indicated hereon, the lottings and areas are as shown on the plat approved May 29, 1883, and Supplemental Plat accepted April 13, 1942.

Survey executed by Glen Kohlerschmidt, Cadastral Surveyor, beginning May 21, 1986, and completed July 21, 1987, pursuant to Special Instructions dated May 6, 1986, for Group No. 817, Colorado.

### ENLARGED DIAGRAM (Not to Scale)



Sec. 22

◆ Recovered original corners

Sec. 27

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

Denver, Colorado April 19, 1989

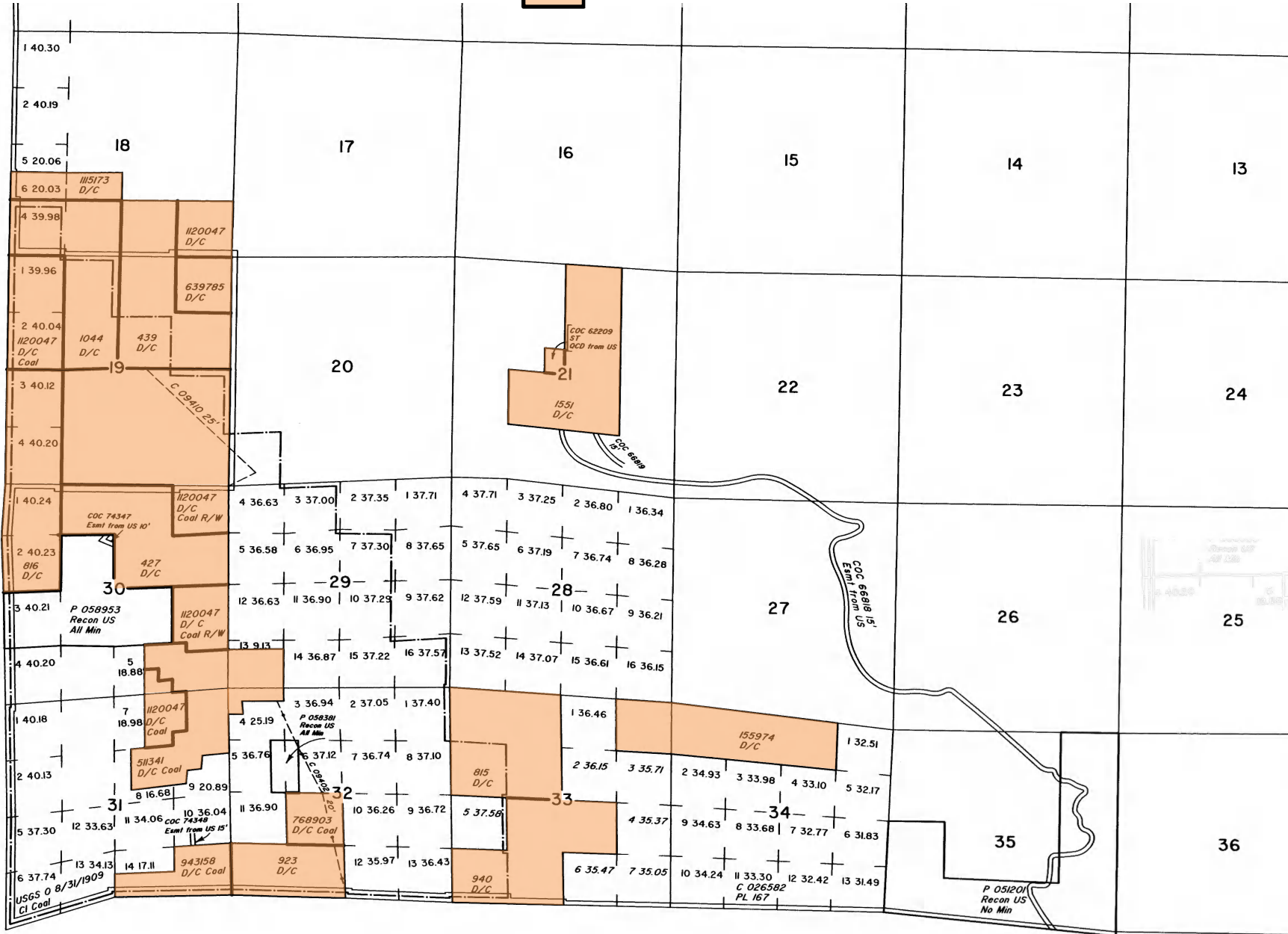
This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

*Jack A. Evans*  
Chief Cadastral Surveyor for Colorado



Private land



ROBERT W. DELZELL  
BETTY SIMPSON

IBLA 99-363

Decided January 29, 2003

Appeal from a decision of the State Director, Colorado State Office, Bureau of Land Management, denying a protest of a dependent resurvey. CO-956.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners. A corner can be determined to be "existing" if such a conclusion is supported by substantial evidence. Where a party challenging the filing of a plat for a dependent resurvey fails to meet his burden of establishing by a preponderance of the evidence that a corner proffered by appellant is an original section corner, the decision dismissing his protest of the dependent resurvey will be affirmed.

2. Surveys of Public Lands: Dependent Resurveys

Where a BLM conclusion that a particular stone is not the original monument for an "existing" corner and that the original section corner was lost is supported by substantial evidence, appellant must show more than a difference of opinion or speculation in order to preponderate. A corner will be regarded as lost where the appellant fails to establish by a preponderance of the evidence that monuments or accessories are those set in the original survey.

3. Surveys of Public Lands: Dependent Resurveys

An obliterated corner is one at which there are no remaining traces of the monument or its accessories, but whose location has been

perpetuated or may be recovered beyond reasonable doubt based on the acts or testimony of the interested landowners, competent surveyors, or other qualified local authorities, or witnesses, or by some acceptable record evidence. Where evidence does not support that a particular location is an obliterated corner, the Board will not reverse BLM's determination that the corner is lost.

4. Surveys of Public Lands: Dependent Resurveys

A survey that has already been accepted will not be overturned, especially after a long lapse of time, except upon proof by a preponderance of the evidence of fraud or gross error amounting to fraud.

5. Surveys of Public Lands: Dependent Resurveys

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. The dependent resurvey does not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

APPEARANCES: Robert Delzell, Bayfield, Colorado, for appellants; John R. Kunz, Esq., Office of the Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Robert Delzell and Betty Simpson appeal from a June 18, 1999, decision issued by the State Director, Colorado State Office, Bureau of Land Management (BLM). <sup>1/</sup> The decision dismissed a protest filed by Delzell, Simpson, and Scott Strickland against a dependent resurvey conducted by BLM on behalf of the U.S. Forest Service (FS) and approved on April 19, 1989. The appeal challenges the resurvey's conclusion that a critical section corner was "lost." (Notice of Appeal at 1.) Delzell and Simpson are landowners whose parcels are located adjacent to FS land. They allege that the

<sup>1/</sup> On July 1, 1999, BLM issued a supplement to the June 18 decision to correct a page in which a line was missing from the printed version; this supplemental decision established 30 days from the date of that letter in which to appeal.

dependent resurvey adjusted boundaries so as to deprive them of land they previously believed was theirs. 2/

On July 8, 2002, Delzell submitted a letter to the Board, which was docketed as a motion to expedite. Given the date the case and motion were filed, the motion to expedite is denied as moot. However, we have taken the case out of order in deference to issues stated in the letter.

#### BACKGROUND

The record indicates that sometime in June 1882, G.D. Nickel surveyed the exterior township boundaries of T. 35 N., R. 5 W., New Mexico Principal Meridian, in Colorado (Subject Area). From June 4-13, 1882, Messrs. Gardner and Cleghorn surveyed the subdivisional lines for sections within the township. These lines are reflected in a plat of the Subject Area issued by the Surveyor General of the State of Colorado and dated May 29, 1883. (BLM Exhibit (Ex.) B.) When Gardner and Cleghorn conducted this survey (1882 survey), the associated field notes assert that they placed a monument at the corner common to sections 29, 30, 31 and 32. Their field notes state that they set a "sandstone 17 x 11 x 5 12 in. in ground for Cor. to Secs. 29, 30, 31 & 32, marked with 1 notch on S. & IIII [notches] on E. edges & raised mound of stone alongside. Pits impractical." (Delzell Ex. 15-1 at 2.)

On September 16, 1985, the San Juan National Forest, FS, requested BLM to conduct a cadastral survey for the Subject Area. (Sept. 16, 1985, Memorandum from Forest Supervisor to Regional Forester; Sept. 17, 1985, Request for Cadastral Survey, Acting Forest Supervisor.) 3/ On May 6, 1986, BLM prepared "Special Instructions, Group 817," for a dependent resurvey, which is conducted to "restore the original conditions of the official survey according to the record." United States Department of the Interior, [BLM], Manual of Surveying Instructions (1973) (Survey Manual) ¶ 6-25 at 149. BLM approved the dependent resurvey on April 19, 1989, BLM Ex. A, and notified the public in the Federal Register that the official plat of survey would be filed effective May 11, 1989. See 54 FR 21 485 (May 18, 1989).

While conducting the dependent resurvey of the subject area, Glenn Kohlerschmidt, a cadastral surveyor assigned by BLM to complete the

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2/ The record does not establish that Simpson properly appealed. Rules applicable to appeals identify individuals who may sign a pleading on another's behalf. 43 CFR 1.3(b). Simpson never signed a pleading before the Board in this case. Delzell and "Sherri McCutchen" signed two documents, allegedly on Simpson's behalf. The Board would normally dismiss the appeal in the absence of additional proof that these persons were authorized to sign for Simpson within the constraints of 43 CFR 1.3(b). Because the decision to affirm covers all issues in the appeal, we need not separately decide this question.

3/ Unless otherwise noted, the documents cited herein are found in a file entitled "Group No. 817 Colorado."

resurvey, searched for original evidence of the location of the section corner for sections 29, 30, 31 and 32 as monumented by Gardner and Cleghorn in 1882. (Oct. 24, 1986, Memorandum from Kohlerschmidt to Chief, Branch of Cadastral Surveys (Kohlerschmidt Memorandum); see also June 18, 1999, State Director decision, attached "Reasons for Dismissal of Protest" (Reasons) at ¶ 2.) Kohlerschmidt examined the original 1882 survey, as well as other available evidence, to determine the location of monument stones. Kohlerschmidt and, subsequently, BLM concluded that if the corner stone identified in the 1882 survey had been set it was now lost.

BLM considered but rejected a private survey of the Subject Area conducted in 1981 by Gareth Crites of Goff Engineering and Surveying, Inc. (Goff Engineering), for Delzell (Delzell Survey). Without explanation or reference to the 1882 survey field notes and topographical data, the Delzell Survey utilized an unmarked sandstone (the Stone) as the record monument for the section corner. See Oct. 24, 1986, Kohlerschmidt Memorandum. Kohlerschmidt compared the Gardner and Cleghorn description of the record monument for the section corner to the physical evidence pertaining to the Stone. Id. Contrary to Gardner's and Cleghorn's description of the monument in their 1882 field notes, when observed by Kohlerschmidt, the Stone was lying loose upon the ground, did not have the described notches, or any etchings, on its sides, was physically larger (24 x 7 x 5) than the record monument, and was not associated with a mound of stones. Id. Kohlerschmidt examined the topographic calls in the 1882 field notes and determined that none of the calls matched existing topography. Id.

As part of the dependent resurvey, BLM also examined earlier private surveys, including 1931 and 1958 Colorado Highway Department survey maps, a 1978 survey completed by Ronald E. Johnson, and a 1985 survey completed by Cliff Schmid. (June 18, 1999, State Director decision, attached Reasons ¶ 2; Oct. 29 and Nov. 17, 1986, Kohlerschmidt Memoranda.) 4/ BLM found these surveys to be inconclusive as to the location of the section corner, as the surveys either were inconsistent in their location of the section corner or lacked sufficient information regarding distances or bearings which could have been used to reconstruct the location of the section corner. Id.

Kohlerschmidt contacted area landowners, surveyors and witnesses, including Gareth Crites who had conducted the Delzell Survey, and Daryl Crites, both of Goff Engineering. None of the landowners with whom Kohlerschmidt spoke provided information concerning the location of the subject section corner or monument. 5/ Id. Kohlerschmidt spoke with Schmid, who had surveyed the subject area in 1985 and used the Stone for his survey ties. Schmid told Kohlerschmidt that a previous landowner of a parcel in the vicinity of the section corner, Gerald Mitchell, had

4/ In addition, Kohlerschmidt identified other private surveys conducted of related township and subdivision boundaries in 1942-43 (Jones), 1955 (Edmonds), and 1969 (Colard).

5/ Kohlerschmidt spoke to C. Friend, N. Wright, C.B. Cooper, L. Sauer and J. Anesi.



informed Schmid that the original corner was some 100 feet south of the Stone. See Oct. 24, and Nov. 3, 1986, Kohlerschmidt Memoranda. Kohlerschmidt also spoke with Ronald E. Johnson, who surveyed the Subject Area in 1978. Johnson reported that the same landowner, Mitchell, had told him that the section corner was located at or near the present driveway to "the old house from the highway." (Nov. 17, 1986, Kohlerschmidt Memorandum.) 6/

As a result of examination of this evidence, BIM found that it lacked original or corroborating evidence of the location of the subject section corner. Therefore, BIM determined that the section corner was lost. Id.

BIM turned to the "double proportionate measurement" method to restore the lost section corner. (Advance Plat, Subject to Correction and Approval, Oct. 1986; undated letter from Darryl A. Wilson, Chief Cadastral Surveyor for Colorado, to Delzell, at 3.) 7/ "Proportionate measurement" attempts to equitably distribute differences arising from errors in distances when placing lost corners between found control points. To reestablish a lost corner common to four sections within a township, BIM uses the "double proportionate" method. Survey Manual ¶ 5-28 at 134. This method relies on control from four known corners within a township, two each on intersecting meridional and latitudinal lines. Id. at ¶ 5-25 at 134.

In this instance, the dependent resurvey located several original monuments on such lines. From these, BIM concluded:

The measurements between this control revealed a shortage of 3.33 chains [8/] or 219.74 feet to be distributed in an east and west direction over the eight adjoining sections involved, or approximately 54.9 feet per mile. The shortage north and south, affecting four sections[, ] was 13.18 chains or approximately 435.23 feet per mile.

6/ Kohlerschmidt's memoranda indicate that Schmid was planning to prepare a report, but did not do so, because of a dispute with BIM over who would first prepare one. Kohlerschmidt indicates that he "asked [Schmid] why he used the stone, when Mr. Mitchell had shown him a different location to the south. He said something about the stone being somewhat controversial, but . . ." (Nov. 3, 1986, Kohlerschmidt Memorandum (ellipses in original).)

7/ Where location of a corner cannot be determined from evidence of original accessories, proportionate measurement has long been recognized as a suitable means to determine the location of a corner. Survey Manual ¶¶ 5-20 through 5-47; John W. and Ovada Yeargan, 126 IBLA 361, 367-69 (1993); James O. Steambarge, 116 IBLA 185, 193 (1990); Boise Cascade Corp., 115 IBLA 327, 333-35 (1990).

8/ A chain equals 66 feet. Survey Manual ¶ 2-1.

(Reasons at 1.) Employing the double proportionate measurement, BLM restored the lost corner to a location somewhat south and slightly to the west of the Stone. To the extent boundaries had been marked in relationship to the Stone, they moved proportionately south, the north/south shortage being apportioned equally along the north/south meridional line between sections 30 and 31 to the west, and 29 and 32 to the east. Because the Delzell Survey had tied Delzell's property lines to the Stone, Delzell discovered that he owned fewer acres than he had thought. See BLM Ex. C (depicting "found original marked stones," the "unmarked disturbed Stone," and contrasting boundary line based on the double proportionate method with one based on use of the Stone as the section corner).

On January 12, 1998, Delzell delivered a "Letter of Request to [BLM] for the Return of Deed Lands Based on the 1883 Survey," demanding that BLM return properties to Delzell and Simpson and to Scott Strickland, a third landowner in the township. This letter asserted that the three landowners would together lose approximately 13 acres of land under the dependent resurvey. BLM responded to this letter by conducting a field investigation on February 5, 1998. (Feb. 5, 1998, Field Investigation, Darryl A. Wilson, Chief Cadastral Surveyor for Colorado BLM.) BLM rejected the landowners' contentions and Wilson sent a letter to them articulating this conclusion.

On April 30, 1999, Delzell, Simpson and Strickland protested the dependent resurvey to the Colorado State Director, BLM. They contended that the Stone identified in the Delzell Survey is the record monument set in 1882 by Gardner and Cleghorn for the subject section corner, and argued that the original section corner was never lost. (Apr. 30, 1999, protest letter at 3.) By letter dated June 18, 1999, the Colorado State Director denied the protest.

Delzell and Simpson appealed that decision on August 2, 1999. Strickland did not participate in the appeal. While Delzell argues that the amount of acreage at issue is 13 acres, he concedes that this total reflects alleged loss by all three landowners. Nothing in the record or the appeal documents expressly identifies how many acres remain at issue in this appeal attributable to Delzell, or to Delzell and Simpson.

In his Statement of Reasons (SOR), Delzell challenges BLM's conclusions with respect to the section corner and its implementation of proportionate measurement, arguing that BLM's central error is its failure to find the Stone to be the original corner monument. Delzell contends that the conclusion that the corner monument is "lost" is erroneous. Because Delzell contends that the Stone monumented the section corner, he argues therefore that BLM had no option to employ proportionate measurement to locate the section corner. Delzell also argues that BLM's identification of the section corner by proportionate measurement failed to protect all entities equally, failed to recognize bona fide rights, and failed to provide for the security of existing private land titles.

BLM filed an extensive pleading in answer to the SOR, responding to each of Delzell's enumerated arguments. (BLM Answer.) In his Submission of Response to BLM's Answer to [SOR] (Response), Delzell states:

BLM's Answer raised several good questions which caused us to search for new evidence as we prepared to write this Response. In February, 2000, for the first time, we had an opportunity to examine the Colorado Group 817 File. Documents from that file shed new light on what occurred in 1986 and 1987 during the Resurvey.

(Response at 3.) Delzell responds with what he claims is further evidence that BLM's conclusions were erroneous.

In the Response, Delzell purports to raise new evidence he alleges BLM did not consider, in the context of twelve errors which he asserts show that BLM failed to achieve the correct result. Delzell's argument pertains to the history of the Mitchell property. Delzell explains that this property was patented originally, in 1909, to Anton Sorenson. (Delzell Ex. 13 (tract book information re: Sorenson Homestead application).) In 1919, Sorenson sold the homestead to Summerhalter, who conducted a survey in 1920. Sometime later, Joe Cooper acquired the property and later transferred it to Mitchell in 1944. (Response at 7 n.8.) Delzell attaches a new Goff Engineering map dated April 2000 which purports to place two identifying markers from the original Sorenson homestead survey. (Delzell Ex. 22.) Delzell asserts that this 2000 map "confirms the current position of the [Stone] as the corner common to Sections 29, 30, 31 and 32, and shows the identifying marks on the stone from the original 1882 survey." (Response at 7.) Delzell asks us to find therefore that BLM committed error in rejecting the Stone as the record monument.

#### ANALYSIS

[1] A dependent resurvey is "a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners." John W. and Ovada Yeargan, 126 IBLA at 362. Its purpose is to

restore the original conditions of the official survey according to the record. It is based, first, upon identified original corners and other acceptable points of control, and, second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey.

Survey Manual ¶ 6-25 at 149.

The cadastral surveyor's primary responsibility when conducting a dependent resurvey is to "act as a 'detective' who gathers all available information and uses his best effort to determine the locations of all the original corners." John W. and Ovada Yeargan, 126 IBLA at 363. There, we stated:

In a resurvey, a corner is categorized in one of three ways. An existent corner is one whose position can be identified by verifying the evidence of the monument or its accessories,

by reference to the description in the field notes, or located by an acceptable supplementary survey record, some physical evidence, or testimony. Manual, 5-5 at 130. An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated or may be recovered beyond reasonable doubt based on the acts or testimony of the interested landowners, competent surveyors, or other qualified local authorities, or witnesses, or by some acceptable record evidence. Manual, 5-9 at 130. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony which bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners. Manual, 5-20 at 133.

126 IBLA at 363.

A corner will not be regarded as lost if its position can be recovered through the testimony of "one or more witnesses who have a dependable knowledge of the original location." Survey Manual ¶ 5-5 at 130. This requires witnesses that have "positive knowledge of the precise location of the original monument" and greater weight will be afforded experts who identified the original monument itself. Id. at ¶ 5-10. Testimony of individuals will be given weight only "according to its completeness, its agreement with the original field notes, and the steps taken to preserve the original marks" and will be "tested by relating it to known original corners and other calls of the original field notes" including topography. Id. at ¶ 5-11 at 131.

A corner can be determined to be existent if such a conclusion is supported by substantial evidence. William D. Brown, 137 IBLA 27, 33 (1996), citing Stoddard Jacobsen (On Reconsideration), 103 IBLA 83, 86 (1988), *aff'd*, Downer v. Hodel, No. 91-15372 (9th Cir. 1992). "The proper standard for BIM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence." 103 IBLA at 86. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Mark Einsele, 147 IBLA 1, 11 (1998), citing Stoddard Jacobsen v. BIM (On Reconsideration), 103 IBLA at 86 n.6 (citations omitted).

In Mark Einsele, 147 IBLA at 11-12, we noted that it was not enough for appellant to identify a corner that the appellant believed was supported by substantial evidence. Rather, an appellant's burden is to

"demonstrate by a preponderance of the evidence that BIM's placement of the corner is wrong." Stoddard Jacobsen, 103 IBLA at 86 n.7. Accordingly, Appellants are obliged to offer more than a difference of opinion or speculation; they must establish that there was error in the methodology used or the results obtained, or show that the resurvey was

carried out in a manner that did not conform to the Manual. Rodney Courville, 143 IBLA 156, 164 (1998); Thom Seal, 132 IBLA 244, 247 (1995).

Likewise, surveys of the United States, after acceptance, are presumed to be correct and will not be disturbed except upon proof by a preponderance of the evidence that they are fraudulent or grossly erroneous. Peter Paul Groth, 99 IBLA 104, 111 (1987). <sup>9/</sup>

[2] We turn first to Delzell's challenges to BLM's conclusion that the section corner was lost. Delzell contends that BLM ignored physical evidence that would establish the Stone as the original survey monument. Delzell alleges that BLM ignored the position of the record monument in the 1882 field notes, the dimensions of the Stone in comparison to the 1882 field notes, the natural changes to sandstone which might have occurred since 1882, and the site conditions today in comparison to those described in the 1882 field notes.

The record before us indicates that Kohlerschmidt made a careful comparison of the 1882 field notes to the description and dimensions of the Stone. See, e.g., Oct. 24, 1986, Kohlerschmidt Memorandum. His conclusion that the Stone was not the survey monument is supported by the fact that the Stone located by Goff Engineering did not have the described notches or remnants of them on its sides, was physically larger (24 x 7 x 5) than the record monument (17 x 11 x 5), and was not alongside or even near a mound of stone. Id. In fact, the 1982 Delzell Survey, conducted by Goff Engineering, identified the Stone as having "no markings" and being "located in an open meadow (pasture) area. It is the only rock within 500' of the area." (Delzell Survey, approved by Gareth Crites, at ¶ 1.)

Kohlerschmidt noted the distinctions among the Johnson, Schmid, and Delzell surveys, and their inconsistencies with regard to the issue of the location of a survey monument as described by the surveyors. (Oct. 24, and Nov. 3, 1986, Kohlerschmidt Memoranda.) He noted that Schmid had conducted a survey in 1985, using the Stone from the Delzell Survey for purposes of survey measurement, but that Schmid had not endorsed that Stone as the actual record monument. Rather, Schmid believed the proper location of the record monument lay 100 feet to the south of the Stone, based on information supplied by Mitchell, who died in early 1986. Id. at 3. Johnson had surveyed three tracts of land owned by Mitchell in sec. 30, in 1978. Johnson used a ½ inch rebar, as the 1/256 corner of secs. 29 and 30. Johnson chose this location in relation to a lost survey corner based also on Mitchell's recollection. This alleged survey corner did not coincide with the Stone or Schmid's relation of Mitchell's recollection of the proper location for the corner. (Nov. 17, 1986, Kohlerschmidt Memorandum.)

On October 29, 1986, Kohlerschmidt prepared a memorandum of his efforts to use information calls from three Mitchell tracts, adjacent to

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<sup>9/</sup> Delzell has not alleged that BLM has committed fraud.

Highway 160, to determine whether the Stone is the appropriate record monument. Kohlerschmidt stated:

There are three tracts in sec. 30 formerly owned by Gerald Mitchell, now owned by his daughter, Mrs. Leta Sauer, from which I had attempted to relocate the position of the original cor. of secs. 29, 30, 31 and 32. One tract, Tract 1, is located north of highway no. 160, Tracts 2 and 3 are located south of the highway. All three are tied to the N-S-S 1/256 sec. cor. of secs. 29 and 30. \* \* \* The tracts were probably created as a result of the building of the new highway in the late 1950s, but I have been unable to find any date on the tracts to substantiate this.

Kohlerschmidt proceeded to tie available calls for the tracts to on-the-ground evidence to determine the location of the section corner. He concluded:

I can not locate the original position of the cor. of secs. 29, 30, 31 and 32 from these tracts because I do not know the exact distance between the N-S-S 1/256 cor. of secs. 29 and 30 and the sec. cor., nor do I have exact corners on the tracts to work from. The position of these tracts with relation to the highway and existing fence lines leads me to believe that the original position of the [section corner] is south of my proportioned corner and close in departure. I do not believe the stone found by Goff Engineering could have been the original sec. cor. because it is too far north and the [Mitchell] tracts would not fit if relocated based on it.

(Oct. 29, 1986, Kohlerschmidt Memorandum).

Critically, BLM compared existing topography with that described in the 1882 field notes and concluded that descriptions of the topography did not match those on the ground and could not lead to the site of the Stone. Kohlerschmidt observed that the 1882 field notes called for a gulch, bearing to the northeast at 16.3 chains on a line between sections 29 and 32, as well as a spring branch flowing northeast at 27.10 chains. On a line between secs. 30 and 31, the field notes call for a wagon road bearing from the northeast to the southwest at 42.75 chains. Kohlerschmidt noted that none of these topographic calls from the field notes could be verified, in relation to the Stone or otherwise, with on-the-ground topography. (Oct. 24, 1986, Kohlerschmidt Memorandum at 1.) BLM's exhibit C shows locations and directions of gulches noted on the field notes, on a topographic map. BLM also notes that the gulches and springs running to the northeast are unlikely given the contours of the ground. See also Answer at 14-15 n.16 (description of field note calls in comparison with topography).

An undated document in the Group File identifies seven difficulties with concluding that the Stone is the appropriate record monument. This document indicates that Kohlerschmidt attempted but was unable to equate the location of what he refers to as the "Goff stone" with the 1882 field notes.

1. The Goff stone is unmarked, with no mound of stones, which does not fit the original description, nor fit other original corners found in the township.
2. The original topo calls on the sections lines do not fit in relation to the Goff stone.
3. There is a discrepancy between three land surveyors (Goff, Schmid and Johnson) as to the actual location of the original corner and to the authenticity of the Goff stone based on the testimony of the Mr. Gerald Mitchell (deceased) who owns the land surrounding the cor. of secs. 29, 30, 31 and 32.
4. The Goff stone fits record bearing and distance reasonably well from the south, but does not fit from the north or west.
5. The proportioned sec. cor. protects the private lands in the adjoining sections better than the Goff stone does.
6. The Goff stone places the shortage in distance between secs. 29 and 30, when other found original corners suggest that the shortage should occur on the last mile south between sections.
7. The on ground location of private land in section 29 suggests that the location of the original stone should lie south of and closer to the position of the proportioned corner than to the Goff stone.

Reviewing these observations, BLM's determination that the Stone was not an "existent" corner and that the original section corner was lost is supported by substantial evidence.

We turn to Delzell's arguments in support of his effort to demonstrate that BLM's placement of the corner is wrong. As noted above, Delzell must show more than a difference of opinion or speculation; he must make a showing by a preponderance of the evidence that BLM's dependent resurvey was erroneous. Stoddard Jacobsen, 103 IBLA at 86 n.7.

Delzell contends that the discrepancies between the 1882 survey's description of the survey monument and the Stone are not sufficient to justify rejecting it as the actual stone monumented by Gardner and Cleghorn. Thus, while the original stone was 17 inches by 11 inches by 5 inches, with notches on adjacent south and east sides, and the Stone found

by Goff was 24 inches by 7 inches by 5 inches, Delzell says the two are still likely to be the same. To further his contention, Delzell establishes a scenario in which the surveyors likely mismeasured the original monument stone, that the markings probably eroded, that the surveyors placed the monument 12 inches in the ground and that they likely measured it from its position in the ground. See generally Response at 13-16. Citing Stoddard Jacobson, 97 IBLA 182, 211-12 (1987), overruled in part, 103 IBLA 83 (1988), Delzell argues that we should accept discrepancies between a recorded description of a monument stone, and a found stone, such as those accepted in that case.

In that first Stoddard Jacobson case, the Board accepted small discrepancies in size, and concluded that it would not find a distinction between the descriptive terms "notches" and "grooves" to be dispositive of whether the stone in question was the monument. Id. By contrast, in this case the Board would have to presume either that Gardner and Cleghorn never placed notches on the monument, or that all evidence of notches (or grooves) eroded away leaving the "unmarked" Stone found by Gareth Crites. The Board would have to find this to be the case, even in the face of Delzell's assertion that we should speculate as to a portion of the Stone which was "more weathered" and a portion "once protected from exposure" (Response at 14), when the field notes maintain no such implication.

Moreover, the 1855 and 1881 Survey Instructions indicate that surveyors should measure the length of an entire stone, not the portion above ground. (Feb. 22, 1855, Instructions at 9.) The 1881 Instructions are more consistent with the Gardner and Cleghorn field notes than with Delzell's suggestion that those notes were off by 7 inches in the length of the stone. The instructions state that "[s]tones 18 ins. and less long must be set two-thirds, and over 18 ins. Long, three-fourths of their length in the ground." (1881 Survey Instructions at 32 § 5.) The field notes assert that the 17-inch monument was set 12 inches in the ground. (Delzell Ex. 15-1 at 2.) We have no basis for adopting Delzell's suggestion that Gardner and Cleghorn violated the 1881 Survey Instructions by mismeasuring the stone and placing it only halfway in the ground. They stated that they placed a 17-inch monument two-thirds of the way into the ground; we presume they meant to follow applicable survey guidelines.

Moreover, Delzell's principal reliance on the Stone as the monument derives from the Delzell Survey conducted by Gareth Crites. The use of the Stone by the private surveyor at Goff Engineering does not establish, however, that the Stone was in fact the record monument set by Gardner and Cleghorn in 1882. The only document submitted regarding this survey was a "Colorado Land Survey Monument Record" performed by Goff Engineering surveyor Gareth Crites. This record reflects no effort on Crites' part to relate the Stone to any single feature of the 1882 survey. It shows no accessories and no topographic features that would relate the Stone to that identified by Gardner or Cleghorn. Crites simply described a stone, and drew it on a map 500 feet from a building and 600 feet from Highway 160 East. This document is insufficient to demonstrate that the Stone found by Crites was the 1882 survey monument. Moreover, a letter and "Addendum to Surveyor's Report" prepared in 1998 by Daryl Crites (Delzell Exs. 19 and



20) indicate that his conclusions regarding the identity of the Stone derive from hearsay and assumption rather than adherence to survey guidelines. 10/

Considering the evidence in the record regarding the Stone, we find that BLM's conclusion regarding the Stone is supported by substantial evidence. Likewise, we find that Delzell has not shown by a preponderance of the evidence that the Stone is one and the same as the original record monument set by Gardner and Cleghorn in 1882.

[3] Given that we have rejected Delzell's claim that the Stone is the survey monument set in 1882, we address his alternative argument that the Stone is evidence of an obliterated section corner. Delzell argues that BLM failed to discover and review early surveys and that if it had done so, it would have had to determine that the Stone provides evidence of the actual corner of secs. 29, 30, 31, and 32, and thus is located at an obliterated corner.

As we understand the logic, Delzell contends that the 1909 Sorenson Homestead application documents were premised on a survey from the original monument. (Delzell Ex. 13.) No such survey appears in the record. However, Delzell submits the 1920 Summerhalter survey which purports to begin at the original stone; the survey notes depict on a hand-drawn map the notched edges of a monument as the point of beginning. (Response at 7; Delzell Ex. 13.) Delzell argues that the Summerhalter survey marked the northern boundary of the Sorenson/Summerhalter property at 990 feet north of the monument, and that there is a fence approximately 20 feet south of a line 990 feet north of the Stone. Delzell asserts that the fence was determined to be a boundary line in a 1983 order of the La Plata County District Court regarding a boundary dispute between Gerald Mitchell and his neighbor to the north, Norman Wright. (Response at 6-7; Delzell Ex. 11, Order in Mitchell v. Wright, et al., No. 82CV81 (Archuleta Co. Dist. Ct. 1983).) In this order, the Court ruled in Mitchell's favor regarding the location of his north boundary fence. Id. In further support, Delzell cites a 1931 Colorado highway map which shows a monument 250-55 feet east of Highway 160. (Response at 9.)

Goff Engineering's newly created map dated April 2000 identifies the Stone at a location which would seemingly square with all of these data points. (Delzell Ex. 22.) Delzell argues that the "customs at the early dates that the fences were built" were "imperfect by today's standards" (SOR at 8). Thus, as we understand it, Delzell argues that the fence 20 feet south of the boundary which would be the north boundary of the original Sorenson/Summerhalter parcel (990 feet north) shows that the Stone represents a perpetuation of the corner.

We do not find that Delzell has preponderated on the assertion that the Stone perpetuates the location of the 1882 survey corner. Rather, the

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10/ The record contains no explanation as to how Daryl Crites can supplement the survey of Gareth Crites 17 years later.

assumptions required to reach this conclusion support BLM's assertions that the corner was lost. In dismissing Delzell's and Simpson's challenge of the dependent resurvey, BLM examined the 1920 Summerhalter Survey and the 1931 Colorado highway map. See June 18, 1999, State Director decision and attached Reasons at ¶ 2. BLM found that the Summerhalter Survey (Delzell Ex. 12), indicated a stone marked with the same number of notches as the record monument but that it "gives no dimensions of the monument used [n]or are there any ties contained within which to specifically locate the monument's position." (Reasons at ¶ 2.) BLM found this survey to be discredited further by the fact that it appeared that all bearings and distances were taken from a single monument, without reference to the official plat, field notes, or other survey lines. Id. 11/ As for the 1931 highway map, BLM concluded that it did not confirm the Stone as the record monument or a perpetuation of it, as the map did not indicate what evidence was used to locate the section corner, nor did it reflect distances or bearings with which the position of the section corner could be reconstructed for evaluation. Id. BLM pointed out as well that a 1958 highway map placed the survey monument in a different location west of the highway and that Delzell's assertions regarding fences were inaccurate. Id.

Delzell discredits evidence which counters his theory regarding the location of the Stone and argues that BLM erred in considering it. Thus, Delzell asserts that BLM should have rejected evidence which was not supportive of his theory of a consistent corner location at the Stone.

Delzell states the BLM should not have relied on the incongruous information provided by Schmid and Johnson concerning the location of the record monument, because it was "uncorroborated and third-hand." (Response at 8.) Delzell also claims that it was improper for BLM to rely on the 1958 Colorado Highway Department map. Id. at 8-9. Delzell alleges that the Colorado Department of Transportation has acknowledged that the section corner depicted on the 1958 map is inaccurate. Id. at 9. Delzell further argues that no other surveys give credence to a particular location as the original corner. Delzell claims that BLM improperly evaluated collateral physical evidence, such as the locations of the various fence lines and cattle guards which he claims reflect "boundary lines." (Response at 9-11.)

Not only did BLM consider these arguments, they generated BLM's 1998 field examination. BLM's conclusions regarding the significance of fences and other manmade features differ markedly from Delzell's. For example, Darryl Wilson's undated response to Delzell's first presentation to BLM states:

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11/ The Sorensen homestead application (Delzell Ex. 13), likewise, is not probative as to the location of the section corner or the record monument, and Delzell does not argue that it is. Rather, Delzell specifically notes that he did not rely on the alleged Sorenson survey as probative of the nature of the Stone as a survey monument. (SOR at 4.)

During the field investigation, we looked for evidence that may have been overlooked during the 1986-87 [BLM] resurvey; such as fence lines, fence corners, or local control that should have been accepted \* \* \* . I was concerned because your letter appeared to indicate reasonably straight fences that would generally be constructed in cardinal directions along the northerly boundaries of the Strickland, Simpson, and Delzell properties. What we found, in reality, was that the fences out on the ground were built along bases of hills and around the edges of clearings \* \* \* .

(Undated letter from Wilson, BLM, to Delzell, at 1.) Wilson went on to describe the fences found and noted the existence of multiple fences and fences encircling ponds and pasture perimeters. Wilson concluded that the fences and guards could not plausibly be construed as intended subdivisional boundary lines or lines between Federal and private property, and queried Delzell as to which of the duplicate fences he contended was the appropriate boundary. Id. at 2. 12/

In short, Delzell persuasively argues that a series of landowner decisions reflects a view of a corner monument somewhere in the vicinity of where the section corner logically could be expected. However, there is no basis for pinpointing that location at the site of the Stone or at a particular distance from it, sufficient to find it to be an obliterated corner. Thus, while Delzell may criticize BLM for considering information objectionable to Delzell, Delzell's contentions rely on assumptions, most particularly the assumption that there was a Sorenson survey tied to a monument located at the site of the Stone found in 1981 by Goff Engineering. There is no evidence to support this assumption. BLM's conclusions regarding the collateral physical evidence may differ from conclusions reached by Delzell, but a difference of opinion or speculation alone is not grounds for reversal. Mark Einsele, 147 IBLA at 12.

We turn to Delzell's contentions that Kohlerschmidt mishandled the investigation. Delzell claims that Kohlerschmidt failed to follow an orderly process of gathering evidence, and that he used poor judgment. (Response at 7-8.) Delzell alleges that Kohlerschmidt failed to interview a former manager of Mitchell's property, W.A. Thwaits, and that he "did not interview Johnson long enough." Id. at 5. He asserts that such interviews would have revealed that Mitchell and the manager "removed the mound of stones \* \* \* in about 1978," which explains why the Stone was not surrounded by the stones indicated in the field notes. Delzell attaches a letter from Thwaits stating that the latter had removed stones around the Stone. (Delzell Ex. 17, July 23, 1999, Letter from Thwaits to Delzell.)

12/ Delzell appears to concede the random nature of the various fences and boundaries he points to. He states that the "fences are not perfectly straight by today's standards but are as straight and correct as could be expected when you consider the physical terrain and customs at the early dates that the fences were built." (SOR at 8.)

Delzell is correct that it is the cadastral surveyor's responsibility to "act as a 'detective'" and gather all available information. John W. and Ovada Yeargan, 126 IBLA at 363. However, Delzell presents no suggestion that Thwaites, having worked for Mitchell until 1985, was an available or appropriate witness at the time Kohlerschmidt conducted the resurvey. Thwaites explains that his view of the Stone as the survey corner derives from a conversation with Mitchell. (Delzell Ex. 17, July 23, 1999, Letter from Thwaites to Delzell.) Thus, Thwaites' letter only begs the question of which of the conflicting stories in the record regarding Mitchell's views to believe. It fails entirely to conform to evidence to which we would ascribe weight under the Survey Manual §§ 5-10 and 5-11. Most importantly, Thwaites' assertion that he and Mitchell deliberately removed stones around the Stone refutes the very suggestion that Delzell would have us infer from Delzell's proffer of individuals' statements in this appeal -- that Mitchell thought the Stone was the original 1882 corner monument. If, as Delzell now asserts, Mitchell believed that the Stone was the monument from which Mitchell's property was to be defined, it is difficult to speculate that he would have removed evidence of its status.

Similarly, we do not find error in Kohlerschmidt's failure to elicit from Johnson alleged knowledge regarding the location of the record monument and mound of stones. When Kohlerschmidt interviewed Johnson in 1986, Johnson stated that Mitchell had told him that the section corner was located at or near the present driveway to "the old house from the highway," not at the location of the Stone. Delzell attaches a letter from Daryl Crites in 2000, relating another conversation with Johnson, in which Johnson allegedly stated that Mitchell had shown him the original section corner and mound of stones in 1978. (Delzell Ex. 19, Feb. 2, 2000, Letter from Crites to Delzell.) Even if we found this reference to overcome BLM's discussion with Johnson contemporaneous with the resurvey, we decline to find that Kohlerschmidt committed error by relying on Johnson's testimony at the time of his 1986 interview. 13/

More importantly, considering BLM's difficulties in correlating the field notes to on-the-ground topography, these arguments do not establish evidence sufficient to overcome BLM's conclusion. Even if we could ascribe to the deceased Mitchell the view which Delzell attributes to him through 1998 and 1999 hearsay conversations, see Survey Manual §§ 5-10 and 5-11, that the Stone is the appropriate location of a survey corner, the record supports BLM's conclusion by substantial evidence that the Stone does not sufficiently correlate to the topographic calls in the field notes.

Delzell contends that Kohlerschmidt disobeyed instructions from the BLM office to contact private surveyors and local landowners before beginning the resurvey. (Response at 4.) The record shows that Kohlerschmidt did contact local landowners prior to setting the proportioned corner. See Oct. 24, 1986, Kohlerschmidt Memorandum.

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13/ As noted above, Thwaites' story as proffered by Delzell supports the 1986 comments of Johnson and Schmid that Mitchell did not ascribe a particular importance to the Stone.

Delzell argues that it was error for Kohlerschmidt to fail to conduct public meetings regarding the dependent resurvey. (Response at 5.) He argues that 1986 BIM instructions specifically directed Kohlerschmidt to hold joint meetings with surveyors and landowners to "inform them 'of the facts and their rights' including the impacts the proportioned corner would have on their properties, and the option of their having the courts decide the corner location." Id. In fact, the 1986 instructions direct Kohlerschmidt to make an effort to apprise local landowners of the situation and inform them of their rights. The record does not reveal clear efforts on BIM's part to contact affected landowners. 14/

We do not find that this failure demonstrates error in this case. BIM was fully aware of the Delzell Survey and took care to review its conclusions and make specific findings as to the possibility that the Stone was the survey monument. For reasons stated above, BIM disagreed with Goff Engineering's conclusion. Delzell has failed to preponderate with any evidence that a different procedure with respect to meeting with Delzell or another landowner would have resulted in a different outcome.

Delzell argues that Kohlerschmidt's failure to discover court records on the boundary dispute between Wright and Mitchell constitutes error. (Response at 6-7; Delzell Ex. 11, Order in Mitchell v. Wright, et al., No. 82CV81 (Archuleta Co. Dist. Ct. 1983).) However, where private owners of land are in dispute over land boundaries, local courts of competent jurisdiction will make the final determination. Stanley A. Phillips, 31 IBLA 342, 347 (1977). It is not within the authority of the Federal government to adjudicate the boundaries between private individuals created by a subsequent division of the original patent. Id. By contrast, only the Secretary of the Interior is "authorized to consider what lands are public lands \* \* \* and has the authority to extend or correct the surveys of public lands and make resurveys to reestablish corners and lines of earlier official surveys." Rodney Courville, 143 IBLA 156, 162 (1998), appeal dismissed No. 98-890-C-M3 (M.D. La. Apr. 18, 2000), citing Paul Chabot, 132 IBLA 371, 375-76 (1995); John W. and Ovada Yeargan, 126 IBLA at 362; Elmer A. Swan, 77 IBLA 99 (1983); 43 U.S.C. §§ 2, 52, 751-53 (2000). The local court's ruling does not discuss and is not controlling of the dependent resurvey. BIM's failure to discuss this local court decision does not lead us to conclude the dependent resurvey was erroneous.

Delzell complains that BIM ignored the fact that the FS had posted signs in locations that indicated FS boundaries. Delzell asserts that he relied on the FS postings. As BIM noted in the Wilson letter, and in its June 18, 1999, decision, FS signs are not sufficient to establish the location of a surveyed section line. Theodore J. Vickman, 132 IBLA 317, 323 (1995); see also Response at ¶ 3; undated letter from Wilson to Delzell at 2. In Vickman, the Board made clear that public information from the FS

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14/ Delzell identifies an address in California from November through May, indicating he may not have been present during latter stages of the investigation.

and even from the United States Geological Survey within this Department does not rise to the legal significance of an official survey.

[T]he GS map is not an official survey of the public lands of the United States. As previously indicated, the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior. That authority has been specifically delegated to BLM. Volney Bursell, 130 IBLA 55 (1994).

The primary purpose of the topographic map is to provide a graphic representation of topographic features. Although the maps do make an effort to portray section lines, the location[s] of these lines are only as reliable as the information available to GS at the time the maps are prepared. Moreover, these maps have not been held out as official surveys of the public lands because they were not performed by or on behalf of BLM. The section lines were never intended to be relied upon in locating property or title boundaries. \* \* \*

Similarly, the FS posting of signs along the alleged boundary of the national forest purportedly marking the boundary between secs. 1 and 2 is insufficient, by itself, to establish the location of the section line. Erroneous marking, for whatever reason, will not override the true location of the section lines as reflected on the official survey.

132 IBLA at 322-23. Delzell fails to demonstrate that BLM's evaluation of the FS signs constitutes error.

Delzell's challenges to BLM's conclusions are premised on speculation. He does not preponderate on his view that the dependent resurvey itself was erroneous. Because a mere difference of opinion is insufficient to overturn a dependent resurvey, we affirm BLM's conclusion that the survey monument is lost, justifying proportionate measurement to relocate it. See Mark Einsele, 147 IBLA at 12.

[4] Delzell contends that even if the proportionate measurement was justified it was performed incorrectly, and also that BLM failed to protect all entities equally, recognize bona fide rights, and provide for security of titles. We address these arguments in turn.

Delzell claims that the proportionate measurement was performed in a manner that is contrary to the Survey Manual because BLM perpetuated an error from the original 1882 survey into the dependent resurvey. Delzell asserts that the 1882 Gardner and Cleghorn Survey made the east side of sec. 30 a length of 4,408 feet, or 872 feet short of a standard section. Delzell expresses the belief that Gardner and Cleghorn did not survey the east line of sec. 30, but instead set the original record monument by surveying east from the range line, at the western corner of secs. 30 and 31. See SOR at 7. Because this was a major survey error, Delzell claims,

BLM had a duty to correct this error before performing double proportionate measurement. Delzell argues that it was improper to take this alleged error of 872 feet and apportion it equally along the east sides of both secs. 30 and 31, because there was no error in the distance north between the township line to the Stone.

BLM responded to this argument in its June 18, 1999, decision. See Reasons at 5. BLM stated:

This office is somewhat confused regarding the above paragraph. The Gardner and Cleghorn survey of the subdivisional lines of this township clearly return a record distance between sections 31 and 32 (east boundary of section 31) as 80.00 chains. This is equal to 5280 feet or one mile, in the next mile between sections 30 and 29 (east boundary of section 30) they again return a record distance of 80.00 chains or 5280 feet. The measured distance from the stone which you profess is the original may place the error as you indicate \* \* \* .

(Reasons at ¶ 4.) BLM went on to explain its belief that Gardner and Cleghorn did not tie their survey to the south boundary of the Township. Id.

We find nothing in Delzell's repetition of his protest assertion in the appeal to alter BLM's conclusion. The field notes in the record indicate that Gardner and Cleghorn measured the east boundaries of section 30 and 31 as 80 chains each. Delzell's argument regarding the alleged lengths of the eastern edges of secs. 30 and 31 presupposes that the Stone is in fact the original record monument. As we understand it, it is only by placing the record monument at the site of the Stone that one would conclude that the eastern side of sec. 31 is only 4,408 feet long. To the extent Delzell's argument depends on the status of the Stone as the original record monument it is rejected. 15/

In any event, a survey that has already been accepted will not be overturned, especially after a long lapse of time, except upon proof of fraud or gross error amounting to fraud. Peter Paul Groth, 99 IBLA at 111, cited in Longview Fibre Co., 135 IBLA 170, 177 (1996). To the extent Delzell argues that BLM erred by adopting a conclusion of the 1882 survey, Delzell makes no assertion that Gardner and Cleghorn committed fraud in conducting the record survey. Thus, we reject any argument that compels the Board to overturn the 1882 survey.

15/ Delzell perpetuates the misconception that the dependent resurvey was compelled to accept the Stone as the survey monument in claiming that the BLM conclusion violated the Survey Manual's requirement that "[e]xisting original corners cannot be distributed." (Response at 17.) There, Delzell asserts that the resurvey is erroneous because it alters the distance between the Stone and the NE corner of sec. 30. This argument again presupposes that the Stone is an existing corner.

Delzell complains that the double proportionate measurement method used by BIM to reestablish the lost section corner failed to treat all entities equally. The crux of this argument is that, as a result of the resurvey, Delzell lost more acreage than other private landowners. <sup>16/</sup> Delzell claims unfairness because other landowners lost only an acre, while others gained acreage as a result of the dependent resurvey. (SOR at 2.)

[5] Delzell mistakenly equates equal treatment with equal result. The double proportionate measurement method is a purely mathematical process which applies equally to affected landowners. Its utilization guarantees that any "latitudinal and longitudinal discrepancies are equally distributed," and that no person or group of individuals will be deliberately discriminated against to the advantage of others. See William D. Brown, 137 IBLA 27, 32 (1996). Here, as the record shows, every landowner in the subject area had the same measurement method applied to his or her lands. BIM prepared a description of impacts showing that all areas, including lands owned by FS, received a proportionate share of impact. (Reasons at page 2, Table.) While the outcome of this measurement was different depending on the parcel, the disparate outcome does not mean that the underlying treatment of the landowners was unequal.

Delzell complains that, contrary to the Survey Manual, the dependent resurvey failed to provide for the security of his property title because the result was to remove patented acres from his title. (SOR at 7.) The Survey Manual provides: "As in the case of original surveys, the records of resurveys must form an enduring basis upon which depends the security of the title to all lands acquired thereunder." Survey Manual ¶ 6-6 at 145. It has been stated repeatedly by this Board that "[t]itles, areas, and descriptions should remain absolutely unchanged in the typical dependent resurvey." Jean Eli, 78 IBLA 374, 376 (1984), citing Bethel C. Vernon, 37 IBLA 226 (1978); Alfred Steinhauer, 1 IBLA 167, 171 (1970).

While we empathize with his situation, Delzell misunderstands the Survey Manual and precedent when he suggests that original titles, areas and descriptions must remain static, or that BIM is under a duty to validate them as understood by the landowner, in the process of conducting a dependent resurvey. Such an understanding conflicts with the purpose of such a resurvey to "restore the original conditions of the survey according to the record." Survey Manual ¶ 6-25 at 149. It is, by definition, a restoration of the original conditions of the official survey, and therefore need not validate a landowner's title that is not based on patents grounded on the original survey. John W. and Ovada Yeargan, 126 IBLA at 369-70. Accordingly, we reject Delzell's argument that BIM had a duty

<sup>16/</sup> As noted above, it is not possible to determine the acres Delzell lost on this record. Delzell alleges a loss of 13 acres to himself, Simpson, and Strickland. (Response at 2.) The map prepared in 2000 by Goff Engineering for purposes of Delzell's response depicts the three properties. A visual examination suggests that the loss is, quite approximately, equally distributed among the three landowners. (Delzell Ex. 22, April 2000 Goff Map.)



in conducting the dependent resurvey to ensure that boundaries based on private surveys remained unchanged.

Delzell contends that he acquired bona fide rights in land when he located his boundaries and placed improvements based on his 1981 survey. He argues that if BLM had utilized the Stone and FS boundary signs, it would protect these rights. (SOR at 7-8.) Delzell complains that BLM failed to recognize these rights when the dependent resurvey resulted in boundary lines different from those established by his private survey. Id. at 8.

Congress has directed that no "resurvey or retracement 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." 43 U.S.C. § 772 (2000); Survey Manual ¶ 6-12 at 147. Under the Survey Manual, bona fide rights are those "acquired in good faith under the law." Id. Delzell states that he acted in good faith in relying on the Stone as the record monument for the subject section corner, as found in the Delzell Survey. (SOR at 8.)

While Delzell clearly operated under the terms of the Delzell Survey, it is not a tautology that the landowners' good faith reliance on a private survey provides him with the boundaries he believed he had. To the contrary, the Survey Manual makes clear that private survey boundaries may be affected by a dependent resurvey.

In cases involving extensive obliteration at the date of entry, the entryman or his successors in interest should understand that the boundaries of the claim will probably be subject to adjustment in the event of a resurvey. \* \* \* A claim cannot generally be regarded as having been *located* in good faith if no attempts have been made to relate it in some manner to the original survey.

Survey Manual ¶ 6-17 (emphasis in original). Further, this Board has warned that "one who relies on other than an official survey that has been duly accepted and approved by the Secretary of the Interior does so at his peril." Mark Einsele, 147 IBLA at 12; Longview Fibre Co., 135 IBLA at 185. The appellants in Longview Fibre, like Delzell, relied on a corner identified in a private survey and the Board held that "appellant did not have, either at the time of the 1991 BLM resurvey or at any time before, any bona fide rights." Longview Fibre Co., 135 IBLA at 185.

Delzell nonetheless contends that his bona fide rights must relate back to the private 1920 Summerhalter survey which allegedly relied on the original record monument as the section corner. However, evidence does not establish that the 1920 survey stone was the original survey monument or that it is the same as the Stone found in the Delzell Survey in 1981. The 1920 Summerhalter field notes show a section corner on a map with the notation "IIIIII," and another indicating the single notch on the south side of the monument. (Delzell Ex. 12.) The notes state that the surveyor started at the section corner. The notes contain no effort to conform the

survey to the original 1882 survey. Rather, Summerhalter states that the southwest corner of the place is "found & checked within 6 ft. of rock monument placed in original survey of Sorenson Homestead application." Id. This provides no evidence establishing that the Stone is the same one relied upon in the 1920 survey, or that the 1920 survey located the stone or corner identified in the 1882 original survey. Because the surveys relied upon by Delzell to assert bona fide rights do not support a conclusion that the Stone is in fact the record monument, we find that Delzell has not demonstrated the good faith reliance necessary to justify his claim that BLM's survey must protect his desired private property lines as bona fide rights.

Delzell complains that BLM improperly acted in a judicial capacity when it allegedly considered the effect on land titles when completing the resurvey. Delzell contends that among Kohlerschmidt's reasons for not accepting the Stone as the original record monument was "the adverse [e]ffects [to] the private lands in secs. 29 and 30." (Response at 7, citing Oct. 24, 1986, Kohlerschmidt Memorandum.) The Survey Manual expressly states that notions of judicial "equity" or "fairness" are not factors to be considered in dependent resurveys: "The surveyor is not a referee as to the justice or injustice of a situation, nor is he qualified to act judicially upon the equities or inequities that may appear to be involved." Survey Manual ¶ 5-13 at 131. Considering the many reasons on which Kohlerschmidt based his conclusion that the Stone was not the original survey monument, we do not believe Kohlerschmidt was acting in a judicial capacity when he made this observation.

The SOR and Response assert a number of other contentions that are not addressed herein. To the extent not expressly considered, any further argument has been considered and is rejected.

#### CONCLUSION

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 18, 1999, State Director decision dismissing the protest filed by Delzell, Simpson, and Strickland, against the dependent resurvey of T. 35 N., R. 5 W., New Mexico Principal Meridian, is affirmed.

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Lisa Hemmer  
Administrative Judge

I concur:

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James F. Roberts  
Administrative Judge