Federal Boundary Cases of the Last 50 Years (1967-2016)

Brian Portwood – Land Surveyor - Bonneville Power Administration – bportwood@bpa.gov

Today we will review 8 federal cases involving boundary and title issues, which have been selected because they are especially thought provoking and because they enable us to understand and appreciate:

1) **The importance of knowledge of the law.**
2) **The fact that proper resolution of conflicting boundary evidence is based upon principles rather than technical factors.**
3) **The significance of historical evidence of every kind, which does not diminish with the passage of time.**
4) **The value of thorough research along with a well organized analytical thought process.**

The primary role of the land surveyor in dispute resolution is to gather all of the relevant evidence and to organize it in a manner that is suitable for legal review, making sound knowledge of the law absolutely essential to any proper evaluation of boundary and title evidence conducted by the surveyor. As we will have occasion to observe, proper application of a rather small number of fundamental principles ultimately forms the basis for boundary determination.

- **Thanks to MSPS for allowing me to engage with all of you today!**

This is the midpoint of my annual 2 week vacation, and I'm pleased to have this opportunity to spend a full day with so many of my esteemed professional colleagues.

Before we dive into the material I have prepared for you however, there are some preliminary matters to be addressed.

We will cover the first 4 cases before breaking for lunch at Noon, and there will be a bathroom break between the second and third cases.

Please be back from lunch by 1PM

We will cover the last cases 5 through 8 this afternoon, provided that time allows, before ending at 5 PM, and there will be a bathroom break between the sixth and seventh cases.

- **Someone you know well wrote these words, can you guess who?**

"Make the commitment and seek opportunities to speak with and educate groups in your communities. Kiwanis, Rotary, Lions, and other community groups are important organizations with members involved in your local community. These are our friends and neighbors who have little or no idea about boundary surveying or there importance. Ask to speak with them and give a short presentation at one of their luncheons. Get involved and help your State Society develop programs and ideas to present Land Surveying to others. We must also be proactive, speaking with and educating the public and our related professions in our communities, regionally, and nationally. Instead of the failed one client at a time effort to educate the public, we must be proactive. All it takes is you, a belief in the value of our Profession, and a desire to raise the perception of the Profession."

And how about this?

Just what does it mean to do something for one's profession? Does all of the survey work we do on a daily basis, in the course of our normal business, not completely fulfill our professional burden?

Doing something for one's profession goes beyond properly completing routine tasks and duties, and involves engaging in activities which exceed our basic legal or contractual responsibilities, such as:

- **Taking steps to expand and broaden our profession's collective knowledge base through advanced education**
- **Passing our own knowledge and wisdom, derived through experience, on to the next generation through mentorship**
- **Enhancing our profession's collective image in the eyes of the public, and particularly those engaged in related professions**

One more item along the same lines for your consideration:

"Surveying and the law both change … nevertheless … a surveyor has a responsibility to research, investigate and discover all the available evidence … a solid understanding of boundary law will guide the modern surveyor in his search for evidence of the all-important element of intent, as disclosed by the words, reliance, actions and expectations of prior parties who owned or had dealings with the property."

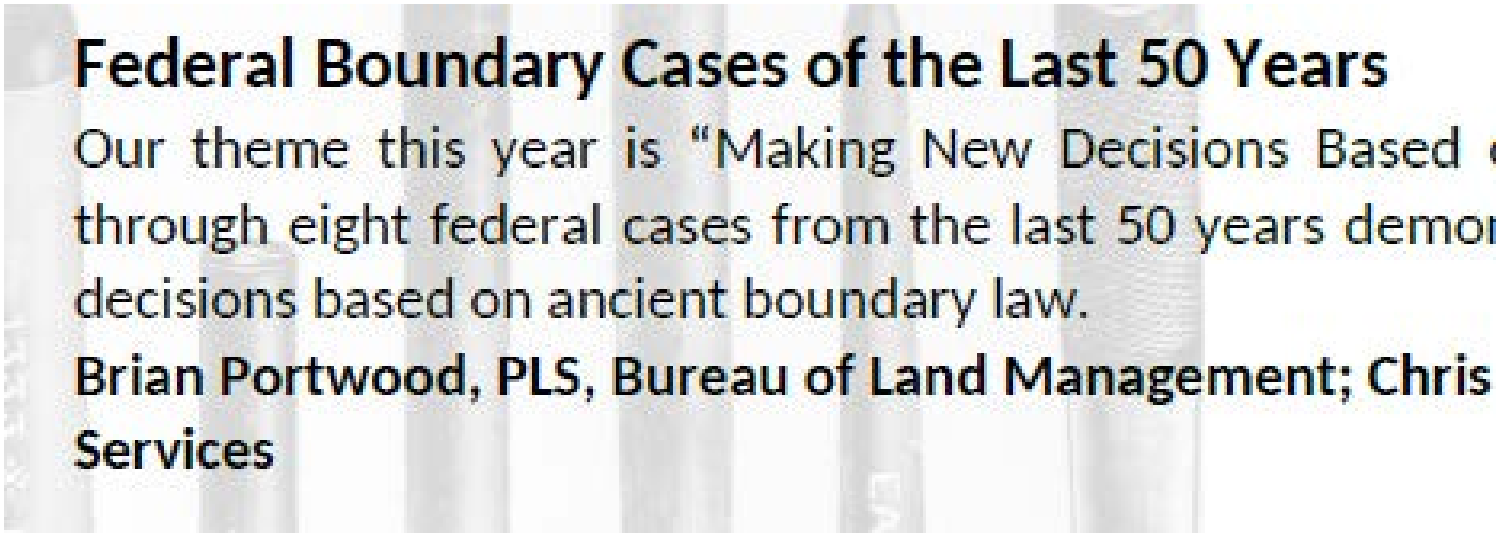
Jerry Broadus – Washington surveyor, land rights attorney and author of the book "Washington State Common Law of Surveys and Property Boundaries"

The preliminary conference schedule that was sent to me showed this:

SATURDAY, OCTOBER 5, 2019

7:00 am	Registration and Continental Breakfast with Exhibitors
8:00-12 noon	**Federal Boundary Cases-The Last 50 Years** TBD **Brian Portwood**
12:00-1:00 pm	Luncheon
1:00-5:15 pm	**Federal Boundary Cases-The Last 50 Years** TBD **Brian Portwood**

The next time I saw the schedule it showed this:



This appeared in an issue of Missouri Surveyor about 2 years ago, introducing some articles about the infamous Red River boundary dispute, involving Oklahoma and Texas:

Our first feature is a three part collection of stories out of Texas regarding the Feds' attempt to ignore customary surveying practices and threaten private land tenure in *BLM Admits 'Incorrect Methodology' Used in Surveys* by John Ingle, *Texans Applaud Suspension of US Land Surveys* by David Lee and another by Mr. Ingle, *Texas Surveying Board Expresses Concerns Over BLM Case*. These tales highlight our required vigilance in practicing and protecting the methods we know better than any other profession

Should I take this to mean that as a federal surveyor I will be lucky to get out of Missouri alive?

My background & educational philosophy

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- **Age 61, started surveying in Arizona in 1983 at age 25**
- **Next 22 years in the private sector, mostly in the construction industry**
- **Last 14 years spent working in the public sector, all with BPA (DOE)**
- **BPA was part of the DOI, along with the GLO and the BLM, until 1976**
- **Commitment to lifelong learning and supporting professional development**
- **Emphasis on broadening the collective knowledge of our profession**

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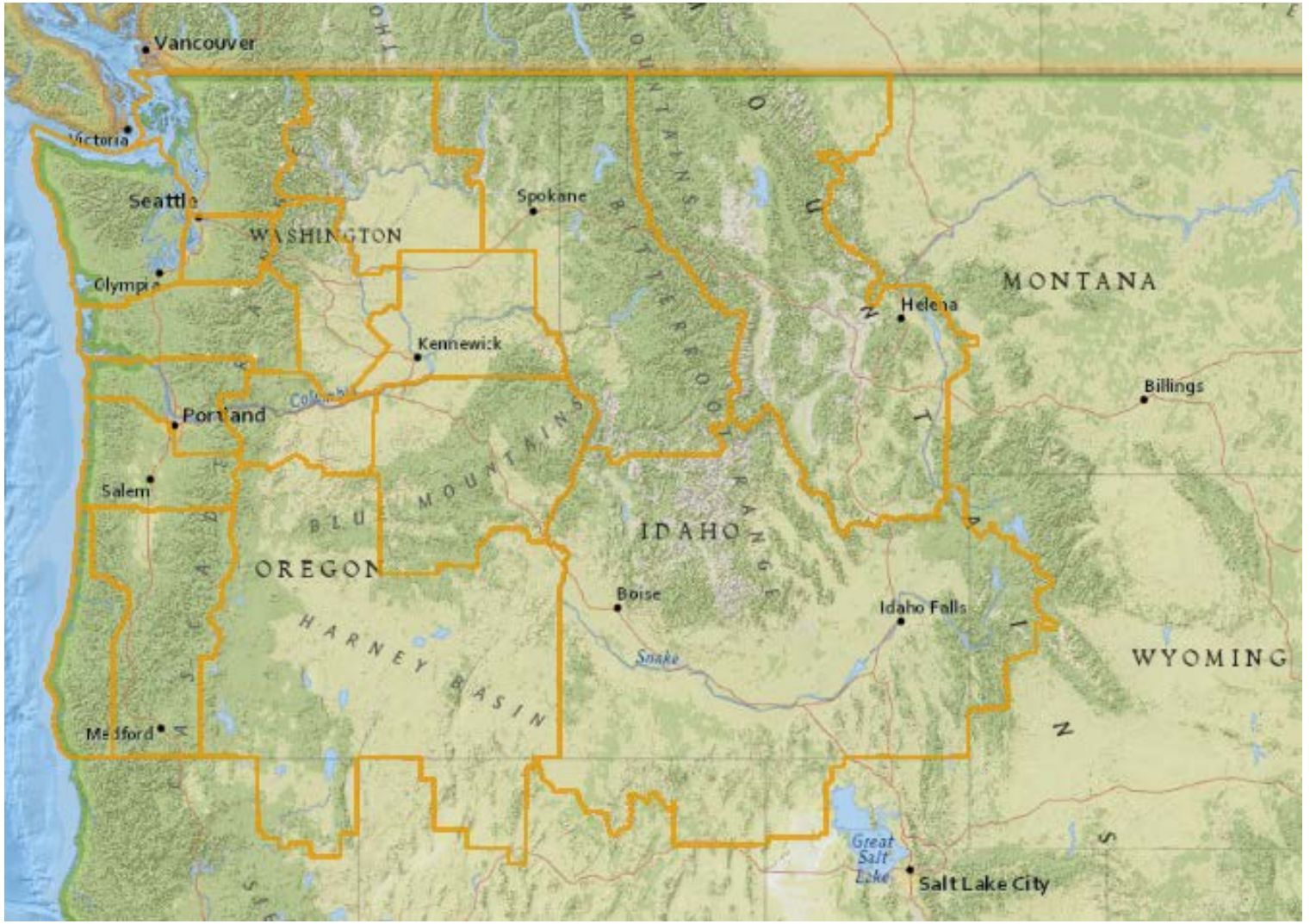
Am I smartest person or the best surveyor in the room? Of course not, in fact every one of you may very well be a better surveyor than I am, but does that mean you cannot learn anything from this presentation?

All any presenter can do is offer you ideas to consider, no presenter should ever tell you how to survey, or tell you what you must do or not do. What you get out of your experience here today will be governed primarily by your own attitude about learning. If you are open to expanding your knowledge, and perhaps even adopting a new mindset with regard to the law and your role as a surveyor in our society, this presentation will provide you with plenty of food for thought, as well as avenues of learning that you can pursue on your own.

The Bonneville Power (BPA) region includes 3 full states (ID, OR & WA) and parts of 5 other states (CA, MT, NV, UT & WY).

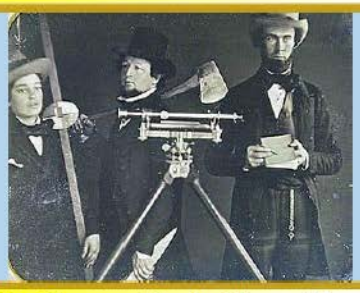


Missouri is part of the federal power region known as SWPA, which just like BPA is a component of the US Department of Energy. SWPA facilities represent federal properties, so be sure to seek information from SWPA before conducting any survey work near any of their power lines, substations, dams or other such facilities. They may be able to provide you with vital or helpful survey information.

Southwestern Power Administration

Agency overview	
Formed	September 1, 1943
Jurisdiction	U.S. government
Headquarters	Tulsa, Oklahoma, U.S.

Land Surveying Workshop



December 6, 2019
8:00 a.m. - 4:00 p.m.
Oregon Tech
Wilsonville Campus

The Oregon Tech Alumni Association and the Geomatics Program are proud to present this year's 16th annual Land Surveying Workshop. Proceeds from this workshop go directly to Surveying/Geomatics student programs.

8:00 a.m.—11:30 a.m. Brian Portwood, PLS BPA:

The Nooksack River Case—A study of riparian boundary and title issues involving federal land, focusing on the importance of understanding when to turn to the federal Quiet Title Act.

Followed by a discussion of the first volume of The Land Surveyor's Guide to the Supreme Court of Oregon, which is available on the PLSO website – those who have the book are invited to bring it to this session and ask questions of the author.

11:30 a.m.—12:30 p.m. Lunch provided, buffet style.

12:30 p.m.—4:00 p.m.

Whose Line is it Anyway? Following in the Footsteps of the Retracement Surveyor— A themed portion of the workshop from a variety of surveyors that focuses on corners that are NOT original Public Land Survey System corners and have something wrong with them: Lost corners re-established by non-standard proportioning methods, corners of unknown provenance which may or may not be the original, multiple monuments, and others. The focus of this presentation will be to develop professional judgement and spur critical conversations.

"Making New Decisions Based on Old Decisions"

Speakers

Dick Elgin, PhD, PE, PLS
Ron Heimbaugh, PLS
Jess Moss, PLS
Joe Paiva, PhD, PE, PLS
Carol Payne
Jim Peterson, PE, PLS, PhD
Brian Portwood, PLS
Joe Svoboda
Jacquline Walters
Steve Weible, PLS
Chris Wickern, PLS

Holiday Inn Executive Center
Columbia, MO
October 3-5, 2019

Are surveyors makers of important decisions?

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Of course, but in order to have the intended result or produce the desired outcome, our decisions must accord with the law, and we must also recognize that nothing is more important to the reputation of our profession than demonstrating that we can work collaboratively with our fellow professionals in the land rights field, and that could be the most important lesson of the day.

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We bring great expertise to the table, as genuine experts, operating within the scope and parameters of our professional knowledge, but does that mean the surveyor is always right, or that the surveyor's opinion must always control?

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Always be mindful that you are part of a team, on every project, however large or small the project may be. In order to be a productive team member, you must be prepared to be conversant with everyone on the team, including attorneys. You can prepare yourself to be an outstanding contributor by broadening your knowledge, but a respectful team member also acknowledges that some decisions are for others to make. The input provided by the surveyor will not always prevail, but those surveyors who consistently provide sound input, and honor the team approach, will be regarded as preferable partners.

Importance of knowledge of the law

The 1975 BLM Casebook, which was created by the federal cadastral training team as a supplement to the BLM Manual of 1973, supporting the education of land surveyors on advanced topics relating to title and boundaries, states in the introduction to the boundary law discussion that:

"There is no statutory law pertaining to these problems, except that no survey or resurvey may be executed in a manner that will adversely affect vested rights of the land owners. The surveyor can and must develop the facts, relationships and evidence, and make decisions based on sound knowledge of the precedents of case law.“

Nonetheless, every land surveyor engaged in boundary work has to make his or her own professional decision regarding the extent to which knowledge of the law is necessary or relevant to his or her work, and thereby determine the extent of his or her personal investment of time and effort in learning about how the law impacts boundaries and interacts with the work of the surveyor.

Knowledge of principles versus technical knowledge

The BLM Casebook emphasizes that acquiring sound and useful knowledge of the relevant principles of law is an appropriate educational focus which holds great value for the professional land surveyor:

"Law students are accustomed to learning principles … there is a knack to … actively looking for the principle … if the reader tries to skim through the text … there can be no real expectation that the principle will be discovered … remember to keep asking yourself (when reading case law or a case law review) "What principle is represented here?"."

In reality, this crucial focus on principles marks the divide between the professional and the technician. In the course of this learning journey, it will be readily observed that the principles which control boundaries correspond directly to those which control title, and quite logically so, since boundaries exist for only one purpose, which is to define and limit the physical extent of any given title. Thus the path of our journey, which leads to genuine boundary expertise, quite naturally passes through the realm of title law.

Knowledge of principles extending beyond technical knowledge

In the title context, determining where any particular boundary is located for boundary resolution purposes is not a technical exercise involving numerical values, it is an exercise in the evaluation of evidence. Whenever a spatial conflict is presented by survey evidence, it exists because at least 2 different lines are in contention, and the location of each line is already known, thus the decisive question is which line is supported by superior evidence. Professional land surveyors are measurement experts, fully capable of defining the location of any line or any number of lines, yet upon completion of that technical portion of the work, the larger task of boundary definition remains incomplete, if the goal is to produce a genuinely reliable and legally supportable survey, correctly identifying property boundaries. The ultimate question to be addressed in so doing, not from a judgmental perspective but from an objective evidentiary standpoint, is whether any given line, having been surveyed and precisely identified in terms of location, is in fact a boundary line. As A. C. Mulford wrote in 1912, emphasizing the importance of boundary stability:

"It is far more important to have faulty measurements where the line truly exists, than an accurate measurement where the line does not exist at all."

The significance of historical evidence

As amply illustrated by each of the cases reviewed herein, no valid and legally supportable conclusions about land rights can be reached without proper analysis of all of the relevant evidence, and under the law pertaining to real property in our country that can mean tracing title all the way back to its origin, which typically lies in a conveyance from the federal government. Any decision regarding the boundaries of any particular title, made in the absence of even one key evidentiary factor, or made without knowledge of relevant federal law, can potentially be shown to have been mistaken, by the production of additional evidence of a more comprehensive and therefore superior nature.

This demonstrates the towering significance of the role of the land surveyor as a gatherer of the many forms of evidence which come within the unique expertise of the surveyor, and which are often unknown to others, or are simply overlooked by those who do not understand its importance. The surveyor who presents the most complete set of evidence, obtained through genuine diligence, clearly depicted on his or her survey, is the strongest ally an attorney dealing with title issues involving property boundaries can have.

The value of an organized thought process focused on full diligence

Although the typical land surveyor is not qualified to act as an attorney, and obviously has no authority to function as a judge, any land surveyor who operates in the arena of boundary and title law is well advised to adopt a mindset which accords with the methodical approach taken by attorneys and judges, who understand the importance of all forms of evidence. The surveyor who successfully gathers all relevant evidentiary information, including both physical evidence and documentary evidence, and has the capacity to recognize, appreciate and cogently communicate its legal significance, thereby provides an essential foundation for success in any legal forum.

In summary, the results of genuinely diligent research, displayed in a chronologically organized manner, produces a most impressive evidentiary package and thereby sets the stage for victory. So even though the retracement surveyor can make no decisions that are legally conclusive in nature, the work of a surveyor with sound and comprehensive knowledge of the law can be absolutely pivotal to the proper resolution of the myriad of title conflicts that present locational issues and therefore have a boundary component.

The value of engagement in education

Engagement is where real learning happens. Just reading some written material and then putting it down represents a minimal learning experience, the more time you spend actually thinking about the issues and the principles that are in play, the better those ideas and concepts will be imprinted upon your brain. In addition, actively discussing educational material with colleagues, while keeping your mind open to the learning value embodied in their comments, also increases your brain's ability to retain the knowledge. So by paying thoughtful attention and actively contributing to the discussion you can enhance both your own learning experience and that of your colleagues.

The cases which comprise this presentation are simply examples of essential principles in action, but those principles are not limited to these particular cases. The goal here is to enable you to see how those principles operate, and to enable you to recognize that they have broad application, to many situations which you are likely to encounter on a regular basis. The ultimate objective is to support your role as a maker of important decisions, to give you the best opportunity to make professional decisions that are both wise and sound.

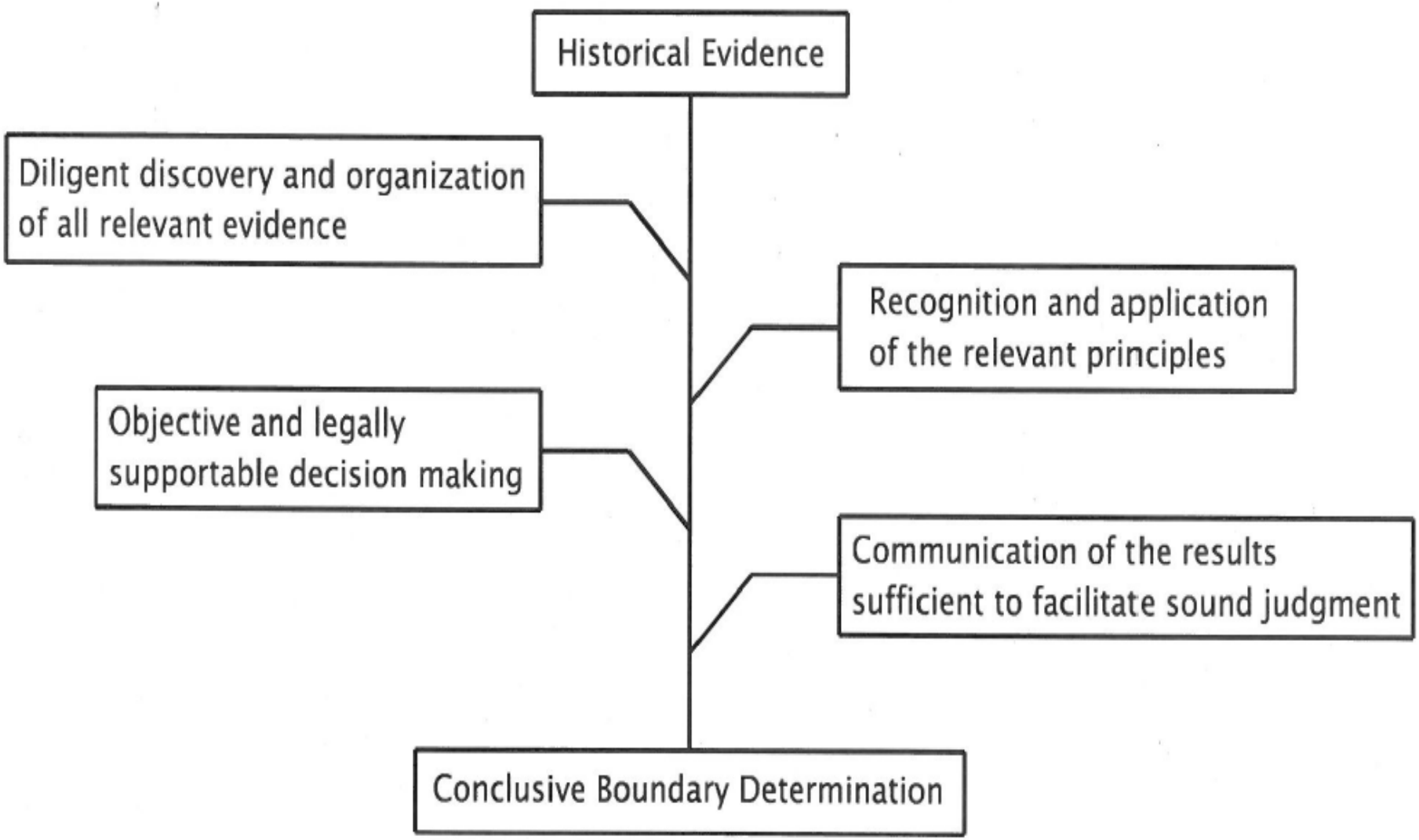
Ideas versus Conclusions

No presentation can provide the attendees with a complete knowledge injection or make them overnight experts on any given subject. The best presentations are designed to stimulate thought in the minds of the attendees.

The real goal of every professional presentation is to plant seeds of thought, which if allowed to sprout will reveal many potential paths of learning that can be followed by the attendees on their own, at their own pace. No professional presenter should expect his or her audience to simply accept the conclusions which he or she has drawn from the material without question. The best presenters invite the members of the audience to explore the subject matter themselves, and to draw their own conclusions as they do so.

So be open to additional learning, beyond the small time period allotted for this session, and view the many ideas that will be set forth during this session as a point of beginning, rather than a finish line, setting the stage for another educational adventure on your never ending professional learning journey.

The Key Ingredients of the Evidentiary Process



<u>Respect for bona fide rights lies at the heart of all survey work involving federally created boundaries</u>

The Bona Fide Rights Act of 1909, amended June 25, 1910 (36 Stat 884) reads:

"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."

In addition, judicial protection of bona fide rights is always a primary objective in federal boundary litigation, which therefore represents a major theme linking the cases that comprise this presentation.

The best education results from engaged interaction, so always be prepared to participate! Every question, comment or idea you express can initiate new and important pathways of thought in the minds of your colleagues, especially the next generation, whose learning journey we elders have a duty to support.

Recommended approach - to guide your thoughts as you review this material

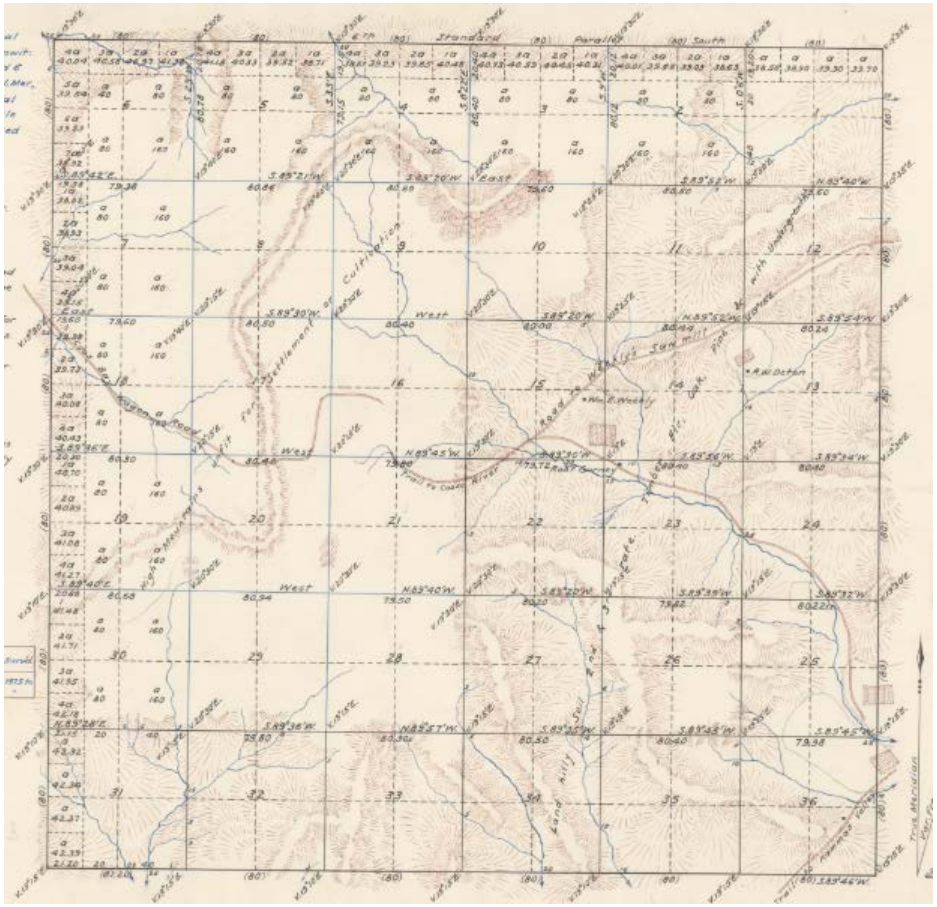
As professionals, we proceed through the evidence in a detailed and organized manner, in order to insure that we have duly noted all of the relevant points of information, but of course not every factual item will prove to be decisive or vital to the outcome, so keep the primary focus of your attention upon:

- **The sequence in which the described events occur**
- **The passage of time between events and the length of each time period**
- **Which parties are directly involved in each event**
- **The potential legal implications of each event**
- **The principles of law and equity which each event brings into play**

Treat this as an exercise in professional analysis and decision making, try to avoid diverging into speculation or conjecture, but be observant as the essential evidentiary facts unfold before you. Concentrate upon objectively noting the potential value of each fact that is presented, but read each page with a relaxed, open and thoughtful mindset, then after reading each piece of additional information ask yourself "How does this piece of the puzzle fit in with the other known information, and does this fact appear to create some form of legal tension or conflict with any of the other known facts?".

The Weyerhaeuser Case (Oregon 1967)

1855 - A GLO surveyor establishes and monuments the township & range lines embracing a certain township, he then subdivides it in the usual manner, and the plat of this township is duly approved the following year.



1857 to 1875 - No settlement or acquisition occurs in the subject area, which is heavily timbered, so all of the land in and around this township remains public domain.

1876 to 1895 - Some land in this township is patented, but the land lying along the northern boundary of the township evidently remains unused, and the township lying directly to the north remains unsubdivided.

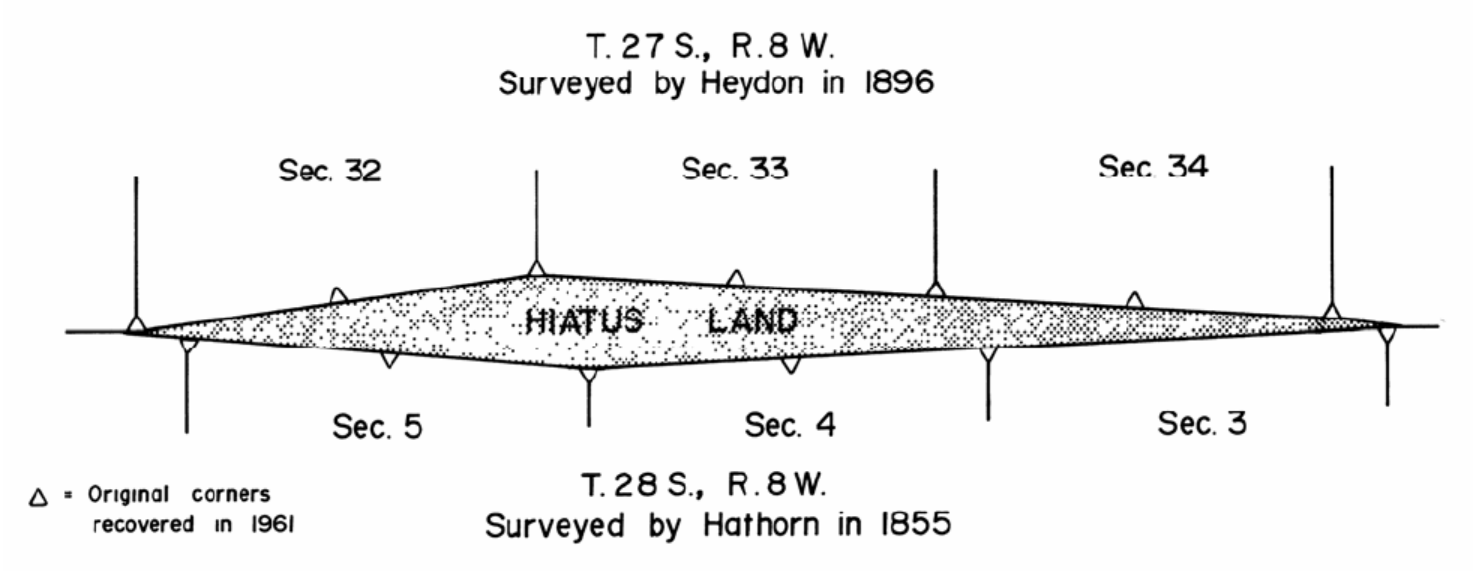
1896 - The GLO subdivides the northerly township, but in so doing the GLO surveyor is unable to locate the 1855 monuments along the north side of Sections 3, 4 & 5 of the southerly township, so he sets new monuments in those locations.

1897 - The plat of the northerly township is approved, and it indicates no deviation from the previously established township line of 1855.

1898 to 1948 – At various dates during this period all of the sections lying along the south edge of the northerly township are patented and by the end of this period all of those sections have been acquired by Weyerhaeuser.

1949 to 1961 – A proposal to build a county road along the township line arises, so a county survey crew visits the area and searches for the GLO monuments. By the end of this period, nearly all of the original monuments set in both 1855 and 1896 have been found and positively verified as genuine undisturbed original monuments. The evidence reveals that 2 distinct lines were monumented by the GLO for a distance of about 3 miles, and line of 1896 is up to 300 feet north of the line run in 1855, because the 1896 surveyor did not find the 1855 monuments in that area, so a gap area exists, consisting of about 46 acres, lying between these 2 monumented lines.

1962 – This scenario is presented to BLM for review and advice regarding the true location of the township line.



You are the BLM surveyor on the federal team assigned to resolve this situation in 1962. Weyerhaeuser owns the land on the north, while the land on the south is either owned by others or remains unpatented. There is no evidence that any surveyor or anyone else ever found or relied on any of these monuments prior to 1961. Your team must clarify who holds title to the hiatus area, because Weyerhaeuser plans to log that ground if they own it, and your answer must be strong enough to withstand judicial scrutiny.

All reasonable possibilities must be given consideration, how many possible responses can you see arising from this scenario?

1) Neither line controls, because neither of them marks a true parallel of latitude, so the line between these townships must be properly run, to determine the extent of all of the relevant sections.

2) The 1855 line controls, because it is the senior line, and the line of 1896 must be disregarded as a false line, which was created only as a result of gross error on the part of the 1896 surveyor.

3) The 1896 line controls, because the fact that the 1896 surveyor could not find the 1855 monuments indicates that the line of 1855 was grossly erroneous, rendering the older line a legal nullity.

4) The 1896 line controls, because the GLO clearly intended the newer line to supersede and replace the line of 1855, which was never relied upon by anyone for any purpose, therefore the 1855 monuments have been legally invalid and worthless since 1896.

5) Both lines control, 2 township boundaries exist and a genuine gap exists between those lines, because both GLO surveyors were duly authorized to set township line monuments and they both did so.

6) The monuments set in 1896 must be regarded as closing corners, and amended by moving them south to the 1855 line, because they were clearly intended to lie upon the line of 1855 and any deviation between those lines is purely unintentional and accidental.

Lets Get Some Input – But Please Adhere to These Guidelines!

To avoid excess noise, discussion must be limited to each table, do not attempt to engage in communication with anyone sitting at another table, communicate only with those at your own table.

Please listen respectfully as others express their views, rather than engaging in chit chat about any other subject during this period.

If you already know the outcome of this case, please do not reveal your knowledge to anyone.

Please allow everyone else to experience the full benefit of this exercise by forming their own thoughts and opinions independently.

Expressing ideas and explaining one's position fosters engagement on the part of others, so all views that are expressed contribute to the overall educational experience and should be appreciated.

All those who contribute to the learning objective in this way are entitled to our respect, regardless of whether their views prove to be correct or not.

The only answer that ultimately matters is the one provided by the court of final jurisdiction.

5) Both lines control, 2 township boundaries exist and a genuine gap exists between those lines, because both GLO surveyors were duly authorized to set township line monuments and they both did so.

BLM deemed this to be the appropriate answer, and proceeded to create another township, in between the 2 existing townships. In so doing, BLM personnel took the position that the 46 acre gap area had never been patented to anyone, because it was not embraced within the boundaries which were established in either 1855 or 1896, therefore it was still federal land, having been omitted from both of the relevant townships.

One might suppose that BLM took this position simply because it resulted in the existence of federal land, in a place where no one had previously realized that any federal land still existed, but in fact that was not the basis for this BLM decision, the federal personnel believed this was the only legally supportable answer. But having taken this position, they had to make it stand up in court.

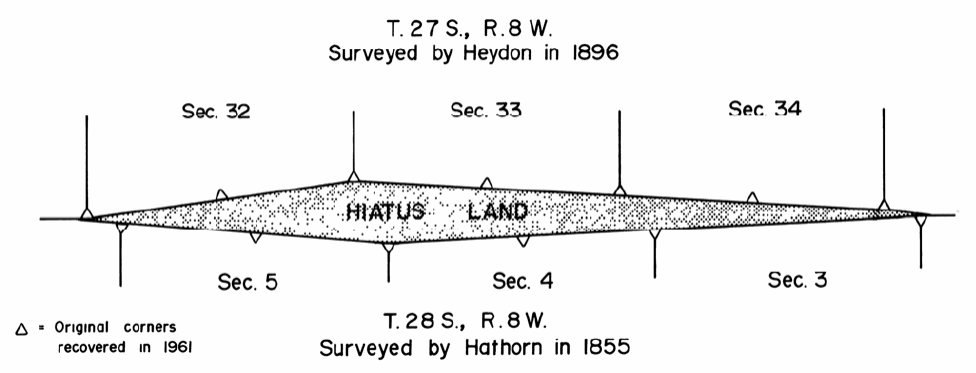
The BLM solution was obviously not the answer Weyerhaeuser wanted to hear, so the company filed a legal action in federal court against BLM, alleging that this federal decision had wrongly deprived the company of both the land and the highly valuable timber which occupied the area in question.

In court, Weyerhaeuser maintained that the line of 1855 controlled, because it was the senior line, and a federal judge agreed, holding that the 1896 line was an unauthorized deviation from the existing original township line, representing nothing more than a plain blunder on the part of the GLO. Having been created in violation of the senior rights principle, the judge decided, the line run in 1896 never held any controlling force, and the Weyerhaeuser sections extended south to the line of 1855 for that reason.

2) The 1855 line controls, because it is the senior line, and the line of 1896 must be disregarded as a false line, which was created only as a result of gross error on the part of the 1896 surveyor.

The federal judge found the position set forth by Weyerhaeuser to be legally solid, and saw the BLM decision to respond by creating a township which had never previously existed as unjustified, because the federal government clearly never intended to retain land in the location at issue, and because the 1896 GLO surveyor certainly never intended to create a second township line or to create any gap.

This judicial ruling was therefore clearly founded upon the powerful principle of intent, but the federal legal team elected to appeal this ruling, and the presence of another equally powerful principle would ultimately determine the outcome.



The Court of Appeals reversed that lower court ruling, confirming that BLM personnel had properly evaluated this situation and had arrived at the correct conclusion. The BLM decision to create another township was legally justified and was perfectly appropriate, because the wedge was omitted federal land, not lying within the boundaries of either the southerly township or the northerly township, as those boundaries had been monumented.

The federal intent to create only 1 township line, which was undisputed, was insufficient to overcome the fact that both lines had been physically established and monumented by federal officers operating within their authority, so the fact that their activities produced 2 lines, where only 1 line was intended, was legally inconsequential, both lines were legally valid, because they were both products of legitimately exercised federal authority.

Now that we have seen the judicial result, lets first observe what turned out to be the most important evidence. Looking back at our chronological list of relevant historical occurrences, which date marks the key event?

The answer is very obvious in this case, particularly to surveyors, because the key event involved the work of a surveyor:

1896 – The year in which the second surveyor created the problem, by failing to find the 1855 monumentation and establishing a second township line when he unintentionally deviated from the 1855 township line, as a direct result of his inability to find those original monuments.

But can this mistake made by the 1896 surveyor be properly classified as negligence on his part, potentially nullifying the value of his work on the basis that it was grossly erroneous, or on the basis that his actions exceeded his authority?

Because this controversy stemmed from acts of a GLO surveyor, the authority embodied in that surveyor was plainly central to its resolution. By 1896, the original township line monuments were over 40 years old, and they had very likely become highly difficult to find. Recognizing that factor, the Court of Appeals was unwilling to agree that the second surveyor's failure to find the original monuments made him guilty of negligence, nor declare him guilty of exceeding the federal survey authority that was vested in him by setting additional monuments which established another line.

Having concluded that the 1896 surveyor did not exceed his authority, the appellate panel found that there could be no justification for discarding or nullifying any of the monuments he had set, despite the fact that he clearly never intended to deviate from the line of 1855. Because both the 1855 and 1896 surveys were performed within the scope of authority that was vested in each surveyor, those surveys were of equal value in the eyes of the law, so neither of them could be legally rejected. Thus all of the monuments found on both lines in 1961 were valid and worthy of respect, as BLM personnel had correctly recognized.

Key lessons regarding essential activities of surveyors:

Courts generally understand that survey work can be difficult, and they realize that properly completing every aspect of that work can be highly problematic, so they are typically quite reluctant to find a surveyor guilty of negligence or gross error. Therefore, a surveyor who made an honest effort to complete his assignment, rather than flagrantly disregarding his instructions and making no such effort at all, will rarely if ever be judicially deemed to have been negligent, even though his work came up short of his intended objective, because imperfect results do not necessarily signify negligence.

Original monuments actually set on the ground ultimately constitute the highest and best boundary evidence, even though they very often mark a path which is not the one that the surveyor intended to follow, because surveyor intent is distinctly secondary in importance. The matter of primary importance is typically the physical evidence that the surveyor actually placed on the ground, since only the line which he physically established for use by others, rather than his intended path, forms a valid basis for legitimate reliance.

Why were the monuments set in 1896 not treated as closing corners, despite the fact that they were intended to mark an existing PLSS line and were not intended to deviate from that line?

Land which was intended to have been patented was not patented and was unknowingly and unintentionally retained by the US, thereby depriving Weyerhaeuser of acreage which it would have owned if the 1855 monuments had been found in 1896, so were the bona fide rights of Weyerhaeuser properly protected?

The legal effect of all actions taken by federal personnel is defined by the scope and the limits of their authority, and federal interference with any established land rights is statutorily barred by the Bona Fide Rights Act.

In this instance however, both surveyors were duly authorized by the GLO, under valid federal law pertaining to the division of federal land, to run and mark a township line, and neither line impaired any existing private land rights, so neither line could be ignored or dismissed as invalid, despite any errors that may have been made by either surveyor.

Thus in reality, neither which line came first, nor which line was more precisely placed on the ground, made any difference whatsoever, each line was entirely valid and legally binding for its own particular purpose, and all of the monuments were equally worthy of respect, despite having gone unseen for decades, because every one of those monuments was equally endowed with federal authority.

Weyerhaeuser argued that they had a right to rely upon the southerly township line because the senior line always prevails, and they lost because that proposition is untrue.

Had the owners of the sections south of the township line, rather than Weyerhaeuser, claimed to own the gap, they could have pointed out that the 1896 line was very plainly intended to supersede the 1855 line, and was definitely not intended to create a second boundary line, which was certainly true, but would they have been able to prevail, either on that basis or by asserting that the line run in 1855 was inaccurate enough to constitute gross error?

As we have already observed, the power of the principle of intent can be neutralized, or even negated in cases such as this one, by the principle of authority, which is an important factor at the state level as well as the federal level.

In addition, a very heavy burden of proof always falls upon any party asserting that a GLO survey was grossly erroneous, so the owners of the southerly sections would presumably have been judicially restricted to the land lying within the boundaries that were physically established during the original survey of their township in 1855, just as Weyerhaeuser was limited to the land that was actually encompassed within the 1896 survey.

Both surveys were original surveys, and neither of them was grossly erroneous by Nineteenth Century standards, which were the only relevant standards to be applied, as the BLM personnel understood. Thus we can see that the BLM decision to create a "half township" in this location was actually both wise and legally sound, because the gap area did in fact constitute genuine omitted federal land.

How is the phrase “omitted land” defined in the federal context?

Land which was not intentionally left unsurveyed, but which was not within the boundaries of any federally conducted survey, and therefore cannot be included within any federally patented tract, comprises omitted federal land. In this case, once the land in both of the townships bounding the 46 acre area in contention had been patented, the wedge became omitted federal land by operation of law, because it was not part of any patented tract, even though no one realized that the wedge existed until 1961, since the relevant monuments stood undiscovered until that time.

How does omitted land differ from unsurveyed land?

Not all of the land forming the public domain was federally surveyed, in riparian areas for example, numerous islands were intentionally left unsurveyed, along with the submerged land surrounding them, when meander lines were created. Any such land, which was deliberately excluded from federal surveys, and was therefore never given any lot number or other identifier for patenting purposes, represents federally unsurveyed land rather than federally omitted land.

"... the only monuments to be found are those of the survey on the basis of which the sale was made ... the first and only survey of the northerly township ... was the 1896 survey ... officially accepted and approved by the Secretary of the Interior ... that survey contained a monumented line marking the southern boundary of the township ... the land included in the patents could not have been ascertained ... except with reference to that survey and plat ... the patents ... did not purport to convey any land which was not included in that survey ... the district court said that the 1896 survey "deviated from the instructions" and "cannot stand" ... the court was in error ... there is no ... impairment of vested rights ... no rights were impaired by what the government did with or upon its own land."

392 F2d 448
(1967 Court of Appeals reversal of lower court ruling)

Monumentation established during a duly authorized GLO survey and portrayed upon an approved GLO plat, represents the source of the legal force that is embodied in that particular plat, because every GLO plat constitutes a representation of the corners and lines that were produced on the ground during the specific survey upon which that plat is founded, and nothing more.

Every federal patent employing PLSS terminology comprises a direct reference to the particular survey and plat through which the conveyed tract was created, and the contents of that patent stand unaltered by any other federal documentation, that was not produced for the purpose of supporting that specific patent.

Error committed during an original survey is no error at all, original monuments are free of error of any nature, and maintain their full controlling force even if they represent unintentional deviation from the PLSS scheme of subdivision, provided that they served as the foundation for an approved plat, based upon which federally platted land has been patented.

<u>Turning to Missouri case law for just a moment</u>

How many Missouri cases do you suppose there are in which the word "surveyor" appears?

When do you suppose the Supreme Court of Missouri first used the word "surveyor"?

1391 Missouri appellate case have included the word "surveyor", and 144 of those cases have taken place in the last 20 years - this is the earliest reported Missouri case containing the word "surveyor":

1 Mo 296 Supreme Court of Missouri 1823

VASSEUR v BENTON

Public Lands—Confirmation by Act of Congress or State

By the act of congress of June 13, 1812, the claims to town and village lots in Missouri were confirmed, but it was left to the courts of the country to decide between conflicting claims; and confirmations made by the recorder of the lots mentioned make the title no better.

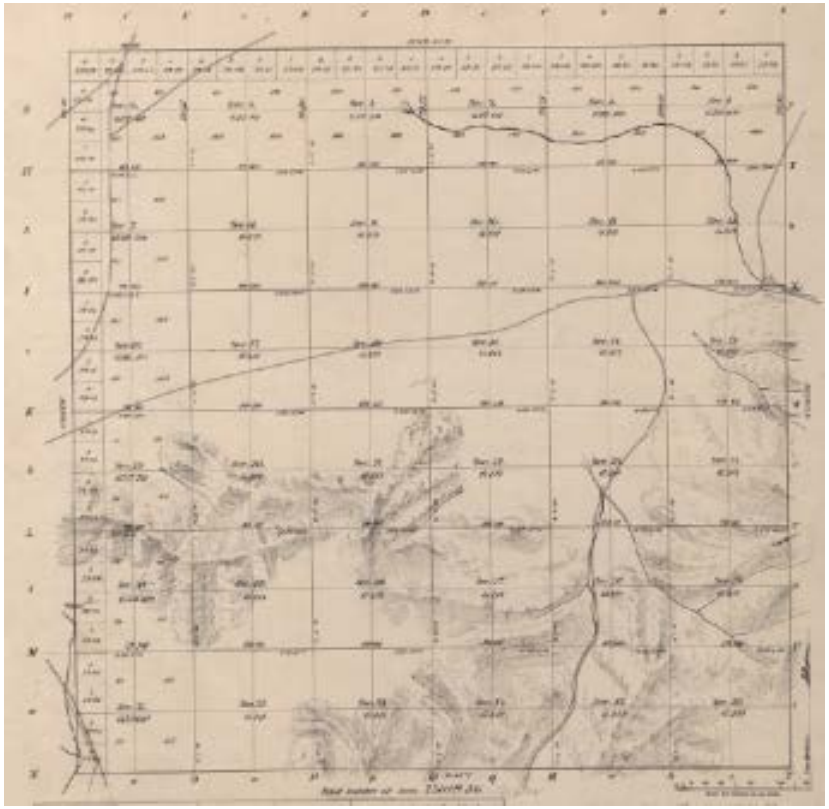
The plaintiff thereupon deduced a title in himself ... and then gave in evidence a plot of survey made by the County Surveyor, under the order of the court ... this survey corresponded to a survey of the same ground, made by the same Surveyor, under the authority of the United States.

The Macmillan Case (Nevada 1971)

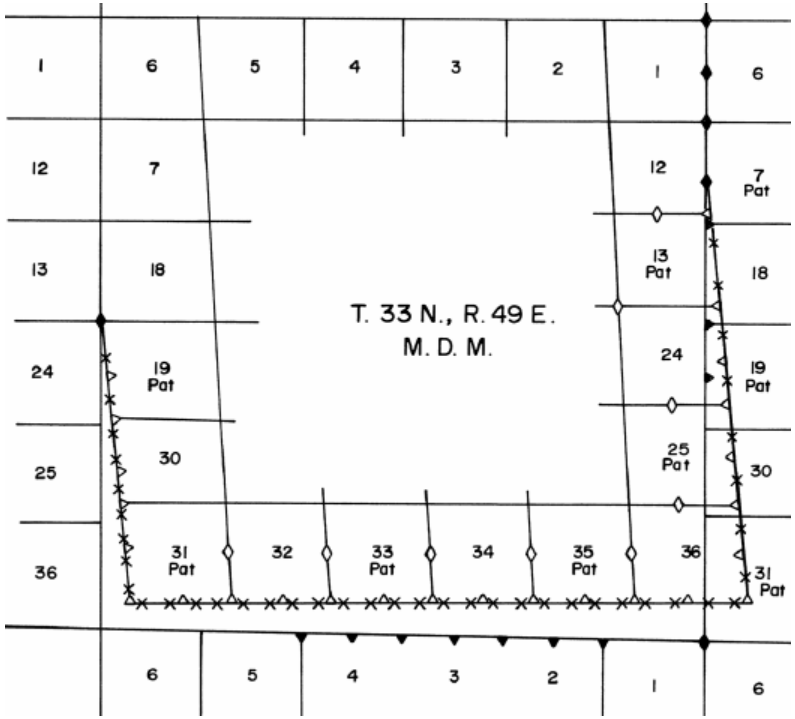
1862 to 1868 - Federal statutes supporting railroad land grants were enacted, which had the legal effect of bestowing fee title to all odd numbered sections in certain townships upon various railroads, and where applicable these federal grants in praesenti took legal effect as soon as each subsequent township plat was approved by the GLO, immediately removing each relevant section from the public domain at that point in time.

1869 to 1874 - During this period, several township boundaries were surveyed by the GLO, and several townships were subdivided and platted in the usual manner, but one particular township remained unsubdivided, although the townships lying directly to the east, south and west of it had all been subdivided and platted by the end of this period.

1893 - A GLO surveyor subdivided this previously undivided township, but in so doing he was unable to locate any existing monuments in numerous locations along the east, south and west township boundaries, so he set new monuments in those locations. In addition, in at least a few places he deliberately destroyed existing monuments, whenever he happened to spot them, deeming them to have been illegitimate, due to their deviation from his newly created township boundary alignment, but he left most of those existing monuments undestroyed. The work of this GLO surveyor was nonetheless approved, and a typical GLO township plat was published at this time based upon this survey, which did not indicate the presence of any conflicts regarding the monumentation of any township boundaries.



1893 Plat

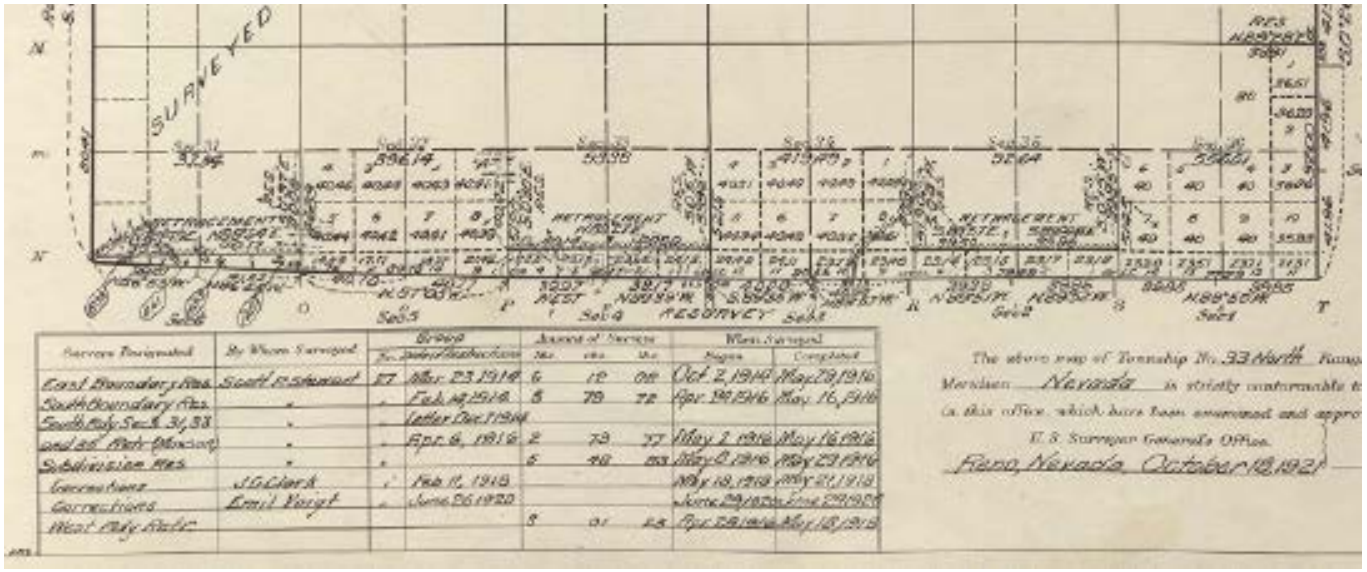


Actual Scenario

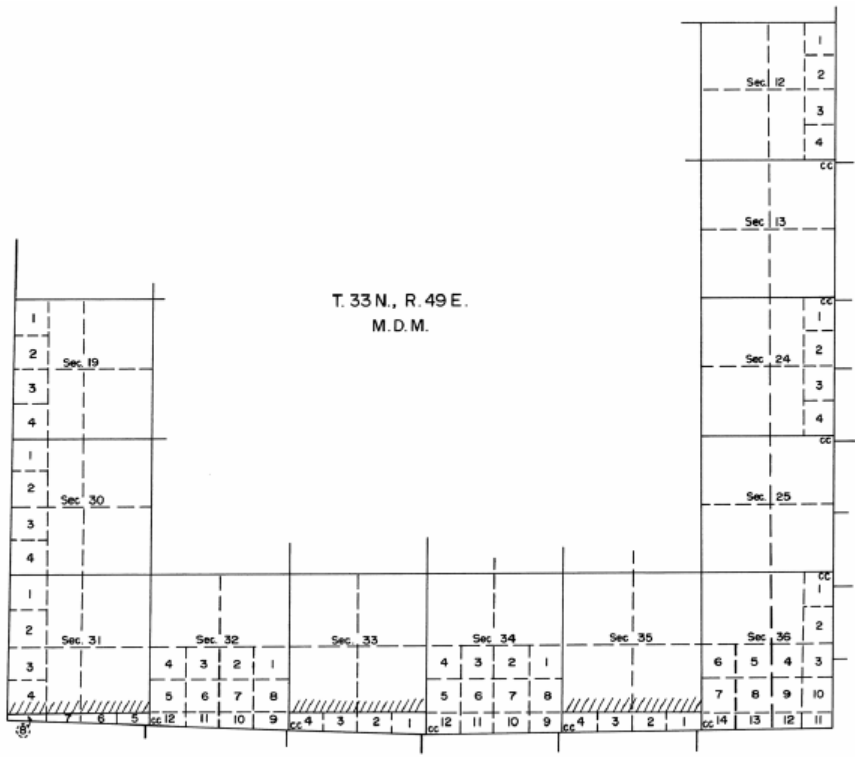
1902 - A railroad obtained patents confirming that it held fee title, by virtue of the aforementioned federal grants, to several of the odd numbered sections within the northerly township, notably including the entirety of Section 31, but there is no indication that the railroad ever made any physical use of any of its land situated in this township.

1921 - From a series of GLO resurveys of portions of the subject area, the GLO became aware that 2 distinct township boundaries existed along portions of the east and west sides, and even more problematically, along the entire south side, of the 1893 township, because the 1893 survey deviated substantially northward by up to 12 chains from the south line of that township, which had been duly established and platted about 20 years earlier, pursuant to the original survey of the southerly township. The Commissioner of the GLO personally reviewed this situation and ordered numerous GLO lots to be created for the purpose of defining the various hiatus areas, and a plat was produced at this time showing those lots, but the GLO did not deem it necessary to create an additional township.

1921 Plat

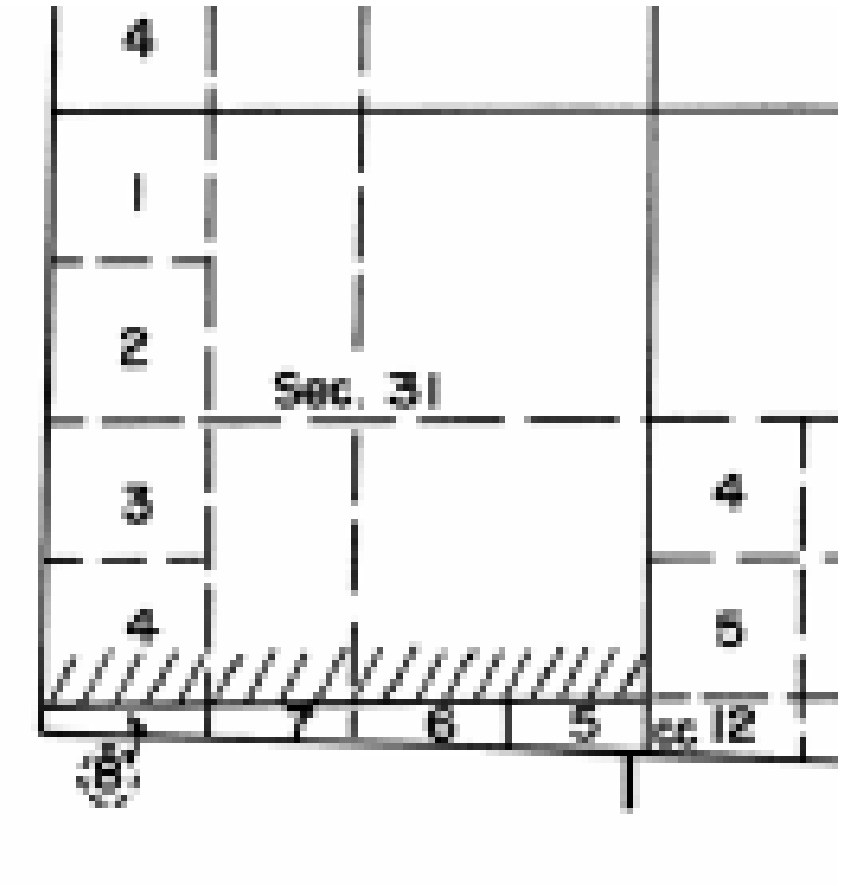


BLM Diagram



1922 to 1963 - At an unspecified date during this period the railroad deeded all of Section 31 to a predecessor of Macmillan. When the Macmillans acquired Section 31, and how they and their predecessors used their land, if they made any use of it at all, are both unspecified, but there is no indication that any structures or fences were ever erected anywhere in or near the subject area, so prior land use would play no role in the forthcoming controversy.

1964 - The BLM leased a 12 acre area to the Nevada highway department for gravel extraction, describing that area as Lot 5 of Section 31, and Macmillan's widow promptly protested that action, insisting that all of Section 31 belonged to her, but the BLM did not agree that Lot 5 was part of the Macmillan estate, so the US filed an action seeking a judicial decree that Lot 5 constituted unpatented federal public domain.



The Macmillan widow maintained that she owned all of Section 31, the BLM acknowledged that she owned Lots 1 through 4, but informed her that she did not own Lots 5 through 8.

The US maintained that all of the township boundaries which had been established prior to 1893 were entirely irrelevant to the Macmillan estate, but in response the Macmillan widow argued that the GLO had very clearly expanded Section 31 southward, as evidenced by the plat of 1921. In so doing, she also pointed out that the Commissioner of the GLO expressly confirmed the addition of 4 lots to her section in writing at that time, in correspondence with the Surveyor General of Nevada, when he made reference to the "increase obtained in Section 31" by the railroad, as a means of compensating for the land lost by the railroad due to the shortened sections resulting from the overlap on the east side of the township.

You are hired my Macmillan in 1970 to survey her property per her legal description, indicating that she holds title to all the land in Section 31, which was deeded to the Macmillans by the railroad. After consulting BLM, will your survey show that her southerly property boundary lies at the north line or the south line of Lots 5 through 8?

1) Macmillan's estate will not include Lots 5 through 8 on your survey, because as a private surveyor you have a professional duty to honor all conclusions regarding PLSS boundary locations that are made by BLM.

2) Macmillan's estate clearly includes Lots 5 through 8, because the legal description in the 1964 deed, which was composed by BLM personnel, specifies and confirms that Lot 5 is in fact part of Section 31.

3) Macmillan's estate will not include Lots 5 through 8 on your survey, because the lots shown on the 1921 GLO plat were illegitimately created, so none of them have any legal existence.

4) Macmillan's estate clearly includes Lots 5 through 8, because she holds a perfectly valid chain of title, indicating that she owns exactly what the railroad owned, and no land within Section 31 was federally reserved when that section was patented to the railroad.

5) Macmillan's estate will not include Lots 5 through 8 on your survey, because the legitimacy of the GLO decision to add those lots to her section has not yet been adjudicated and judicially validated.

6) Macmillan's estate clearly includes Lots 5 through 8, because she holds a bona fide right to rely upon the plat which was produced by the GLO in 1921, plainly showing those lots as part of her section.

Lets Get Some Input – But Please Adhere to These Guidelines!

To avoid excess noise, discussion must be limited to each table, do not attempt to engage in communication with anyone sitting at another table, communicate only with those at your own table.

Please listen respectfully as others express their views, rather than engaging in chit chat about any other subject during this period.

If you already know the outcome of this case, please do not reveal your knowledge to anyone.

Please allow everyone else to experience the full benefit of this exercise by forming their own thoughts and opinions independently.

Expressing ideas and explaining one's position fosters engagement on the part of others, so all views that are expressed contribute to the overall educational experience and should be appreciated.

All those who contribute to the learning objective in this way are entitled to our respect, regardless of whether their views prove to be correct or not.

The only answer that ultimately matters is the one provided by the court of final jurisdiction.

Once again, as in the Weyerhaeuser case, the outcome will hinge upon the legitimacy and legal impact of a single event of primary importance, so identifying the most crucial historical occurrence is necessary to understand the basis for the outcome, which date marks the key event?

1893 – When the defective township survey was approved.

1902 – When the federal patenting process, identifying which sections had been acquired by the railroad, was completed.

1921 – When the GLO produced a plat showing additional lots for the purpose of rectifying and clarifying existing sectional boundaries.

1964 – When the BLM utilized a legal description based upon the 1921 plat for conveyance purposes.

The 1921 GLO decision to address the discrepancies in the relevant township boundaries by adding lots to several existing sections, and to create another township plat showing those lots, proved to be the key event.

While those activities were certainly within the scope of GLO authority, and additional township plats can be created at any time for legitimate federal purposes, in this case the purpose for which the 1921 plat was created extended beyond the limits of federal authority. The decisive principle therefore was once again authority, just as in the Weyerhaeuser case, but in this instance it was an absence of authority, rather than the presence of authority, which determined the outcome.

A federal district court held that the action taken by the GLO in 1921 was unjustified, because the Commissioner had no authority to either reduce or enlarge the size of any patented section on any basis. Thus Macmillan learned that she had no right to rely upon the 1921 plat, and that the boundaries of her section were conclusively defined solely by the monumentation which was established during the original survey of her township in 1893.

Had intent controlled the outcome Macmillan would have prevailed, because the Commissioner clearly intended to expand Section 31, but his intent to do so was legally nullified by the fact that the action he decided to take exceeded his authority.

Had reliance controlled the outcome Macmillan would have prevailed, because she clearly relied upon the 1921 plat at the time of the Macmillan acquisition, and understandably so, as it appeared to be a duly authorized and federally approved township plat showing 8 lots in Section 31, but that reliance on the plat of 1921 was legally baseless, because that plat came too late to alter the boundaries of her section, which were beyond federal control after 1902.

Like Weyerhaeuser, Macmillan also had no right to rely upon any GLO monumentation which was established for the purpose of defining the boundaries of any adjoining townships, her right of reliance was limited to the boundaries that were actually run on the ground during the original survey by which her section was created, even though the monuments marking the boundaries of her section proved to be far from the positions they were meant to occupy.

"It is true that the right to land granted (to railroads) by Congress ... vested immediately (in praesenti in 1868) ... however, definition of the boundaries of the public lands of the US is a duty residing in the legislative and executive branches ... the exact lands (acquired by the railroad) ... were not determined until official approval of the survey and plat of 1893 ... it was the first and only survey ... to which the patent (of 1902) could apply ... the 1921 survey plat ... closed the hiatus ... as lots appended to the southerly tier of sections ... 43 USC 772 (the Bona Fide Rights Act) ... precludes affecting vested rights by action of the government correcting mistakes and misalignments ... the Commissioner ... could not and did not accomplish a transfer of title (as he intended) ... the 1921 resurvey changed nothing ... the corrected plat did not deprive the railroad of any lands ... the hiatus lands remained in the public domain ... the Commissioner ... was wrong in his assumption that there could be any increase obtained in Sections 31, 33 & 35."

331 F Supp 435
(1971 District Court ruling - no appeal was filed)

Macmillan experienced defeat because she made the same fundamental mistake Weyerhaeuser had made. She and her legal team failed to comprehend that no surveys, plats or monuments other than those directly associated with the patent which had removed her specific section from the public domain could be of any use or benefit to her, specifically they failed to recognize that the plat of 1921 had no legal connection whatsoever to the title held by Macmillan.

While Weyerhaeuser placed mistaken reliance upon the wrong monuments, Macmillan mistakenly placed her reliance upon the wrong plat, in the erroneous belief that the 1921 plat represented a legal revision or update of the 1893 plat of her township, based on the comments that had been made by the GLO Commissioner regarding the purpose which the 1921 plat was designed to fulfill.

Unfortunately for Macmillan however, the intent of the Commissioner, just like the intent of the second surveyor in the Weyerhaeuser case, was legally irrelevant and held no controlling force for boundary or title purposes, because intent which exceeds authority holds no value.

Key lessons regarding the interaction of principles:

One must always be mindful of the principle of authority when evaluating federal land rights interests, specifically the authority of federal officers charged with handling federal land rights, such as the GLO Commissioner in this instance, because federal officials have historically engaged, either knowingly or unknowingly, in numerous acts which transcended the boundaries of their authority.

Although the GLO had the authority to execute a resurvey and replat the subject area in 1921, even after portions of this township, like Section 31, were no longer part of the federal public domain, the GLO had no authority to either reduce or expand any existing patent, and under the law, federal intentions which result in an act that exceeds federal authority are legal nullities, unable to generate any legitimate right of reliance.

Information obtained from governmental sources is not always accurate or complete, and can sometimes be inaccurate or misleading, because personnel operating in the public sector can just as easily be mistaken as those operating in the private sector.

Is it appropriate for a professional surveyor who has been employed to survey private property to seek input regarding that survey from BLM or other relevant governmental personnel?

If use of information or advice obtained from governmental sources would result in a survey which does not meet the needs or wishes of the surveyor's client, does the surveyor have the option to complete a survey showing the results that are desired by the client anyway?

How can consultation between private sector surveyors and public sector surveyors about boundary or title issues benefit the private surveyor?

Since the lots created in 1921 could not legally enlarge any of the existing patented sections they adjoined, what purpose did the creation of those lots actually serve?

Could this scenario have potentially turned out successfully for Macmillan, had she happened to be the owner of a different section in this township, such as Section 32 for example, rather than Section 31?

Were the bona fide rights of Macmillan adequately protected, or was she victimized by her presumably innocent but mistaken reliance upon the expressly stated intent of the GLO Commissioner and the plat that was produced under his direction?

The bona fide rights of the Macmillans were properly protected under the law, but there is nonetheless a very good chance that they were innocent victims of misinformation.

They may very well have been told, when they acquired Section 31, presumably by an attorney or a realty agent, that Section 31 had been expanded by the GLO, suggesting that they had a right to rely upon the 1921 plat, a copy of which was probably provided to them, leading them to believe that they were acquiring the area which had been platted as Section 31 in 1921, including all 8 platted lots.

But had they consulted a title abstracter, the truth would have been readily revealed, because an abstractor would have informed them that the 1921 plat was completely unrelated to their acquisition and was utterly useless to them, since it did not yet exist at the time when their section was patented. In reality, it was impossible for the Macmillans to acquire Lots 5 through 8 from anyone, because although those lots had been platted, none of them had ever been patented, so they remained public domain, just like the omitted land which appeared in the Weyerhaeuser case, as BLM personnel correctly recognized in 1964.

As can readily be seen, the GLO decision to add lots to several of the sections in this township was unwise, because it resulted in the production of a plat which was highly misleading to innocent property owners such as Macmillan. In addition, that decision was both misguided and unfortunate, because it was based upon the mistaken assumption, on the part of the GLO Commissioner, that all of the sections in this township, including those which had been patented to the railroad, remained subject to federal modification, and could therefore be federally adjusted, upon a discovery of problems with the original survey work.

Reflecting back upon the Weyerhaeuser scenario, after seeing how this case turned out, the wisdom of the 1961 BLM decision to create a half township becomes clear. Between 1921 and 1961 federal personnel learned a lot about the interaction of their work with the law, and that knowledge helped them to avoid some of the mistakes of that federal decision makers had made in the past, like the flawed 1921 decision to alter the size of sections which in reality were no longer subject to any such alteration for any reason, since they were no longer under federal control.

GLO surveys did not merely define the boundaries of sections, they literally created those sections, so the moment when each original GLO survey was conclusively memorialized, through the approval of a township plat, was the moment at which the platted sections legally came into existence, subject to potential modification only through subsequent federal surveys conducted prior to patenting.

One who holds nominal title to an entire section may not hold title to all of the lots which appear to be part of that section, if those lots did not yet exist at the time when that particular section was patented.

No federal patent is capable of conveying any federally created lot which did not yet exist at the date of patent issuance, unless it is proven by the claimant that the subsequent federal creation of the lot in question represented a genuine violation of the bona fide rights of a patentee.

HERD-HERD 537 SW2 414 2018 - CHRISTIAN COUNTY

A GRANTEE WHO OBTAINS A PARCEL DIVISION SURVEY WHICH INTENTIONALLY DOES NOT PROPERLY OUTLINE THE AREA THE GRANTOR INTENDED TO CONVEY IS GUILTY OF FRAUD AND ACQUIRES NOTHING.

A GRANTOR WHO CONVEYED LAND WITH REFERENCE TO A SURVEY WHICH WAS AFFLICTED WITH FRAUD CAN LEGALLY NEGATE THAT CONVEYANCE, EVEN IF THE GRANTOR SAW THE SURVEY AND DID NOT OBSERVE THAT IT ENCOMPASSED LAND WHICH THE GRANTOR DID NOT INTEND TO CONVEY.

As this case amply demonstrates, any survey which is graphically incomplete, because it shows no structures, and therefore provides no visual reference to any existing objects on the ground, can easily be utilized as a tool facilitating the perpetration of fraud.