Stoddard Jacobsen/Robert C. Downer IBLA Decisions
“The Rest of the Story”

1881 - One Corner & Three Locations - 1989

Presentation by Steve Parrish, PLS, CFedS
NDSPLS 41st Annual Convention
February 6, 2020 – Fargo, North Dakota
Pre BLM/IBLA
Record of Survey Map Recorded May 7, 1965 & November 25, 1966 (Slide 3-39)

BLM Dependent Resurvey & IBLA Decisions
1983-1989 (Slide 41-153)

Post IBLA Decisions & New Challenges
1990-1994 & 2019 Update (Slide 154-236)

The information is being presented in three parts. The Pre BLM/IBLS is additional information that lays a foundation for the three (3) IBLA Decisions that were rendered between 1983 and 1989. The BLM Dependent Resurvey & IBLA Decisions will provide a refresher on the elements that the IBLA dealt with during the better part of six (6) years. The Post IBLA Decisions & New Challenges is “The Rest of the Story” that continued to involve the both private and government entities from 1990 through 1994. Twenty-nine (29) years is a long time to keep debating the acceptability of a few original General Land Office monuments.
Butler Ives surveyed the S & W Boundary of T. 11 N., R. 21 E., MDM, Nevada in 1861 under Contract A. Twenty years later Stewart & Conkling surveyed the N & E Boundary and the Subdivisions of said Township under Contract 129. The above plat was examined and approved by Surveyor General E. S. Davis, in Virginia City, Nevada on October 27th, 1881.
Settlers and miners were very active in 1881 and the General Land Office (GLO) was busy “surveying the land” so patents could be applied for and fortunes could be made. The roadway that traversed across this Township was, and still is, a major route for traveling from the Carson Valley into California.
We will be concentrating on Section 4 and the details and arguments that have evolved around the SE corner of Section 4 (1), the SW corner of Section 4 (2), the S 1/4 corner of Section 4 (3), and the W 1/4 corner of Section 4 (4).
Another GLO Survey, for some reason having been drafted as a “Supplemental Plat” in 1913, plays a minor role in the evaluation of survey evidence. There are some interesting comments written on the face of this Supplemental Plat. H. W. Reppert, U. S. Transitman, was a very busy guy in this township for a short period of time. Though we won’t go into detail, an examination of his work through a dependent resurvey recently completed by the BLM, reveals that Reppert frequently had errors in measurement between 40 to 100 feet per mile of surveyed line.
The recent BLM dependent resurvey found several of the original 1881 Stewart & Conkling 1/4 section corners that Reppert was unable to find approximately 100 years ago when the evidence must have been much fresher and visible.
The numerous corner issues in Section 4 evolve around decisions made by (the late) Robert C. Downer when he surveyed “the boundaries of private lands” in the north portion of Section 9. Stoddard Jacobsen, somewhat of a local “Land Barron” in Douglas County, hired Mr. Downer to survey and monument three (3) Parcels within a portion of an aliquot part he owned in Section 9 of our subject Township. This Record of Survey was completed by Mr. Downer in March 1965 and Recorded in Douglas County on May 7, 1965. Parcels A, B, and C are the intended products of this survey.
Notice that there is no County Surveyor review. It may not have been a requirement in 1965 in Nevada. That's a detail I probably knew at one time and will certainly research.
I’m confident that if a County Surveyor had reviewed this Record of Survey it would have been questioned. Let’s walk through the A thru F items and discuss each.

A is a notation that a “Rk. (rock) pile & white post” has been accepted as the corner location for the corner of Sections 9, 10, 15, and 16. Referring back to slide 6 & 7 you will recall that Reppert located the same corner. We’ll discuss this beginning at slide 15.

B is another “Rk. (rock) Pile” and is obviously intended to represent the E 1/16 between Sections 9 & 16. Note how Mr. Downer labels the lines extending westerly and northerly as “property line.”

C is interesting. He labels this C-E 1/16 as a “U.S.G.L.O. 1/16 Cor., scribed hardwood post in rock mon. (mound).” The G.L.O. has not set a monument at the the C-E 1/16. Said 1/16 is, however, fixed by virtue of the location of the four 1/4 corners of Section 9. There is a possibility that this location was monumented by Transitman Reppert. I have found his presence in several other locations in this Township other than the Supplemental Plat mentioned previously.

D is a form of a table listing a tie from a certain corner of each Lot to the C-E 1/16 corner of Section 9. Mr. Downer also has a short “arrow” from the specific corner of the Parcel that is being tied.

E is merely my estimate of where the 1/4 corner between Sections 4 and 9 should be. How can the common section line be monumented (as noted along the north line of Parcel B) without locating the actual line between controlling corner monuments?

F is obviously intended to be the E 1/16 between Sections 4 & 9. Maybe I have not done enough research and Mr. Downer has prior Records of Survey wherein he found the necessary G.L.O. controlling corners. Again, he labels the line as the “Section & prop. Line.”
About 18 months later Mr. Downer records another Record of Survey for Mr. Jacobsen. This one creates Parcels D, E, F, G, H, and an access road between Parcels. Parcel H will be the focus and fuse that ignites a flurry of activity a couple of decades later.
Same comments as on slide 9.
Note another tie from a corner of Parcel H, to the C-E 1/16 corner of Section 9. Since Parcels D thru G are on the “1/16 Section Line” a calculated tie is not needed.
Again, where are the controlling corners that were used to define the locations of these “prop. lines?”
Mr. Reppert crossed through “Special Investigation” on the front sheet of his field notes but still labeled the field note sheets as a “Special Investigation.” He has excellent handwriting unlike many of the GLO field notes that we have to suffer through. It is possible though that he kept notes in the field and had another office person write the final field notes for him.
This is an unusual pair of INDEX DIAGRAMS that I have not seen before (or maybe just haven’t paid attention). When you view the field note pages you will see two page numbers that might be confused as being only one page number. However, notice that the hand written items on the above Diagrams are obviously by different scribners. Likewise the numbers at the top of the field notes are different. One is hand written and the other is a stamp. The hand written page numbers are the sequential numbers for the specific set of field notes and coincide with the left Diagram above. The stamped page number is a volume number and coincides with the right Diagram above.

So why does this matter? GLO field notes were bound in large volumes and a particular volume will have numerous sets of field notes from many different locations. When searching for a set of field notes it is handy to have a table listing where a set of field notes is located within the large volume. Thus the reason that a volume page number is added to the numbered field note pages to help in finding the field notes within a volume.
The 1913 Reppert Special Investigation survey was made to determine the proper location of certain corners of the original 1881 Stewart and Conkling survey.

Let’s examine Reppert’s description of the corner to Sections 9, 10, 15, and 16. Refer to the enlargement on the next slide.
On April 13, 1913 Reppert finds a “5 ins. x 5 ins. x 3 ft.” pine post in a mound of stone properly marked. We'll jump ahead 69 years on the next slide and see what the BLM found as part of a 1982 dependent resurvey.
What happened to the scribed post that Reppert describes? Why didn’t Reppert describe a marked stone in the mound? If you look back you will see that Reppert did state “and marked and witnessed as described by the Surveyor General.” The “witnessed” part refers to the bearing trees (that he did not remeasure) and maybe the “marked” word refers to him acknowledging a marked stone in the mound as reported by the Surveyor General. Notice that the bearing tree is at a bearing 8-1/2 degrees different from record but the distance is within 2 links. This small difference, and a lot more, will become a major issue as you get deeper into this survey case.
A July 28, 1981 memo from a local mining attorney, (representing The Vets Grande Companies, Inc.) to the then owner of Parcel H, gets the ball rolling and momentum keeps increasing from here on. Read the enlarged portion on the next slide.
Pretty straight forward and to the point. I’m not sure that I would be too proud of the “detailed map prepared by AER” but it does clearly show a potential problem for neighbor Hanneman. I’m sure that being greeted courteously, but “treat the matter seriously and consult an attorney at once” would get the attention of most folks. What we have here is two parties already claiming rights to the same piece of land. AER has the right to explore for minerals on the BLM ground and Hanneman has purchased Parcel H and thinks he owns a portion of the ground AER is staking for mining purposes. Let the games begin!
Self explanatory! Why didn't Robert Downer find the monument that AER has accepted as the local 1/4 corner for Sections 4 & 9? If the section line is really where AER depicts it Mr. Hanneman only has about 25% of what he thinks he bought and his home would be on federal land. There is no adverse possession against federal interest lands when the lands have never been patented before.
A frustrated land owner makes an inquiry to his neighbor to the north – the BLM – requesting a BLM survey of the section (9) line so it may be officially established. This is a good step and I assume he had already contacted Robert Downer – or not.
Any experienced surveyor will readily recognize that a problem exists when a survey map and/or a description of land calls for cardinal directions (N, S, E, or W) along section or subdivision of section lines – especially when following an 1881 GLO survey. It is just “SELDOM” the case that any section line is truly cardinal.
BLM

District employee walking the area with Downer showing the survey problems.

Downer is gearing up and building his defense one contact at a time. He is keying in on a couple of locations that he should have considered back in 1965 as part of his efforts to define the north line of Section 9.
Mr. Dickinson at least has a reasonable background in corner evidence evaluation. As you read from here through slide 30 you will find some interesting opinions expressed by Mr. Dickinson. He seems to have grasped the basics but needs more exposure to the reality of discrepancies in the GLO surveyors.
I spoke too soon in the previous slide. The top paragraph just cast a serious doubt about Mr. Dickinson’s understanding of the actions and records of many GLO surveyors and their records. This last paragraph scares me and I’m only on page two of his thesis.
The Illogical and Highly Improbable South Boundary of Section 4 (BLM Independent Survey of 1962) accepts a SW corner and a South 1/4 corner in very radical conflict with both topographical and cultural calls, dismissing a mine tunnel cell just one chain south of the true section line as described in the 1881 notes.

The location of Carter’s Station is unquestionable fixed by State of Nevada maps and field notes as well as personal testimony of a witness. The very valid call for historical Carter’s Station is physically verified by evidence of an old chopped line running S 12° 20’ E, which supports Robert Domarsh conclusion that the 1861 Deputy was unable to see the old landmark because of topography and intervening Pine Timber, hence actually ran toward his own section line from Carter’s for accurate distance intersecting it at a point three chains west of the 1/4 corner.

Both the mine tunnel cell and Carter’s Station cell fix the Section line in a Easterly direction which agrees with the actually accepted NE corner Sec. 9.

I have no reason to believe that these cells have been faked in or the distances approximated.

The line established by BLM for the North boundary of Sec. 9 not only is in conflict with the valid topo & cultural calls to Carter’s Station and the mine tunnel but it is also in conflict with acceptable corners both North & South of the NW cor Sec 9 for distance. It ignores the Easterly bearing given in the 1861 survey and substitutes the improbable 1/2 mile runs in order to close on the actually acceptable corner for Sec 9.

The SW corner of Sec. 9 as remeasured by BLM is unacceptable to me as the proposed original bearing trees are in complete radical conflict with the 1861 field notes, the diameters appear to have shrank and location do not fit. I found no evidence of surviving rooted root crowns at the stated ref.

Keeps getting scarier as we read on. Mr. Dickinson obviously feels that the BLM has erred in accepting the “radical” discrepancies that exist between the field evidence and the official field notes at the NW corner of Section 9.
points for the supposed origin of these down-dead small pines, which still bear much of the bark on areas near enough to the ground to suggest they should have long since been bare and deeply rotted. The largest of these trees fits no record and those that fall within a remote distance of the 1861 record appear to have shrunk a great deal, rather than having increased in size, as expected.

The trap stone does not match dimensionally and the hack marks appear to have been made at a much later time than the 1861 survey. The discoloration of the hack marks as compared to the surface is not proper for a 100 year old stone.

The scribed post in the record designates the surrounding Indian allotments which were surveyed by Dennington as commissioned by the Indian Service between 1910 and 1915. The numbers on the post are Indian allotment numbers, and the post is not the original as set in 1861. The location of this corner is well over 200 feet south of the position fixed by record distances from the acceptable corners located at the N 1/4 Sec. 1 and the SW corner Sec. 9. The corner appears to me to be similar to many corners set by local residents with a limited knowledge of surveying.

Preliminary Report (NW Sec. corner Sec. 5)

The stone monument with its 1861 stone of record, identified by measured dimensions, is convincingly supported by two road calls to the North, and, an accurately measured distance to the dry gulch (running due E-W) to the South. The distance to the South Section corner at the SW corner Sec. 5 matches record distance within 38 chains.

Wow, this guy is an expert on a wide variety of ancient GLO materials.
An old rock mound with a rebar capped with an aluminum cap stamped "H.B.O.T."
(Heav. Bldg. of Transportation) is located 1301 feet north and had probably been used as a 1/16 corner apparently accepting the rock mound as the Section corner.

The 1973 BLM brass cap corner lacks its valid stone of record, and in my long time experience with what we believed were nationwide BLM standards, that alone would disqualify the sound even if it were not in radical conflict with three important line calls to the North and South.

Preliminary investigation of NE corner Sec. 4

I found the corner set by Surveyor Engineering in a very old imbedded rock mound, in which they identified the original stone of record, accurately measured. This corner file the descending call to the North. This corner will be reviewed again with an instrument run from our now positively identified 1881 1/4 corner between 4 & 6. Against the possibility that the original BLM evidence may not positively identify a record point a bit to the West at record bearing and distance along the 1881 run from Sec 1/4 corner, where we have already recovered evidence of an old chipped instrument line.

I find the 1973 brass cap set for the common corner of 4,5,32,33 to be in conflict with the descending call, as we ascended north for some distance after reviewing the point. This sound is unsupported by a proper record stone and the bearing trees are not accurate for distance or spiriting according to the 1881 record.

Since it appears that a court case may be possible in this serious difference of Deedual opinions, I will continue a careful and objective retracing of other lines of this grid in the interest of foreing independent conclusions.

[Signature]

WOW! I'm speechless.
There’s not a lot of federal interest land in our subject township but what there is certainly demands a lot of cadastral involvement. The large block of mining lode claims straddling Sections 3, 4, 9, and 10 are not actually patented. We will see the unpatented mining claim cancellation documents in a few slides to come.
The most recent Master Title Plat for our Township. See the enlargement of Section 4 on the next slide.
Notice the additional “Lottings” in Section 4. The Lotting designations are the result of aliquot parts of a dependently resurveyed section being out of limits coupled with a corrective dependent resurvey. The casual observer will be understandably confused by the numbering of government lots in Section 4.

The corner locations we will be discussing in detail are along the south line of Section 4 and the W 1/4 corner of Section 4. The NW corner of Section 4 was also challenged by Robert Downer and others but this presenter has not personally visited this corner location and will refrain from commenting on one I am not personally familiar with.
Above is the Douglas County assessor map for Section 4. A close up view of the encroachment area can be more easily seen on the next slide.
Douglas County GIS staff have obviously not adjusted the actual ownership lines to conform with local court rulings.
Douglas County assessor map for Section 9 and the enlargement to follow.
It appears there has been a Lot (Parcel) Line Adjustment between the original Parcels A and H.
Douglas County assessor map for Section 5. If time allows I will share an experience I had while with the BLM and overseeing the official survey of Indian Allotments SW of Highway 395 in the NE 1/4 of Section 5.
The APN ending in 006 now occupies a couple of corners that will be discussed at slides 146-153 and 224-232.
We’ve seen what initiated the BLM involvement into issuing Special Instructions for the dependent resurvey of the south line of Section 4. Before going any further Jason Lightbown will provide us with a summary of the three (3) IBLA decisions they opined on between 1983 and 1989.

We will return to this slide and provide additional background information about this protest of a BLM dependent resurvey.
Sounds like Mr. Downer is trying to direct the BLM in where and what to survey. The BLM received directions from many sources during the execution of this survey group.
IBLA DECISIONS SUMMARY
Jason Lightbown
BLM, PLS, CFedS

The Official Protests Begin and the Pathway to the Interior Board of Land Appeals (IBLA).
Summary of

85 IBLA 335, 97 IBLA 182, and
103 IBLA 83

Prepared by Jason Lightbown, BLM, PLS, CFedS
for the NDSPLS 41st Annual Convention
February 6, 2020 – Fargo, North Dakota
85 IBLA 335

Appeal from a decision of the State Director of Nevada, dismissing the protest to GP 599, a dependent resurvey.

The dependent resurvey was prompted by a substantial disagreement between two private surveys of the section line between secs. 4 and 9, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada

When a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependent resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing.

This IBLA decision documents the evidence presented by the BLM and the appellant in regards to the location of the line between sections 4 and 9 and the corresponding controlling corners. Resulting in a hearing held by an Administrative Law Judge.
43 CFR 4.450-2 challenging a dependent resurvey prior to acceptance, the appellant has the burden of establishing clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

BLM concluded that the appellant had not met this burden of proof.

In accordance with 43 CFR 4.450-2 when challenging a dependent resurvey prior to acceptance, the appellant has the burden of establishing clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey (same when the appellant appeals from a decision dismissing a protest).

BLM concluded that the appellant had not presented “clear and convincing evidence that the BLM resurvey is not an accurate retracement and reestablishment of the lines of the 1881 original survey.” This is referring to the line between sections 4 and 9.

Let’s take a brief recap of the evidences discussed in this appeal.
The NW corner of section 9. BLM finds a stone marked with 5 grooves on the S. face and 4 Grooves on the E. Face, that matches record dimensions +/- 3 inches.

The bearings and distances to the trees do not agree with the original record. For instance a 12 in. diam. Pine, N 80 W, 19 links was reported in the resurvey as an uprooted pine 6 ins. diam., N 18 1/2 E, 23 links.

You can see that not only are the bearings and distances considerably off but the tree diameters are substantially smaller.
Appellants: “Reasonably Accurate”

IBLA: discrepancies not uncommon, but not this inaccurate.

Appellants: Contend typically the bearings and distances to the trees of original surveys are “reasonably accurate.” Also, there are large surviving trees within 10 feet of the BLM corner position that would have been blazed but are not.

IBLA: Discrepancies between bearings and distances in old and more recent surveys are not uncommon and are not sufficient alone to disprove a reestablishment of a corner. They are reluctant to conclude that the original surveyors were as inaccurate as the BLM concludes.
The quarter corner of sections 4 and 5; the West 1/4 corner of section 4.

The BLM contests that the appellants stone is marked. The appellants support their position with record topographic calls. More details in 97 IBLA 184

The IBLA is troubled by the fact the BLM reports a granite stone of such a difference in size.
(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

IBLA: After due allowance has been made for natural changes, there may still be material disagreement between the particular evidence in question and the record calls. The following considerations will prove useful in determining which features to eliminate as doubtful: (1), (2), and (3).

(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.
The Line between sections 4 and 9

Line cuts and rock piles

Topographic calls

Tie to Carter’s Station

The appellants note that there are many blazes and rock piles that support the location of their line. The BLM notes that the original field notes make no mention of these.

Record calls to several topographic features from the original notes are disputed, some of the appellants calls are closer to record and some of the BLM’s calls are closer to record. I will discuss these in more detail later.

There is a disagreement on what building was actually tied at Carter’s station in the original 1881 notes. There is a barn, house, and other out buildings. BLM suggests that the tie was estimated because the station was not visible from line.

IBLA: The appellants have raised a substantial question regarding the BLM’s location of the line bet. Sections 4 and 9. Not willing to conclude the original surveyor did not accurately measure to Carter’s station.
IBLA: THE APPELLANTS have raised a substantial question of fact whether the section line bet. secs. 4 and 9 is where the 1982 BLM resurvey places the line. IBLA orders a hearing by an administrative law judge. At this hearing the appellants will have the burden of proving by a preponderance of the evidence that the lines and corners, as determined by BLM in its 1982 dependent resurvey, do not depict the original survey lines and should be resurveyed if found to be true.
Judge L.K. Luoma conducted the hearing in June of 1985 and ordered responses to the appellant’s appeal in 85 IBLA 335.

The result of the hearing was Judge Luoma ordering a resurvey of public land Group No. 599, because there are so many deviations from the original calls and distances in BLM’s resurvey. He also concluded that the appellants’ evidence did not fully support the accuracy of the appellants’ retracement and reestablishment of the line bet. Secs. 4 and 9.

In October of 1985 the appellants appeal this decision. Saying their survey should have been accepted because it does “conform reasonably with the calls and distances recorded in the original notes and plat.”

BLM (Solicitor) in November of 1985: Judge Luoma failed to provide any guidance to BLM on how to conduct another resurvey and that, in such circumstances, it would simply stand by its original dependent resurvey, which it believed to be supported by a preponderance of the evidence adduced at the hearing. (arguing that discovery of corners on the ground have greater weight than the calls in the field notes)

The BLM offers a solution to reestablish the SE cor. of sec. 4, which was not disputed by the parties at the time of the hearing, by the method of double proportionate measurement in order to reduce the 5-degree deflection in the south line of sec. 4, shown in the resurvey. This deflection had been considered significant by Judge Luoma.
In the Appellants reply brief they propose a theory of “double corners” essentially. The original surveyor moved the NW cor. of sec. 5 to fit the tolerance to the township corner because of misclosure, he then felt he should move the corresponding corners affected by this. He moved all the corners in sections 4 and 5 except the east line of sec. 4 because the terrain was too difficult and it would be unlikely to be inspected.
The line between sections 9 and 10, 3 and 4, 4 and 9, and 4 and 5 are resurveyed. The line between sections 4 and 33 was resurveyed in 1973 by a cadastral surveyor.

I will start by recapping the elements in dispute regarding the line between section 4 and 9, which is the central dispute in this case.
The original 1881 field notes: 4 in. diam. post, from which a 10 in. diam. Pine bears N 80 W, 70 lks (46.2 ft.) and a pit 24 x 18 x 12 is 8 links N. of the post.

BLM positioned the corner based on Jimmy Jones (RLS) state authority survey. Jones got the position from a tie to this corner on a Nevada Department of Highways ROW map, that claimed to find the corner in 1917 (field notes, plat dated 1939 with tie as well). A surveyor that participated in the Jones survey testified that they looked for the original at this location and found a buried mound of stone, 1 ft. deep, and considered this a perpetuation. They also found remains of a stump N 81 W, 67 links.

Appellants: claim this is not a perpetuation of the original. There is no sign of stump remains, the call from the highway department map is to the center line of the ROW and then to the 1/4 cor., the original calls for a pit and there is no sign of this. The area of the BLM position has many other trees that could have been used in 1881 but the original surveyor dug a pit, indicating there were no available trees.

IBLA: Cannot determine beyond a reasonable doubt as to whether the found mound is a perpetuation of the original monument.
Record call to the SE cor. of sec. 4

The original 1881 field notes: 79.72 ch (5261.52 ft.) S. 89 – 56’ W.

Appellants state that their corner is 18 feet short of the record distance to the SE cor. of sec. 4, which is undisputed.

BLM cor. is 187 feet short.

Field notes are deemed "presumptively correct" and must be "taken as true" until disproved by a preponderance of the evidence. We, therefore, conclude that even a 175-foot (or 2.65-chain) deviation from the record distance was enough to raise doubts about the accuracy of BLM's location of the south 1/4 corner.
The original 1881 field notes: at 2.72 ch. westerly of the cor.

Appellant claims they found the ledge exactly matching the original notes.

BLM does not call for a ledge in the resurvey because the top of ridge and the ledge are in nearly the same place.

IBLA: the ledge is of little help in locating the 1/4 sec. cor. of secs. 4 and 9 because it is so close to the SE sec. cor. of sec. 4. Both BLM and Appellants’ calls are within reason. However, if the corner was moved this call would support the appellants’ line.
The original 1881 field notes: at 9.72 chs. westerly of the SE. sec. cor. of sec. 4

BLM calls the top of ridge at 8.87 ch.

Appellants’ say the original call was only a change in slope not the true top of ridge, the land just leveled out.

IBLA: This call cannot be relied on.
The original 1881 field notes: at 19.7 chs. westerly from the SE sec. cor. of sec. 4, the tunnel is N. 1 ch.

Appellant: Tunnel is 1.3 ch. N. at 22.73 chs.

BLM: Line passes the N. edge of the tunnel at 20.14 chs.

IBLA: In one way or another the tie does not match the field notes for either, the tunnel is 2 chains wide so there is a question of where it was tied to in the original notes. This seems to support the Appellants’ line more because the original notes likely tied to the center of the tunnel entrance.
Topo calls: Carters

The original 1881 field notes: at 3 chains westerly of the 1/4 cor. of secs. 4 and 9., S 12 1/2 E., 16 chs. to Carter’s House.

The record (historical research and testimony) shows that Carter’s House was actually a group of buildings.

Appellant: staked out the record call and it fell near the center of the complex of buildings. When using the BLM corner to stake out the record call, it is 3.27 chs. short (BLM line is north of the appellants’ line).
The point was raised about the original notes having handwritten words and words that are typed. Did the original surveyor intend to correct the typed portions? Or meant to tie in the barn and not the house?

The BLM argued that Carter’s was not visible from line so the original surveyor probably approximated the bearing and distance because they would not have chained up and over a hill for a call like this.

IBLA: “...we simply do not know what the surveyors did. The fact remains that BLM's 1/4 corner does not match the call to "Carter's House," whereas appellants' corner does, within a reasonable level of tolerance. This also raises doubts as to the accuracy of BLM's location of the south 1/4 corner.”
The original 1881 field notes: at 51.23 chs. westerly of the SE sec. cor. (11.36 chs. Westerly of the 1/4 cor.)

BLM reports a bladed road at 11.4 chs. The road was identified using a 1893 map superimposed on a 1938 aerial photo.

Appellants report a road at 8.97 chs. They state that the map of the road the BLM used was created using plane tables and the road depicted is an alternate travel route and not the stage road, this is further supported by the steep grade that would have made this road unlikely for uses as a stage road. The appellants also testify that they found horse shoes for draft horses and a gap in the trees at the record call for the stage road on their line.

IBLA: The road in the 1893 map is plainly not the Bodie road depicted in the 1881 plat. Thus, accepting appellants' location of the Bodie road, appellants' south line matches the call from the south 1/4 corner and BLM's line does not. We note that Judge Luoma was likewise persuaded. As previously noted, this also raises doubts as to the accuracy of BLM's location of the south 1/4 corner.

There is more on this discrepancy in the written case that I will not go into in this summary.
The original 1881 field notes: at 12.36 chs. From the 1/4 sec. cor. of secs. 4 and 9, bearing NW and SE.

BLM did not find evidence of this.

Appellants: found brackets high in the trees for the old telegraph line (one insulator 40 ft. N. and others 100 and 300 ft. north of their line) that create a zig zag line that crosses fairly close to record distance. BLM did not dispute.
The original 1881 field notes: A Gulch 20 lks. wide, course NW at 55.72 chs. from the SE cor. of sec. 4, or 15.86 ch. from the 1/4 sec. cor. of secs. 4 and 9.

BLM calls for the Gulch at 16.20 chs.

Appellants call for the Gulch at 16.20 chs.

IBLA: This makes the evidence regarding this inconclusive, because both are close to the record.
The original 1881 field notes do not call for any line trees or a blazed line.

The BLM reports no line blazes and emphasizes that they are not in the original notes.

Appellants: State that their line passes very old directional line cuts made by axes and a blazed dead tree. They testify that the instructions in 1881 called for lines to be blazed but this did not go in the field notes.
The original 1881 field notes: S 89-56 W

BLM: line yield a 5 degree deflection at the 1/4 cor. N. 84 degrees 48' E.

Appellant: N. 89 degrees 49' E.

BLM then suggests reestabishing the SE sec. cor. of sec. 4 by double proportion which would yield a bearing more agreeable to the original. They sate: "We did not find a corner of [secs.] 3, 4, 9 and 10. We accepted evidence that was used by other people. We felt that that was not the corner, but we couldn't prove it, so we accepted that." (Double proportion yields a line still off by 3 degree which would then be out of agreement with the calls of record that fit their current line)

IBLA: In a nut shell says: “This does not solve the problem it compounds it.”
Neither BLM or the appellants have established **beyond a reasonable doubt** that they recovered the original monuments, a perpetuation of the original, or collateral evidence that locates the position.

However, certain record topo calls support the Appellants’ position: Record calls to SE cor., Carter’s House, Bodie Stage Road, Bodie telegraph line, the gulch, and two blazed trees (East and West of the 1/4 sec. cor.).

The take home here is the rhetorical question of “what does it take to cast a reasonable doubt as to the location of an original monument?”

Do the inherent inaccuracies or inconsistencies of an original survey present a reasonable doubt?

Lets look at how IBLA evaluates evidence of other disputed corners that were reestablished during the 1984 BLM dependent resurvey.
Original description (1881) Set Trachyte Stone 42 x 22 x 20 ins., in a mound of stone, 4 ft. at base, 2 ft. high.

The BLM: Found a granite stone, 14 x 6 x 4 ins., firmly set in a mound of stone, plainly [marked] 1/4 on the [West] face (this was accepted by the Jones (RLS) survey previously mentioned.) Stated the marks are old and the stone weighs about 35 lbs.

Appellant: described as a trachyte stone embedded in the ground measuring 42x22x20 inches on the surface with a 1/4 chiseled on the west face. Weathering and cloudbursts washed away the mound and made the marks hard to read. They testify to the accuracy of the early surveyors identifying stone types. They had a geologist testify that the marks are at least 100 years old and a masonry supply business owner testify to the marks being man made but rather vague and needing to look for it in order to see it. This stone weighs over 1000 lbs.

The BLM testifies that the appellants “stone has no marks on it” and that the original surveyors did not chisel marks on stones a foot high and 7 inches wide. Also, the stone was set - you can not lift a 1000 lb. boulder.

Judge Luma stated: Moving this stone over 1000 lbs. is not reasonable. IBLA concludes it was an in place stone. (he notes the word “set” is printed not written)
IBLA: says that if the word is printed it likely means he forgot to correct the error, and the word “set” was added to conform with the instructions. We find this more plausible in than that the surveyors actually meant a smaller stone, as suggested by BLM. However, we cannot find beyond a reasonable doubt that appellants' stone is the stone described in the 1881 survey field notes. Because they are unable to discern any man-made marking on the stone with sufficient certainty to conclude Judge Luoma had erred.
Appellants: The appellants’ stone is online, 142 feet long from the record distance from the northwest corner of sec. 33, T. 12 N., R. 21 E., MDM, Nevada (Township line to the North), and 28 feet short of the record distance from the southwest corner of sec. 9, two undisputed corners.

BLM: From the BLM stone the measurement is 173 feet long (to NW of sec. 33 in township to the north) and 343 feet short of the record distance from the SW sec. cor. of sec. 4.

Original notes call for a Gulch at 38 ch. or 2.35 ch. south of W 1/4, drains NW, 25 lks wide.

Appellants have a call within half a ch. but the creek has two beds.

BLM calls for a wash that crosses their line at 38.2 (but is 20 links draining NNW).

IBLA: Says the evidence of the gulch is inconclusive.

Judge Luoma concluded that if the rock is indeed the dimensions given in the notes and there are no other rocks similar then it is the true monument. BLM has a visual inspection by surveyors but no experts. The appellants stone needs independent scientific analysis by a professional to determine if the marks were man made. This evidence at the W 1/4 casts doubt on the BLMs SW sec. cor. of 4 location.
IBLA agrees with Judge Luoma.
Cor. of secs. 4 and 5, T. 11 N., R. 21 E.
and secs. 32 and 33, T. 12 N., R. 21 E.

Original 1881 survey: West line of the section is 80.35 ch., S 0°-14’ W, monumented with a 20x10x8 ins. trachyte stone set in a mound of stone, 4.5 ft. diam., 2 ft. high, with a 12 in. pine, bears S. 28 W, 25 links, and a 6 in. pine bears S. 57-3/4 E., 20 links.
This corner and the north line of sec. 4 was dependently resurveyed in 1973 (GP 496). Forsyth located the bearing trees with blazes. Described in the official record as a 12-inch-diameter pine, S. 74-1/4 degrees E., 45 links distance and a 12-inch-diameter pine, S. 26-1/2 degrees W., 30 links distance (Judge Luoma notes the SW tree is off).

BLM also testifies that there was a marked stone with proper notches, but there were no record dimensions given.

Original: 12 in. pine, bears S. 28 W., 25 links, and a 6 in. pine bears S. 57-3/4 E., 20 links (SW tree 1.5 degrees different {0.5 ft. over 19.8 feet dist.} and 5 links different {3.3 ft.})

BLM corner is 230 ft. short of record dist. to the NE cor. sec. 4, 342 ft. short of record dist. to the SW cor. sec. 9., and 182 ft. long from the dist. to NW cor. of sec. 33 (township to the north).

The Appellants used a single proportion to establish the NW cor. of sec. 4, (using N ¼ of 4 and the NW of sec. 5) They did not have adequate records to assess these controlling corners.

IBLA: With scribed trees and a marked stone we cannot say the corner is lost, we conclude the corner has been found. **This corner was resurveyed, the burden of proof is to show fraud or gross error in the resurvey by a preponderance of the**
evidence. The appellants did not. The BLM position is the cor. regardless of discrepancies in record calls to known cors. However, this is not adequate to assess how it affects the BLM’s location of the southwest cor.
BLM believes the cor. is found, Downer says it is lost. The determination is whether the evidence leaves a **reasonable doubt** as to the location of the corner.

Original 1881 survey: Set a trachyte stone 24x18x12 ins., in a mound of stone 4.5 ft. base, 2 ft. high.

**Monument:** BLM found a 22 x 17 x 9 ins. stone with 5 grooves on the S. face, and 4 grooves on the E. face. Appellants’ say the marks look fresh.

**IBLA:** Says evidence regarding the freshness of the marks is inconclusive. The dimensions are agreeable and not widely different.
**Bearing Trees**: The bearing trees found in the field do not conform with record.

I will quickly show a few slides displaying the difference for each tree. Take note of not only the difference in bearings and distances but the sizes as well.
**Cor. of secs. 4, 5, 8 and 9**

A stump hole, bears N. 18-1/2 E., 23 lks. dist., with an uprooted pinon lying alongside, 6 ins. diam., mkd. BT on open blaze. (Record: S. 62 E., 28 lks. dist.)

23 lks = **15.2** ft.  
28 lks = **18.5** ft.

**46.5** degrees different (and a different quadrant)
Cor. of secs. 4, 5, 8 and 9

A stump hole, bears S. 43-3/4 E., 18 lks. dist., with an uprooted pinon lying alongside, 12 ins. diam., mkd. BT on open blaze. (Record: S. 54 E., 31 lks. dist.)

18 lks = 11.9 ft.          31 lks = 20.5 ft.

10.25 degrees different
Cor. of secs. 4, 5, 8 and 9

A stump hole, bears S. 56-3/4 degrees W., 22 lks. dist., with an uprooted pinon lying alongside, 8 ins. diam., mkd. BT on open blaze. (Record: S. 79 W., 23 lks. dist.)

22 lks = 14.5 ft. 23 lks = 15.2 ft.

22.25 degrees different
Cor. of secs. 4, 5, 8 and 9

A stump hole, bears N. 50-1/2 W., 14 lks. dist., with an uprooted pinon lying alongside, 8 ins. diam., mkd. BT on open blaze. (Record: N. 80 W., 19 lks. dist.)

14 lks = 9.2 ft.  23 lks = 15.2 ft.

29.5 degrees different
Cor. of secs. 4, 5, 8 and 9

Fraud.....?

Moving bearing trees?

Marking stones?

Appellants argue that either the bearing trees were moved to the area of BLM's southwest corner, or the trees were blazed on site, in an effort to create a fraudulent corner. Ties to other known corners are off from 1/2 a chain to 2 chains.

“We also note that, in its dependent resurvey, BLM found a rebar, 1-inch in diameter, with a cap on top marked "T 11 N R 21 E 4 5 8 9 RLS 3740 1981," next to the stone identified by BLM as the corner Monument. This stone had been placed by the Jones survey in 1981. However, the corner record for this corner prepared in connection with the Jones survey states that the Jones survey found a "18x14x7 stone, 5 notches on south, 4 notches on east, in a stone mound." This suggests that BLM's 22x17x9 stone was placed at that site sometime between the time of the Jones survey and the BLM dependent resurvey in 1982, and is either not the original stone or that it was moved to that location. It also calls into question the accuracy of the Jones survey.

The appellants double proportion a position that fits better with record calls to other known corners.
Cor. of secs. 4, 5, 8 and 9

does not establish beyond a reasonable doubt that the monument represents the position of the corner set in the 1881 survey.

does not relate to known cors., field notes, or indisputable collateral evidence.

IBLA: We find the evidence that the monument identified by the BLM, as the monument for that corner, does not establish beyond a reasonable doubt that the monument represents the position of the corner set in the 1881 survey.

None of the bearing trees found by BLM agree with the original notes in bearing and distance from the corner, or the size of the trees. Some are 50% smaller. The location of the corner and calls on the line from the corner to the SE corner of sec. 9 have wide discrepancies, and there is overwhelming evidence of the existence of multiple monuments in the general area. This corner is not found and not obliterated because it does not relate to known cors., field notes, or indisputable collateral evidence.
IBLA states in reply to BLMs proposal to double proportion the SE sec. cor. of sec. 4: To now say that this corner should be moved to straighten the dogleg in BLM's placement of the boundary between sections 4 and 9 without any consideration of the physical evidence, including but not limited to calls to natural and man-made monuments, violates the stated purpose of a resurvey. See, Survey Manual at 6-4.

On the 1/4 cor. of secs. 4 and 9: Our review of the evidence presented to Judge Luoma, we also find there to be sufficient conflicting evidence to conclude that a reasonable doubt exists as to the location of the corner. Appellants’ calls more closely agree and the distances between the corners more closely match the boundary placement they propose. But...“We also find that a reasonable doubt exists as to the evidence in support of those corners.”

Essentially IBLA agrees with all of Judge Luoma’s opinions issued after the hearing.
We are troubled by the apparent inconsistency of BLM's position.

The evidence of discrepancies presented by BLM almost makes a case for a fraudulent survey.

They note the inconsistency in the record for the bearing trees at the SW sec. cor. of sec. 4. The variances were explained away as sloppy surveying. Or ties being reconstructed by memory such as a call to Carters House. Evidence of lines blazes discounted because they are not in the original notes. Amongst a few other things.

The evidence of discrepancies presented by BLM almost makes a case for a fraudulent survey. The option of conducting an independent resurvey remains open to BLM, and should be considered.

IBLA instructs BLM to conduct another resurvey, to consider the double corner theory, and to consider an independent resurvey.
[T]he majority purports to set forth a new evidentiary test to be used in conducting resurveys of the public lands which contradict the test previously approved by this Board, the 9th [1/] Circuit.

This case is a petition from the BLM to the IBLA to reconsider their ruling based on a different standard of evidence.

BLM in this petition states that IBLA misapplies or ignores the well established rule that survey monuments, when found, control over distances and calls made in the field notes of the original survey.

The majority’s new rule holds that a surveyor, when conducting a dependent resurvey of the public lands, may not use evidence of an original corner if its correct position cannot be determined beyond a reasonable doubt. The BLM asserts that this burden of proof cannot be practically utilized in dependently resurveying the public lands since the discrepancies inherent in original surveys, most of which were made in the late 19th or early 20th centuries, contain errors which would always create some doubt as to their authenticity. [Emphasis in original.]

BLM notes that the Boards prior ruling is the only pronouncement connecting “beyond a reasonable doubt standard when evaluating a corner as existent.”
The 1973 Manual

existent corner section 5-5
"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 supplemental survey record, some physical evidence, or testimony."
6-11. An existent corner is one whose original position can be identified by substantial evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or reliable testimony.

Added to the 2009 Manual: A corner is existent (or found) if such conclusion is supported by substantial evidence. The substantial evidence standard of proof is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is more than a scintilla of evidence but less than a preponderance of the evidence.

A preponderance means more likely than not a fair and impartial mind would gravitate toward one side or the other.
...re-evaluate the evidence of record in this case as to specific disputed corners employing the proper evidentiary standard.

So, I think the language in the 2009 manual is the spoiler as to the response from the IBLA to the BLMs petition.

The board applies the proper evidence standard to each disputed corner.
**SW Corner of Sec. 4**

That corner with the marked stone and bearing trees with disputable bearings, distances and sizes.

The 1881 field notes denote corner monumentation for the SW corner of sec. 4 to be by a "trachyte stone 24 x 18 x 12." BLM's 1982 resurvey relies on a trachyte stone measuring 22 by 17 by 9. This same stone was found by the Nevada State Highway Department in 1939. Four bearing trees were found nearby, supporting a conclusion that the foregoing stone represents the original corner monument. The Board holds BLM's decision as to the location of the SW corner of sec. 4 is supported by **substantial evidence.**
Both BLM and Jacobsen and Downer (appellants) claim to have located the original corner monument for the quarter corner common to secs. 4 and 5. BLM's monument is smaller than the monument described in the original survey and is of a different composition. Nonetheless, Eugene Faust, a cartographer for the State of Nevada, testified that having examined section corners of various kinds for over 35 years, he would clearly accept BLM's monument as the original corner monumentation, based on markings on the stone and other considerations. Moreover, BLM's monument stands in proper relation to the section corners one-half mile to the south and north. 9/ BLM's decision as to the location of the quarter corner common to secs. 4 and 5 is supported by substantial evidence.
BLM submits that the quarter corner common to secs. 4 and 9 is not locatable by an original corner monument. According to BLM, it is not a lost corner, but an obliterated one whose location has been correctly perpetuated. The controversy over this corner was discussed by the dissenting opinion in our prior decision. Therein, it was advocated that the Board should adopt BLM's recommendation that it be allowed to re-establish the corner of secs. 3, 4, 9, and 10 (SE cor. Sec. 4) by double proportionate measurement. This procedure would serve to reduce the 5-degree deflection in the south line of sec. 4 occurring between the quarter corner and the southeast corner, the principal criticism advanced by Jacobsen and Downer (appellents) to BLM's placement of the quarter corner common to secs. 4 and 9.

The Boards concludes that a corner is existent "if such a conclusion is supported by substantial evidence."
WAIT!!!

It is not over yet, one more thing.

The BLM, in September of 1988, seeks an amendment to the boards July 1988 decision directing them to reestablish the SE sec. cor of sec. 4

They found the original corner for the SE sec. cor. of sec. 4.
S. 89-56 W. was the bearing of the south line of sec. 4 in the original notes.
Keeping the communications open to all possibilities.
When the applications for unpatented mining claims are left dormant, and the claim(s) are not maintained and updated as required, the claims may be cancelled by the Cadastral Office. That is the action taken on the block of unpatented lode claims sitting largely in Section 10.
An accompanying form used to document the cancellation of an unpatented mining claim.
The above highlighted statements provide the conditions under which these unpatented mining claims have been cancelled.
The Laboratory of Tree-Ring Research in Tucson, Arizona is an excellent source for age-dating trees – dead or alive.
These are the results of age dating three suspected bearing trees from the SW corner of Section 4. They all started growing in the mid 1700s.
The blazes on all three of these specimens date back to exactly 1881 – the year of our GLO survey.
A closer view.
A letter informing Mr. Downer of the procedures he has to follow when pursuing a protest of a Cadastral survey.
Jacobsen attorney informing BLM of the coming protest of the dependent resurvey of Sections 4 & 9.

An official protest notice from Stoddard Jacobsen's legal counsel.
Robert Downer’s official notice to protest the dependent resurvey of Sections 4 and 9, T. 11 N., R. 12 E., MDM, Nevada. The explanation (basis) for the protest continues in slides 101 thru 115.
The homestead patent, dated June 1, 1882, secures to him the 
lands and 
section of Section 9, T.11 N., R.21 E., M.D.M., containing 160 
acres,
"according to the Official Plat of the Survey of the said land, returned
by the General Land Office by the Surveyor General." The "Instructions" to Deputy
Surveyors required them to tie in settlers' cabins.
There is only one Official Plat of this township, and I requested this plat
along with the original survey notes for my use in the survey of this
homestead. There were furnished to me by the Reno Office of B. L. M. in 1965.

The G. L. O. survey notes state that the north section line of Section 9
passes one chain north of a tunnel which is located in the northeast
quarter of the section.

The G. L. O. survey notes also state that the north section line at a
certain point is 16 chains from Carter's, the freighting station operated
by William Carter, and that the bearing to Carter's was S 12½° E.

The same notes also state that Section 9 is 80 chains from south to north,
and that the bearing of the north section line is very close to due
east, S 0° 50' W.

The location of the old tunnel and the waste dump are easily ascertained.

The location of Carter's is determined very accurately by Nevada State
Highway Department maps and notes, 1917 to 1960, relating it to a point
on the highway centerline alignment stationing. The highway stationing
relates Carter's to a 24" diameter culvert installed in 1923 and extended
in all later highway improvement projects. "Although Carter's was moved
Mr. Spang  
Protest Page 2

to make way for the highway, its former location can be determined exactly. Please see attached maps. The location of Carter's Station is verified by Stoddard Jacobsen who has personal knowledge of its location having seen it as a boy. Please see attached signed statement.

The north line of Section 9 is also pin-pointed on the ground by double-blazed line trees, many line cuts, rock piles, and a squared tree trunk, which is the entryman's corner. All these are in good agreement with each other and with the topographical and cultural calls. Along this line the distance from the NE corner Section 9 west to the creek matches the recorded distance within 5 feet. The old telegraph line and Bodie road trace are found in close agreement to the recorded called distances. The stump of the original bearing tree for the NW corner has been found, and from it the NW Section 9 has been set.

The "NW Corner Section 9", "N1/2 Corner Section 9", and "W1/2 Corner Section 9", as tied by the Nevada State Highway Department are rejected for the following reasons:

NW Cor, Sec. 9 This rock pile is 5.1 chains short of record 50 chains north of the SW Cor, Sec. 9 (50.0 - 74.9 = 5.1)

There is no matching trapetone.
The bearing trees, which are laying across the top of the brush and do not appear to have originated at this location even though dated 1881, do not match the record for bearing distance or size. See attached diagram.

Large trees, obviously rooted within ten feet of the rock pile, are not scribed as bearing trees.

The scribed post bears the numbers of Indian Allotments and was probably placed by Dunninton who marked allotments sometime between 1910 and 1915. There are no records of his survey and he probably accepted the corners he found in place.

From this rock pile to NE Cor. Sec. 9 is 2.2 chains short of record east to west.

This rock pile does not match record calls to original telegraph line and Bodie Road.

\[ \text{Cor. Sec. 9} \]
This is a small rock pile. There is no evidence of the original corner which was an earth mound and one pit.

There is no evidence of the bearing tree.
No 1883 line cuts can be found running east or west out of this corner.

This rock pile is only 800 feet north of Carter's, or 12.1 chains. The record is 1031 feet, or 15.6 chains (15 ch x cos 12.5°). Therefore, it is 230 feet south of record.

A due east bearing from this rock pile passes about 2 chains south of the tunnel instead of one chain to the north as described in the original notes. The bearing from this rock pile to the NE Cor. Sec. 9 is over 5 degrees off record, creating a large "dog-leg," and the distance is 2.5 ch. short.

W1 Cor. Sec. 4 This small rock pile does not match the calls to the Bodie Road, as verified on the ground as well as by the Nevada State Department Highway maps.

This small rock pile does not have the matching 42" stone and is several chains south of where record distances from the SW Cor. 9 or NW Cor. 33 would place it.
All three of these corners are totally lacking in authenticity. Whoever surveyed them and whenever they were surveyed is not known. One thing is sure: there has never been an official resurvey recorded, and there are no other records of any kind to substantiate these points. As stated in the 1973 "Manual of Surveying Instructions," a line is regarded as having been fixed in position by the senior survey unless that survey was officially superseded.9

These corners are "improperly related to an extraordinary degree" to all other authenticated corners in this township.

To explain how this could have happened, we should look at the township line between T.11 N. R. 21 E. and T.12 N. 21 E. It is apparent that Stewart and Conkling, the Deputy Surveyors who contracted with the Surveyor General's office in Virginia City, to survey these townships in June of 1881, ran the random line for this township from east to west, setting a temporary corner every half mile. They arrived at a point 210 links south of the western township corner set in 1861. An error of 210 links in 6 miles is 3'15". So they ran S 69° 45' E. on the true township line from the township corner and set the true corners every half mile. Presumably then the true line lay north of the random line.

There are two rows of rock mounds along the township line about 200 feet apart north to south.
Later, in the same year, the subdivisional section lines were surveyed in T.11 N., R.21 E., starting at the south and checking into the true (northerly) township line on the north.

The 1881 "Instructions to Deputy Surveyors" Section 99, Paragraph 5, specifies "... where the lines of a township do not extend 6 miles the excess or deficiency shall be specially noted and added to or deducted from the western and northern ranges of section or half sections in such township."

The notes show that the line between Sections 4 & 5, T.11 N., R.21 E., was closed into the township line and that there was 0.33 chains in excess. When the line between Sections 32 & 33, T.12 N., R.21 E., was surveyed, they record 80 chains from the true township line to the NW corner Section 33.

The distance from the northerly of the two rock mounds on the township line to the NW corner Section 33 checks within 1/3 chain of record 80 chains. The distance from the southerly of the two rock mounds is 82.7 chains, 2.7 chains more than record. Obviously, the northern rock mound is on the true line.
One mile west along the township line a similar situation exists. There are two rock mounds about 230 feet apart to north to south. The northerly mound is 3 chains south of the old road, exactly as called for in the notes for the section line between Sections 31 & 32 T.12 N. The southerly mound is 6 chains south of the old road, 3 chains more than record. Obviously, again the northerly mound is on the true line. The northerly rock mound also matches a call to a road 29 chains north and to a running 31 chains south, as well as the record distance to the SW Cor. Sec. 8.

However, when running south from the true northerly township line, we find that the corners do not match record and are 3 chains too far south. But, if measured from the rock mound on the random township line, the distance matches record distance, but the cells do not fit. The distance to the SW Cor. Sec. 8 is 2.6 chains short.

The answer is apparent. After the township line and section lines were all surveyed, notes and plotted, the corners of Sections 1 & 5 appeared to have been moved south 3 or 4 chains.

This is obvious because the north-south dimensions of Sections 6 & 9 have been reduced by similar amounts, 3 chains more or less, while Section 33 was increased by 3 chains more or less.

Fortunately, the calls to the tunnel and Carters as well as calls to the Norwegian, telegraph line and Bode Trail Road record the true location on the ground of the north line of Section 9 and the Carter homestead.

The excellent line cuts and double blazed line trees as well as the N 1/4 corner of Sec. 9 as relocated from what we believe to be the stump of the 1862 bearing tree serve to record the official survey line.
Mr. Spang

Protest Page 5

The true NE\(^2\) Cor. Sec. 4 has been found, an embedded boulder with surface dimensions agreeing well with the record 22" stone. It has been chiseled into the west face. It is 10.2 chains north of the line of blazed trees along the north line of Sec. 9. It is 119.6 chains north of the SW Cor. Sec. 9. It agrees with the calls to the creek, the telegraph line, and the Bodie Road. There are 1/16 section corners located at close to record distances to the south along the section line, to the east (west center 1/16 Cor) and to the southeast (SW 1/16 Cor.), which were set to segregate the NE\(^2\) SW\(^2\) Section 4 as mineral land as stated in the original field notes, page 363A.

William Carter, down in Section 9, T.11 N., R.21 E., had been operating a freight station on the Bodie Stage Road since 1866, and knew about the homestead Act of 1862. As soon as his area was surveyed by the Surveyor General's Office and the official map signed October 27, 1881, Carter went to the Carson City Land Office and applied, in December 1881, for 160 acres, the NE\(^2\) SW\(^2\) and NE\(^2\) SE\(^2\) of Section 9. His homestead papers were signed by President Chester A. Arthur on June 1, 1882.
Eventually the Homestead became the property of Stoddard Jacobsen of Carson Valley, who used it and the spring and intermittent stream that ran by the site of former Carter's Station, for watering his sheep, grazing the surrounding area of the Homestead, and bedding the sheep down overnight. There were long watering troughs fed by a pipe from the spring. Stoddard Jacobsen remembers stopping at Carter's Station when he was a small boy, traveling with his father, and has verified the location as previously stated.

Stoddard Jacobsen also owns two other Homesteads acquired by William Carter from the State of Nevada under the Act of the Legislature, March 5, 1875, providing for selection and sale of lands that may be granted to the State of Nevada by the United States. On September 9, 1875, the deed was filed for record to the SE and WSWW of Section 7, T.11 N., R.21 E. On September 28, 1875, the deed to WSWW and SE of Section 9, T.11 N., R.21 E. was filed for record. The total acreage in the three is 660 acres. Each deed says "660 acres according to the official plat of the survey of the public lands, as made by the United States Surveyor General for the District of Nevada, which said tract has been purchased by the said William Carter."

"... to hold the same, together with all rights, privileges, immunities, and appurtenances of whatever nature thereto belonging, unto the said William Carter and to his heirs and assigns forever." Signed by J. W. Adams, Governor.

Stoddard Jacobsen and other owners, have owned the entire 660 acres and have paid taxes on every acre of it. They should not have to lose any of it due to these obviously contradictory circumstances. The north line of Sec. 9 which is in agreement with all of the calls and record distances has been relied upon by these owners for over a hundred years.
Some court decisions having a bearing on this situation are as follows:

Craig v Powell. Appeal from Circuit Court of US for Eastern District of Louisiana. "When lands are granted according to an official plat of their survey, the plat, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and as far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant.

"When the General Land Office has once made and approved a governmental survey of public lands, the plat, maps, field notes and certificates having been filed in the proper office, and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interference or appropriations of subsequent corrective resurveys made by the Land Office."

"One who acquires land knowing that it covers a portion of a tract claimed by another will be held either not to mean to acquire the tract of the other, or will be considered to be watching for the accidental mistake of others, and be preparing to take advantage of them, and as such not entitled to receive aid from a court of equity."
Jefferys v East Omaha Land Co. (134 US 176, 184)
"It is a familiar rule of law, that, where a plat is referred to in a deed as containing a description of land, the courses, distances, and other particulars appearing upon the plat are to be as much regarded in ascertaining the true description of the land, and the intent of the parties as if they had been expressly enumerated in the deed."

Chapman & Dewey Lumber Co. v St. Francis Levee District (232 US, 196, 197)
"The explanatory words "according to the official plots of survey of said lands returned to the General Land Office by the Surveyor General" constitute another element, and a very important one, for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks and other particulars appearing thereon become as much a part of the patent and are as much to be considered in determining what it is intended to include as if they were set forth in the patent."

Rubicon Properties, Inc. et al 4-30748, May 6, 1968
"A resurvey of public land by the United States cannot alter or change property rights of private persons which have become vested and fixed by virtue of patents issued by the United States."

Van Amburgh v Randall, 893, 22 SW 626, 115 No. 607
"Of two overlapping surveys, the one first made has priority and any calls of the second survey conflicting with monuments and calls of the first must yield thereto."
Kittridge v. Landry, 1815, 2, Rob. 72
"Surveys by United States Surveyors, though sanctioned by the principal
deputy surveyor of the District, may be corrected when erroneous."

"The field and descriptive notes of a survey form a part of a survey,
and are to be considered along with the plat."

Southern Development Co. v. Enderen, I. C. Nov. 1912, 200 P. 272
"The field notes are presumptively correct and are prima facie evidence
of the fact stated, and they must be taken as true, till disproved by
a clear preponderance of evidence."

Anthony T. Ash, 52 ILL 210 (January 30, 1981)
"A class 1 color-of-title claim requires good faith, adverse peaceful
possession by a claimant, his ancestors or grantees under claim or
color of title for more than 20 years. The claim or color of title
must be based upon a document which on its face purports to convey
the claimed land to the applicant or the applicant's predecessors.
When the applicant fails to produce such a document the application
must be rejected."
"An instrument of conveyance upon which claimant relies is sufficient to provide color of title only if it describes land conveyed with such certainty that boundaries and identity of land may be ascertained. A color of title application is properly rejected where the claimed land is not described in deeds produced to support an applicant's claim."

Quote from Chapter 25 A - Lands held under Color of Title, PP 1068, "Lands held in adverse possession, issuance of patents; reservation of minerals; conflicting claims."

"The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application, during which time they have paid taxes levied on the land by State and local government units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre. Provided, (where in excess of 160 acres) (not applicable) Provided, (coal & mineral rights reserved). Provided, (conflicting claims adjudicated in favor of applicant)."
Mr. Spung
Protest Page 8

The original owner and all successors in title to all portions of the 160 acres granted to William Carter have, to the best of my knowledge, confirmed their activities and improvements to lands within the boundaries of the patent, as described in the Official Plat and survey notes.

This protest letter constitutes only a portion of the information developed. Many other details can be deduced from the maps and other documents accompanying which illustrate the statements made in this letter. As we develop additional information it will be brought to your attention. This protest is against any corners or markers, set by any agency or person purporting to be on the north boundary of Sec. 9, T.11 N., R.21 E., which are south of the north section line which is so clearly described in the Official Plat and field notes of the original survey returned to the General Land Office in 1881, by the Surveyor General. We will look forward to an examination of our data and the evidence in the field, with you.

Very Truly Yours,

Signed

[Signature]

Date 3/23/83

I have read the above protest and believe the facts are as stated. I am joining in the above protest.

Signed

[Signature]

Date 3/23/83

[Signature]

Date 3/23/83
List of Attachments

2. NDOT R/W map at Carter's
3. NDOT Topography notes at Carter's
4. Stoddard Jacobsen, Statement re location of Carter's
5. NDOT 1923 Construction Layout sheet at Carter's
6. " 1931 " " " "
7. " 1940 " " " "
8. " 1978 " " " " at W cor. Sec. 4
9. " 1923 " " " "
10. Sketch of relationship of W cor. Sec. 4 to Bodie Rd.
11. Recording of 1915 Homestead, W NW & SE Sec. 9.
12. " " " " " W NW & SE Sec. 9.
13. " " " " W NW & SE Sec. 9.
14. " " " " W NW & SE Sec. 9.
15. Bearing tree comparison at NW cor. Sec. 9.
16. Map illustrating conflicting data; to accompany protest. 24" x 36"
17. Stoddard Jacobsen, Statement re location of Bodie Rd.
To Whome It May Concern:

When I was a child I had the opportunity to travel the original Bodie Trail Road. The original Bodie Trail Road of 1881 crosses back and forth across the creek and is not the graveled detour road which lies to the west of the existing State Highway. I have observed the traces of the original Bodie Trail Road and telegraph line in the vicinity of the north line of Section 9 as pointed out by Downey Engineering personnel and believe to my best recollection that it is the original position of same. In the vicinity of the west 1/4 corner of Section 1 the original Bodie Trail Road cuts easterly across the State Highway as shown on the 1922 New Highway plans and departs from the location of the graveled detour road which lies to the west of the existing State Highway.

Stoddard Jacobsen
3/23/83

An affidavit from Stoddard Jacobsen.
This Dependent Resurvey, dated July 5, 1984, accepted a local corner at the SE corner of Section 4. Robert Downer also accepted this location. This resulted in about a five (5) degree departure from cardinal (1881 Record bearing was S. 89°56’ W., 39.86 Chs.) along the east half mile of the south line of Section 4. The difference is 5°08’ of bearing and 2.64 chains short (174.24’).
After all three IBLA decisions had been worked on the BLM was still in a quandary. The third decision from the IBLA directed them to apply a double proportion solution for the SE corner of Section 4. During another search for the original corner, Robert Pratt, one of Nevada BLM’s most competent Cadastral surveyors, lucked out and stepped through a dense patch of sagebrush and discovered what everybody had been searching for – the original 1881 marked stone in a mound of stone.

This discovery resulted in a difference is 2°43’ of bearing and 0.82 chain short (54.12’). More details on this corner in later slides.
Let’s review the four (4) primary corners now starting with the SE of Section 4, then the SW of Section 4, the S 1/4, and ending with the W 1/4 of Section 4.
A July 27, 1982 view of Neil Forsyth with his left index finger touching the local corner described in the next slide. The mound of stone has been built higher and more prominent.
Jimmy D. Jones is Nevada PLS 3740 and has surveyed in many locations in this township.
In 1988, after Robert Pratt had found the original 1881 marked stone for the SE corner of Section 4, the BLM monument set in 1982 was left in place. The marking showing the section and township information were sanded off and AM 1982 1988 were stamped on the aluminum cap. The above Google Earth image, with the Earth Point overlay shows the approximate location of the original monument and the AMd location.
This and the following 2 slides provide a detailed description of the recovery of the original corner monument and the accessories established in 1988. Myself and one of my immediate staff were called upon by Lacel Bland, Nevada Cadastral Chief, to join Robert Pratt when he first discovered this critical monument. Bob had not disturbed anything except a careful and close examination of the original monument to confirm that it bore the appropriate markings.

Robert Downer, and legal representatives for Downer and Jacobsen, visited the site with us to examine the undisturbed site. After Robert Downer had reviewed the field notes again and examined the original corner monument and mound of stone I asked him a question – “Do you believe this is the original monument, in its original location, as set by Stewart and Conkling in 1881?” He answered yes but quickly qualified his answer by adding that when Stewart and Conkling closed north on the township line they should have recognized their error and came back and moved this monument.

The tie to the NE corner of Section 4 is quite reasonable for late 1800s era GLO surveys. I surprised that the line between Sections 3 and 4 is as close as it is – 2°43’ bearing difference and 0.82 chain (54.12’) short. GLO surveyors frequently left out the closing half mile of line into the exterior corners of a township.
The only thing you really know when you can’t find an original corner in terrain that does not appear to have been disturbed is – YOU can’t find the corner. It doesn’t guarantee that another surveyor won’t find it at some future date. I am uneasy every time I make the decision to “proportion” a corner.
There is not any living bearing trees remaining at any one of the four corners we are discussing here. A series of fires in the last 15+ years have burned the hillsides clean. We are lucky to find the charred remains with an occasional chop mark or a shadow of the scribing when the light is reflected across the open burned scar. There is another surprise to reveal at this corner location when we return a little later in this presentation.
Now we are at the SW corner of Section 4 with a very plainly chiseled original rock. I learned a long time ago that the geologic description of a rock monument is a pretty weak excuse for rejecting a corner monument unless you can prove that the surveyor you are retracing has a reliable reputation for knowing what kinds of rocks he is selecting to set. I suspect that it is the moundsman who really picks the rock and provides a description to whoever is keeping notes on the crew.

This location is also rejected by Robert Downer even with the well marked corner stone. The bearing tree bearings and distances are again greatly different from the original record but distances to adjoining corners (that the BLM accepts) are well within acceptable range for Stewart & Conkling.
This wood post is typical of the wood posts that Reppert cut and scribed along with several other tribal surveyors that have worked in this area over the last several decades. This side is scribed “T11N S4 IA 118” and additional scribing on the other three sides.
Neil Forsyth is in the upper left view examining the uprooted and fallen stump of one of the original bearing trees. Close up of the scribing is on the next slide.
Remains of an 1881 “BT” with axe marks below the “T” and upper portion of the tree having been cut off.
Only the lower blaze with the scribing “BT” still remains after 138 years of exposure to the cyclic hot and cold weather conditions.
A close up of the scribing on the BT in the former slide.
BLM surveyors have been accused of having dragged these bearing tree remains to this location from their original locations several hundred feet northerly. Quite an imagination some folks have and a sad opinion of a federal lands surveyor.
The original cor. of secs. 4, 5, 8 and 9, monumented with a trachyte stone, 22X17X9 ins., plainly mkd. with 5 grooves on the S. face and 4 grooves on the E. face, firmly set in a mound of stone with a wooden post, 36 ins. long, 3 ins. diam., with illegible scribe marks visible, and a rebar 1 in. diam., with cap on top mkd. T11N R21E 4 5 8 9 RLS 3740 1981 alongside, from which the original bearing tree:

A stump hole, bears N. 18° E., 23 lks. dist., with an uprooted pinon lying alongside, 6 ins. diam., mkd. BT on open blaze. (Record: S. 62° E., 28 lks. dist.)

A stump hole, bears S. 43° E., 18 lks. dist., with an uprooted pinon lying alongside, 12 ins. diam., mkd. BT on open blaze. (Record: S. 55° E., 31 lks. dist.) On August 23, 1982 a section 2.6 ft. long was cut including the open blaze and was taken for age dating purposes. The section was sent to the laboratory of tree-ring research at the University of Arizona at Tucson. The report received from the University of Arizona, dated October 25, 1982, concluded that the blaze scar occurred in the year 1881, the same year as the original survey.

I'll leave the reading up to you.
Evidence of all four original bearing trees was found at this corner location. If original corner monument acceptance depended heavily on a close relationship between field notes and existing evidence and measurements thereto we wouldn’t accepting many corners.
from which new bearing trees

A juniper, 10 ins. diam., bears S. 17° 38' E., 37
ïks. dist., mkd. T11N R21E S 9 BT.

A juniper, 8 ins. diam., bears N. 60° W., 19 lks.
dist., mkd. T11N R21E S 5 BT.

There are no other suitable bearing trees available.

Bury the cornerstone and reset the wooden post and
rebar inverted alongside the aluminum post.

This corner is identical with the position of the
Nevada Highway Department Plans of U.S. 395 in 1939.

From this corner, a mound of stone, bears N. 17° 41' W., 4.19 chs. dist. This mound of stone is accepted
as the corner by Downer Engineering RLS No. 2350 on
his map dated March 22, 1982.

The final paragraph in this description is the tie to Downers corner located approximately
276 feet NW.
Someone has even placed a steel “T” bar fence post in the mound of stone. A view towards the W 1/4 of Section 4.
How radical can it get and still be the location of the original corner? In my 56+ years searching for and examining endless bits of corner evidence I have found every kind of “material discrepancy” and poor bearing and distance relationships between records that one can imagine. Consider the working and living conditions, coupled with the low pay, that GLO surveyors have endured since the beginning of surveying in America.
There is not logical reason for double corner disagreements like these. Commit yourself to doing it right, the first time.
The S 1/4 corner of Section 4. The BLM accepted a local corner as the best available evidence.
And Downer has his own “two” corners NW of the BLM location.
A lot of reliance has been placed on the old Nevada Highway department records and corner locations.

| 37.22 | The \( \frac{1}{4} \) sec. cor. of secs. 4 and 9, monumented with a rebar, 16 ins. long, 1 in. diam., firmly set 12 ins. in the ground and in a cellar of stone, with cap on top mkd. \( \frac{1}{4} \) 4 9 RLS 3740 1981, and is accepted as a careful and faithful perpetuation of the position of the original corner. (There is no remaining evidence of the original bearing tree.) This corner is identical with the position of the Nevada Highway Department survey tie dated Dec. 18, 1917 and with the Nevada Highway Department Plans of U.S. 395 in 1919 and 1939. |
| CHAINS | At the corner point |
| | Set an aluminum post, 30 ins. long, 2\( \frac{1}{2} \) ins. diam., 16 ins. in the ground to solid rock and in a mound of stone to cap, 3 ft. base, with aluminum cap mkd. |
| | T11N R21E |
| | S 4 \( \frac{1}{4} \) |
| | S 9 |
| | 1982 |
| | Reset the rebar inverted alongside the aluminum post. |
The encroachment onto federal interest land is easy to recognize when reading these descriptions.
From this same corner, a BLM project marker, located at the SE. end of a water trough, monumented with an aluminum post, 1 in. diam., projecting 10 ins. above ground, ekl. CARTER SPRINGS SE - SE SEC. 9 1940, bears S. 27° 50' W., 11.11 chs. dist.

From this same corner, the NW. cor. of a house, bears S. 54° 22' W., 12.08 chs. dist.

From this same corner, a mound of stone, on the toe of a road fill, bears N. 27° 27' W., 3.68 chs. dist. This mound of stone is accepted as the corner by Downer Engineering RLS No. 446, on the map of Robert G. Downer dated March 22, 1982.

From this same corner, a ½ in. diam., rebar set by Downer Engineering RLS No. 2350, bears N. 34° 55' W., 4.46 chs. dist., on the map of Robert C. Downer dated March 23, 1983.

And again the last two paragraphs describe two different monuments offered up by Robert Downer. It is nice to have choices but not with multiple corners,
It is difficult to understand why Mr. Downer has so many situations where he has two corners for a corner location. In this case the landowner of the home and shed NE of the 1/4 corner has totally abandoned his dwellings.
The lower purple line is the Earth Point line representing the section line. The red lines are plotted from BLM ties to buildings and clearly demonstrates the encroachment problem with the original Parcel H.
Now for the most controversial location on this project – the West 1/4 corner of Section 4.

More time and disagreement has surrounded this corner than any other. The field notes have a grossly different corner description than what was found and accepted by the BLM and the plaintiffs searched long enough to find a boulder that roughly approximated their needs to match the record. How do you even begin to explain such extreme differences as 42”x22”x20” vs 14”x6”x4” for the dimension of the original stone corner monument. Volume wise this is a factor of 1:55 and linear dimensions of nearly 4 times bigger. The Nevada Highway department has accepted the smaller “1/4” marked stone in place for decades.
The position of the dark grayish, chiseled corner stone on the right was remonumented by the BLM in 1982 with the original corner stone buried alongside.
Neil is examining the plaintiffs “boulder in place” that does match the record dimensions much better than the small chiseled stone that the BLM accepted and remonumented a few hundred feet SE of this location.
Mr. Dickenson really favored this rock as being the W 1/4 corner of Section 4 and strongly feels that there is a man made chiseled “1/4” on the easterly side of the boulder. If this is the actual corner stone called for in the field notes then why didn’t they chisel the “1/4” on the west side of the boulder as directed by under Article X of the 1881 Manual of Surveying Instructions?
A clearer view of where the plaintiffs say they can identify the chiseled 1/4 marks on the boulder.
With construction of a home on the Indian Allotment both of the plaintiff’s “corner monuments” have been removed. The large boulder was located near the entrance to the garage and the 3/4” rebar was located in the landscaped area on the northwesterly side of the home.
This and the following slide is the description of the 1982 remonumentation of the W 1/4 of Section 4.
Bury the cornerstone and rebar inverted alongside the aluminum post.

This corner is identical with the position of the Nevada Highway Department Plans of U.S. 395 in 1939.

From this corner, a rebar, 1/2 in., firmly set in a mound of stone, bears N. 35° 34' W., 3.96 chs. dist. This rebar and a mound of stone is accepted as the corner by Downer Engineering RLS No. 2350, on his map dated March 22, 1982.

From this same corner, a deeply embedded basalt stone, 42X22X20 ins. above ground, with no original chisel marks visible, bears N. 34° 36' W., 5.82 chs. dist. The only markings on the stone are natural fractures and where the lichen has been scraped from the stone. This stone was found by Francis Dickinson and is accepted as the corner by Downer Engineering RLS No. 2350, on his map dated March 23, 1982.

From this same corner, a Nevada Highway Department monument, monumented with a concrete post, 6X6 ins., firmly set and exposed 4 ins. above ground, with a copper pin in the center, bears S. 89° 40' E., 0.47 chs. dist.
The Corrective Dependent Resurvey is authorized.
Double Proportion per 103 IBLA 83 (1988)

Subject: Corrective Resurvey, T. 11 N., R. 21 E., Mount Diablo Meridian, Nevada


Therefore, the survey approved July 5, 1984, is canceled in part as a result of IBLA's decision. This cancellation pertains to the north one-half mile between secs. 9 and 10, the line between secs. 3 and 4, the east one-half mile between secs. 4 and 9, and the lots in sec. 4.

A notation will be made on the original plat approved July 5, 1984, that the above portion of the survey is canceled. Duplicate and triplicate original plats will be prepared and the plats will be officially filed.

You are authorized to prepare Supplemental Special Instructions for Group No. 599, Nevada, for a corrective resurvey in T. 11 N., R. 21 E., in accordance with the IBLA decision that states that the southeast corner of sec. 4 will be reestablished by double proportionate measurement.

It is recommended that the execution of this corrective resurvey be assigned a priority in your cadastral survey program which takes into consideration your total public land survey responsibility in Nevada.

The Corrective Dependent Resurvey is authorized.
Memorandum

To: Chief, Branch of Lands and Minerals Operations

Attn: Title and Records

From: Chief, Branch of Cadastral Survey

Subject: Plat Distribution and Filing Instructions

The triplicate original plat, accepted on the date noted, is being attached for official filing. The original plat and appropriate field notes are also attached for placement in your open files. No notations are to be placed on the original plat without the prior written authorization of this office.

The triplicate original of the following described plat will be regarded as officially filed as of 10:00 a.m. following the time of receipt in your office. An immediate report of such date, on Form 1810-6, shall be made to this office as provided in 43 CFR 1813.1-2 (BLM Manual Section 2007 - Opening Orders). As a matter of information, public notice will be made in the Federal Register that the survey has been filed.

T. 11 N., R. 21 E. - Dependent Resurvey

This survey was accepted July 5, 1984, and was executed to meet certain administrative needs of the Bureau of Land Management.

Official filing of the July 5, 1984 Dependent Resurvey.
MEMORANDUM

To: Chief, Branch of Lands and Minerals Operations

Attn: Title and Records

From: Chief Cadastral Surveyor

Subject: Plat Distribution and Filing Instructions

The triplicate original plat, accepted on the date noted, is being attached for official filing. The original plat and appropriate field notes are also attached for placement in your open files. No notations are to be placed on the original plat without the prior written authorization of this office.

The triplicate original of the following described plat will be regarded as officially filed as of 10:00 a.m. following the time of receipt in your office. An immediate report of such date, on Form 1810-6, shall be made to this office as provided in 43 CFR 1813.1-2 (BLM Manual Section 2097 - Opening Orders). As a matter of information, public notice will be made in the Federal Register that the survey has been filed.

T. 11 N., R. 21 E. - Corrective Dependent Resurvey

This survey was accepted September 7, 1989, and was executed to meet certain administrative needs of the Bureau of Land Management.

Mr. Fred Wolf,  
Acting Director,  
Bureau of Land Management Nevada  
P. O. Box 12000  
Reno, NV 89520  

May 25, 1990

Re: Jacobsen-Downer Survey Case  
Destruction of Evidence

Dear Sir:

On Sunday, May 20, accompanied by my son, Robert G. Downer, I hiked over the north line of Sec. 9, T.11N., R.21E., M.D.M., which has been the subject of administrative hearings and appeals to the Interior Board of Land Appeals, protesting BLM's 1982 re surveym of the line, which cuts off about 20 acres of private property. The case is now before the United States District Court, District of Nevada, for judicial review of BLM decisions.

I had not been over the line for about a year and wished to rephotograph some of the critical evidence supporting my survey of the north section line, and disproving the BLM 1982 resurvey.

I was shocked to discover that in several places complete sections of trees which have been placed in the record as evidence, had been cut out and removed from the area.

One of these was a large, double-blazed juniper tree, about a half mile west of the north corner (1366') and within a few feet of the line. In November, 1984, I had taken a wedge of wood from the blaze area for age-dating. The Univ. of Arizona tree lab dated it to the period of the original survey, 1881.

Whoever removed this entire section of tree trunk took far more than necessary and prevented further examination by anyone else. This was a critical piece of evidence substantiating my survey. This case is still before the court, and the removal of evidence is highly illegal.

Three other tree sections were removed from the vicinity of the northeast corner of Sec. 9. Two were possible witness trees to the corner recognized by me. One was claimed to be a bearing tree for the corner recognized by BLM.

I am asking you to direct your cadastral section to restore these missing tree sections to their original locations. The BLM crew are the only persons having the slightest reason to remove or destroy this evidence. They are also the only persons having any knowledge of the out-of-the-way, hard to find, and steep places where these trees are located.

Your attention to this request, and a response to this letter will be urgently awaited.

Sincerely, [Signature]

Copies sent to agencies and parties involved.

Photos are being developed.
Mr. Fred Wolf  
Acting Director  
U. S. Bureau of Land Management  
P. O. Box 12000  
Reno, NV 89502

Re: Jacobsen-Downer Survey Case  
Destruction of Evidence  
Letter sent about May 26, 1990

Dear Sir:

Just in case you did not receive the original letter from me I am enclosing a copy herewith and sending by certified mail.

At the same time, I wish to make you aware of two other instances of destruction of evidence supporting my survey: At the north quarter corner of Sec. 9, T.11N., R.12W. there is the stump of the bearing tree, bearing N80°W, 70 links. This 109 year old stump had been kicked off of the base and down the mountain side on or about the time the BLM crew set their new point for the northeast cor. Sec. 9, in the spring of 1989. This fact was discovered by Mike Parthalis (attorney for Stoddard Jacobsen) and myself.
We replaced the stump on its root base. The other instance of destruction of evidence was where the old Bodie Telegraph line crossed my survey line. There had been old wooden insulator brackets attached to the tree trunks, and partly overgrown. There was broken insulator glass on the ground, and one insulator still in place. These trees have been removed, possibly by woodcutters, and the broken insulator fragments are gone.

Fortunately there is plenty of other, immovable and inaccessible, evidence remaining which support my survey, but I think you should be aware of these incidents.

I am hoping to receive acknowledgement of these letters in the near future.

Very truly yours,

Robert C. Dowser
RE, ELS, NV #446
944 Vasser St.
Carson City
NV 89703
Mr. Robert S. Downer
SE, RLS, NO. 444
344 Vassar St.
Carson City, NV 89701

Dear Mr. Downer:

This letter is an acknowledgement of receipt of your letters dated May 25 and June 6, 1990, concerning Bureau of Land Management (BLM) Cadastral Survey activities in conjunction with the dependent resurvey and corrective resurvey of section 4 and the east boundary of section 9 in T. 17 N., R. 21 E., MEM, Nevada.

I want to thank you for the information provided about certain evidences in connection with these surveys. I have been informed by our Cadastral Survey Branch that portions of certain trees in the area were removed for age dating and have been addressed during past court proceedings. Additionally, in 1989, while examining evidences of the northeast corner of section 9, our surveyors cut into several potential bearing trees in an effort to determine blaze and/or scribe marks.

The aforementioned actions are routine and legal activities performed by our survey personnel. There have been no evidences destroyed or removed that were mentioned in the field notes of the 1981 survey, conducted by Stewart and Comling, that was not documented in the approved field notes during the evidence evaluation procedures.

If you have further questions or information, please contact Steve Parrish, Chief, Branch of Cadastral Survey at 702-485-543.

Sincerely,

/3/ FRED WOLF
June 22, 1990

Mr. Fred Wolf,
U.S. Bureau of Land Management
Acting State Director, Nevada
550 Harvard Way, P.O. Box 12000
Reno, NV 89510

Dear Mr. Wolf:

Thanks for your reply of June 20 to my letters of May 26 and June 6, regarding the removal, by BLM Cadastral employees, of critical evidence affecting the case now before the U.S. District Court, CV-M-85-515 PNM.

I am asking you to direct the BLM Cadastral Section to return all evidence which they have removed from the vicinity of the conflicting lines and corners, especially as relating to the north line of Sec. 19, T.11N., R.12E., M.D.N.

This removed evidence is not limited to evidence mentioned in the 1981 field notes, nor to evidence documented in the approved BLM field notes. This evidence was listed in my letter to you of May 25, 1990.

The absence of this evidence is hindering further investigations into the facts in this case, and the immediate return of the evidence is urgently requested.

Your early response will be greatly appreciated, since time is of the essence for all involved.

Very truly yours,

[Signature]

Robert C. Downer, P.E., P.L.S.
944 Vassar St.
Carson City, NV 89705

Downer June 22, 1990 reply to Fred Wolf.
Downer inquires about his destruction letter via a memo dated July 16, 1990.
Private surveyor does not have standing to challenge a government survey – per Judge in Ninth Circuit.
Downer bringing a complaint against the BLM Director but it was dismissed on grounds of no standing.
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT C. DOWNER,
Plaintiff,
v.
DONALD MODEL, Secretary U.S.
Department of Interior Board of Land Appeals Office of
Hearings and Appeals,
Defendant.

ORDER

The complaint filed by plaintiff was dismissed for lack of standing to sue (document §17). We granted plaintiff's motion for reconsideration and provided plaintiff with the opportunity to file an amended complaint wherein he could outline his compliance with the standing requirements as set forth in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Plaintiff has filed an amended complaint (document §26) in an attempt to meet the standing requirements.
ROBERT C. DOWNER,

Plaintiff,

v.

DONALD HODEL, Secretary U.S. Department of Interior Board of Land Appeals Office of Hearings and Appeals,

Defendant.
ISSUES

169

PLAINTIFF

In this matter, the plaintiff alleges that the defendant violated the Administrative Procedure Act, 5 U.S.C. § 552(a), 7 U.S.C. 202(e)(2), which prohibits agencies from engaging in arbitrary and capricious actions. The plaintiff further alleges that the defendant’s actions caused it to sustain injury in fact, and that the injury was the result of the defendant’s violation of the Administrative Procedure Act.

In response, the defendant argues that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The defendant further argues that the plaintiff has not shown that it was injured by the defendant’s actions.

The court agrees with the defendant that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The plaintiff has not shown that it was injured by the defendant’s actions.

PLAINTIFF

169

DEFENDANT

In this matter, the defendant argues that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The defendant further argues that the plaintiff has not shown that it was injured by the defendant’s actions.

The court agrees with the defendant that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The plaintiff has not shown that it was injured by the defendant’s actions.

169

PLAINTIFF

In this matter, the plaintiff argues that the defendant’s actions were arbitrary and capricious. The plaintiff further argues that the plaintiff was injured by the defendant’s actions.

The court agrees with the plaintiff that the defendant’s actions were arbitrary and capricious. The plaintiff has shown that it was injured by the defendant’s actions.

169

DEFENDANT

In this matter, the defendant argues that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The defendant further argues that the plaintiff has not shown that it was injured by the defendant’s actions.

The court agrees with the defendant that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The plaintiff has not shown that it was injured by the defendant’s actions.

169

PLAINTIFF

In this matter, the plaintiff argues that the defendant’s actions were arbitrary and capricious. The plaintiff further argues that the plaintiff was injured by the defendant’s actions.

The court agrees with the plaintiff that the defendant’s actions were arbitrary and capricious. The plaintiff has shown that it was injured by the defendant’s actions.

169

DEFENDANT

In this matter, the defendant argues that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The defendant further argues that the plaintiff has not shown that it was injured by the defendant’s actions.

The court agrees with the defendant that the plaintiff has not shown that the defendant’s actions were arbitrary and capricious. The plaintiff has not shown that it was injured by the defendant’s actions.
399 (1987). We look to the statute authorizing the survey for evidence of congressional intent. The statute provides:

The Secretary of the Interior may ... cause to be made ... such surveys ... as ... be necessary or essential to properly mark the boundaries of the public lands described and located. Provided, That no such survey ... shall be so conducted as to impair the base line rights or titles of any claimant, taxpayer, or owner of lands affected by such survey ...


This statute is drafted to protect the rights of landowners, not surveyors. As plaintiff is not a claimant, taxpayer, or landowner, plaintiff's interest is not within the zone of interests protected by this statute.

Therefore, although plaintiff may have suffered an injury in fact, his interest is not within the zone of interests protected by the relevant legislation. Thus, plaintiff does not satisfy the second requirement of the standing test. Hence, plaintiff lacks standing to maintain the present action.

IT IS, THEREFORE, ORDERED that our order dismissing plaintiff's complaint (document 457), be, upon reconsideration, AFFIRMED.

The Clerk shall enter judgment accordingly.


[Signature]

UNITED STATES DISTRICT JUDGE
Downer sues BLM surveyors.

Nov. 28, 1994

Page 1

Ownership Plan: (See Exhibit 188, Plan 4, and text.) The land contained in the M 1/2 W 1/4 and the S 1/2 SW 1/4 of Section 4 was a patented homestead granted to William Davis in 1882, but owned by Sanford Jacobson in 1969.

In 1983, Defendents performed a survey of the north section line of Section 4, as shown on the official plat map of Section 4, signed by Defendant David B. Flood on July 31, 1992. (See Exhibit 2, 1992 BLM plat.)

By referring to the two above-mentioned plans, the difference between the original 1883 survey record and Defendants' non-conforming survey becomes apparent, as explained in the following points. (In the following points, "north" means further north in latitude, but not necessarily due north.

1. On the 1883 plat, the north line of Section 5 is 6,100 feet east (or mile) north of the southeast corner of Section 5 at the northeast quarter corner.

2. On the 1992 plat, the north line of Section 5 is 6,097 feet north of the southwest corner of Section 5, at the NE 4 quarter corner. This 3 feet greater than the official recorded distance.

Page 2

Downer bring a suit against retired BLM surveyors thru Slide 177.
(1) On the 1961 plat, the southeast corner is 44 feet south of the north section line.

(2) On the 1961 plat, the southeast corner is 44 feet south of the north section line. The line between the north corner and the southeast corner is the same as the line between the north corner of the adjacent section and the southeast corner of the section to the south.

(3) On the 1961 plat, the southeast corner is 44 feet south of the north section line.

(4) On the 1961 plat, the southeast corner is 44 feet south of the north section line. The line between the north corner and the southeast corner is the same as the line between the north corner of the adjacent section and the southeast corner of the section to the south.

(5) On the 1961 plat, the southeast corner is 44 feet south of the north section line.

(6) On the 1961 plat, the southeast corner is 44 feet south of the north section line.

(7) On the 1961 plat, the southeast corner is 44 feet south of the north section line.

A mile long and contains about 56 acres, which for, then, improperly transferred from Section 5 to Section 6, and increases the acreage of all the private lots bounding the east side of the north line of section 5.

STATE OF THE CASE

(1) Plaintiff had surveyed the north section line in 1961, setting the boundaries in accordance with the rules and distances to identifiable points on the ground as shown in the 1961 plat and notes.

(2) As the basis for their survey, defendants accepted a' plat, in 1961, two monuments which did not coincide with the line of the north section line. The monuments were placed by the United States Board of Land survey.

(3) The same computations show that the northwest corner of the 1961 plat is about 344 feet north of the original north section line, as shown in the 1961 plat and notes. This 344 feet north of land is about three-quarters of a mile long and contains about 56 acres, which for, then, improperly transferred from Section 5 to Section 6, and increases the acreage of all the private lots bounding the east side of the north line of section 5.

STATE OF THE CASE

(1) Plaintiff had surveyed the north section line in 1961, setting the boundaries in accordance with the rules and distances to identifiable points on the ground as shown in the 1961 plat and notes.

(2) As the basis for their survey, defendants accepted a' plat, in 1961, two monuments which did not coincide with the line of the north section line. The monuments were placed by the United States Board of Land survey.

(3) The same computations show that the northwest corner of the 1961 plat is about 344 feet north of the original north section line, as shown in the 1961 plat and notes. This 344 feet north of land is about three-quarters of a mile long and contains about 56 acres, which for, then, improperly transferred from Section 5 to Section 6, and increases the acreage of all the private lots bounding the east side of the north line of section 5.
Additionally, the "substantial evidence" standard, which says, "... every reasonable, not every grossly impossible interpretation..." was misapplied. The only real way is "doe...". In this case the defendants' occurrence was unproved, classified uncertain incidents. (See R. M. v. R. M. [1979], p. 233, Inf. 2000 1E 10.8.)

And since they were not directly 'actual' instances, they cannot be used as 'official' notices to control over values and distances in the fixed house of the original survey.

(b) Importance of marginal state and block notes

Judge of the department of state C.D. O. [1980, 12:16] wrote as follows: "It has been repeatedly held by both state and federal courts that plans and field notes retained in a manner that is reasonably clear for the purpose of determining the limits of the real estate must be with precision. In the case of Rogers v. Powell [1980, 12:16, 12:17], the Supreme Court held:

"It is a well settled principle that when lands are described according to an official plan of the survey of such lands, the plat issued, with all its owner's, lines, descriptions and observations, includes as such part of the grant or deed by which they are conveyed, the contents as far as limits are concerned, as if such descriptive features were written on the face of the deed or the grant itself." The above principle applies to all situations as located in the potential lands.

Page 5

Appendix

Defendants' survey of the north line of Section 9 in Abraham's West was not noted to any true principle, expressed by the Supreme Court, or set forth in the "Manual of Instructions for Survey of the Public Lands" (1957, section 503). (See Appendix, 12:16 edition of this manual.)

Defendants' survey of the north line of Section 9, T. 11 R. 36 E., was performed negligently. plat survey (This is all of the environmental information contained in the 12:16 survey plan and 12:17 notes.)

The above described geologically survey of the north line of Section 9 was noted at 508 acres in legal description. It has also caused Plaintiff a loss of plating practice over a period of years, estimated to be for a total of $398,000. Total assigned damage due to Defendants' negligence survey is $398,000. Additionally, due to the Defendants' negligence caused by this controversy, Plaintiff has suffered damages to his own health and family members have also suffered.

Page 6
CONCLUSION

That said negligence has resulted in Plaintiff's sustaining damage in the sum of $150,000.00.

Wherefore, Plaintiff prays:

1. For Judgment against Defendants, and each of them, for damages in excess of $150,000.00;
2. For possible anticipated fees in this case;
3. For such further relief as the Court deems just in the premises.

DATED this 21st day of November, 1994

By

Robert C. Downer, P.E.
Plaintiff
244 Vassar Street
Carson City, Nevada 89703
Tel. 783-267-3484
Pursuant to NECP Rule 5.1, I hereby certify that I am
Robert C. Dover, Plaintiff in the foregoing case No. 94-CU-0393
and that on this date I caused to be deposited at the U.S. Post Office at
Carson City, Nevada, First Class postage prepaid, a true and
complete copy of the foregoing document, properly addressed
to:

Local E. Bland
1215 Sharon Way
Reno, NV 89509

Neil E. Perry
9905 Speckled Way
Reno, NV 89506

Robert A. Pratt
1148 O'Callaghan Ct.
Sparks, NV 89434

Edison & Patricia Nakamura
156 Hardie Lane
Pawley, NV 89429

Betty Sarby
C/O John Sarby
1383 Queen's Court
Gardnerville, NV 89418

Stoddard Jacobson
P.O. Box 76
Gardnerville, NV 89418

DATED this 27th day of November, 1994.

by

Robert C. Dover, P.E.
940 Viera Rd.
Carson City, NV 89705
Tel: (775) 328-3904.
State Director asking BLM Regional Solicitor for assistance with Cadastral retirees being sued by Downer.
The correctness of the resurvey Mr. Downer refers to has been decided on by the Interior Board of Land Appeals and several other court decisions in favor of the Bureau of Land Management. Messrs. Forsyth and Pratt have requested representation from the U.S. Attorney’s Office in defending them. Mr. Bland’s similar request is forthcoming.

It is our office’s opinion that these three individuals were acting within the scope of their employment as federal employees at the time of the incidents out of which this claim arose, and should be defended as if the lawsuit had been filed against the United States Government. Please take the necessary steps to initiate the defense of the Messrs. Bland, Forsyth and Pratt.

The defendants must respond within 20 days after their Summons was served. Mr. Forsyth was served on November 25, 1994.

Please contact John S. Parrish, Chief, Branch of Cadastral Survey, at (702) 785-6541 if you need more information.

Attachments
1 - Forsyth Request (14 pgs.)
2 - Pratt Request (14 pgs.)

RHTHOMPSON:1h 12/07/94

Sgd. ANN J. MORGAN
Hanneman v. Downer – Nevada Supreme Court (1994)
871 P.2d 279 (1994)


No. 23434.

Supreme Court of Nevada.


*281 Jack McAuliffe, Reno, for Eldon and Patricia Hanneman.
Jon M. Yaple, Carson City, for Robert C. Downer.
Aebi & McCarthy, Carson City, for Maxine V. Swenson.

OPINION

PER CURIAM:

FACTS
This action results from a negligently performed survey and subsequent conveyance of the inaccurately described real property. The subject property is part of a tract of land located in the Pinenut Range of Douglas County. Respondent Stoddard Jacobsen acquired the tract in 1950. In 1965, Jacobsen retained respondent Robert Downer to prepare a survey map and record it in the official records of Douglas County. Downer prepared the survey with the understanding that the tract would be subdivided into several parcels. Prior to commencing the survey, Downer obtained plats, notes, and prior surveys from the Bureau of Land Management ("BLM"). When surveying the property, Downer found and rejected the monuments, accessories, and corners because they did not comport to the field notes of the original survey and because he believed them to be fraudulent.[1] Thus, Downer relied almost exclusively on the calls and distances in the field notes and upon plats in determining the northern boundary of Jacobsen's property.

The property at issue ("the property") is shown on the Downer map as consisting of 5.88 acres; it is one of the parcels created by Jacobsen's subdivision. In late 1966 or early
1967, Jacobsen conveyed the property to Frank Frazier, a well driller, in exchange for services rendered by Frazier. However, the conveyance from Jacobsen to Frazier was never officially memorialized because Frazier was illiterate. In 1971, Frazier sold the property to respondent Maxine Swenson for $9,500.00. At Frazier's request, Jacobsen deeded the property directly to Swenson by a grant, bargain and sale deed.

In 1976, Swenson sold the property to the appellants, Eldon and Patricia Hanneman, for $35,000.00.[2] The Hannemans gave Swenson $7,500.00 and executed a promissory note for $27,500.00, to be paid in monthly installments of $200.00. Both Swenson and the Hannemans believed that the property consisted of 5.88 acres, upon which was situated a dilapidated and uninhabitable house. The well on the property was inoperative, the water pipes were broken, the access road was nearly inaccessible, the flat roof on the old house leaked, and the kitchen and bathroom were in shambles.

Hanneman, a carpenter by trade, repaired the well, water pipes, and road, constructed a gable roof, installed custom-built kitchen cabinets, and made sundry repairs to the kitchen and bathroom. He also installed new siding, two windows, a sliding window door, a wood stove, light fixtures, and a concrete patio.
In 1981, Hanneman learned that a private survey performed by Veta Grande Mines revealed that over four acres of the property (including the house and well) belonged to the federal government. Hanneman contacted Swenson and informed her of the defective survey performed by Downer. Swenson defended Downer's survey but rejected Hanneman's offer to continue paying for the property on condition that Swenson agree to reimburse him if Downer's survey proved to be incorrect. Hanneman stopped making payments in April of 1982. At that time, the unpaid balance on the note held by Swenson was $26,019.48. Shortly thereafter, the BLM confirmed the accuracy of the Veta Grande survey. Ultimately, the Interior Board of Land Appeals ("IBLA") affirmed the accuracy of both the Veta Grande Mines survey and BLM resurvey.

Hanneman continued to occupy the premises on a sporadic basis until the autumn of 1985, when he abandoned the property entirely. In an effort to mitigate his damages, Hanneman removed the kitchen cabinets, bathroom vanity, light fixtures, wood stove, washer and dryer, and other items of personal property. In leaving the premises, Hanneman made no provision for protecting the property against vandalism or the elements. During trial, Odd Kjell "Kelly" Larsen, a carpenter called by Swenson, testified
that it would cost over $12,000.00 to repair the damage caused by Hanneman's mitigation. Swenson eventually foreclosed upon the property and now owns the remaining 1.5 acres, which are narrow, steep, and valued at $1,000.00.

The Hannemans filed the underlying action on July 31, 1984, in which they asserted claims against Swenson for misrepresentation, breach of the sales agreement, and breach of warranty of title. The Hannemans also complained against Jacobsen for negligence and breach of warranty of title, and alleged negligence against Downer. The action sought $120,000.00 in damages, consisting of the market value of the property on the date of the complaint, and attorney's fees.

Swenson counterclaimed against the Hannemans for breach of the promissory note. Swenson also filed cross-claims against Jacobsen and Downer seeking indemnification for breach of warranty of title and a negligent property survey, respectively. Finally, Jacobsen cross-claimed against Downer for indemnification based upon the negligent survey.

At the close of the Hannemans' case-in-chief, Jacobsen moved for an NRCP 41(b) dismissal on grounds that: (1) no privity existed between the Hannemans and Jacobsen.
or between Swenson and Jacobsen to support a breach of warranty of title claim; (2) Hannemans had failed to present evidence of Jacobsen's negligence; and (3) Jacobsen was not liable for Downer's negligence, if any, because Downer was an independent contractor. The district court granted the motion and dismissed Jacobsen from the case.

At the conclusion of the bench trial, the district court found that Swenson had contracted to sell the Hannemans 5.88 acres, and that Swenson's "inability to convey 5.88 acres was a breach of that contract due to a failure of consideration." Accordingly, the district court ordered Swenson to pay the Hannemans' out-of-pocket costs of $7,500.00. Swenson's liability to the Hannemans, however, was offset by her judgment against Downer for $7,500.00, with interest, which the district court specifically designated as the amount of "Swenson's liability to the Hannemans." The court found that Downer negligently performed the survey and ordered him to pay Swenson the unpaid balance of the promissory note from the Hannemans ($26,019.48 minus the $1,000 value of the remaining land). Finally, the district court ordered Downer to pay attorney's fees to the Hannemans and to Swenson in the amount of $10,000.00 each, together with taxable costs.
DISCUSSION
The parties have raised several issues on appeal, only the following of which need resolution. The Hannemans impute error to the district court's calculation of damages and its decision to dismiss Jacobsen from the action. Swenson contends on cross-appeal that the court erred when it awarded damages to the Hannemans and failed to award Swenson damages for breach of contract. Finally, Downer insists that the district court erred in finding that he negligently performed the property survey and that his liability extends to subsequent purchasers of the affected property.

1. The Hannemans' Damages
Under the peculiar facts of this case, where Swenson purported to sell land which she mistakenly thought she owned, the district court correctly determined that the measure of the Hannemans' damages would be the amount of their "out-of-pocket" loss. However, damages are awarded to make the aggrieved party whole, and the district court's award, although pursuant to the correct standard, did not adequately reflect the "out-of-pocket" loss sustained by the Hannemans. See Hornwood v. Smith's Food King
No. 1, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991). "Out-of-pocket" damages are measured by the difference between the amount paid by the aggrieved party and the actual value of that which was received. Randono v. Turk, 86 Nev. 123, 130, 466 P.2d 218, 223 (1970).

The Hannemans were dispossessed of property concerning which they had expended approximately $53,000.00.[4] Nevertheless, the district court limited the Hannemans' damages to $7,500.00 based upon findings that the Hannemans had "failed to mitigate their damages" when they abandoned the property, and that the monthly mortgage payments were "completely offset by the reasonable rental value they received in occupying the property."

As a general rule, a party cannot recover damages for losses that a reasonable effort could have avoided. Conner v. Southern Nevada Paving, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987). Our review of the record compels us to conclude that the district court clearly erred in finding that the Hannemans did not make a reasonable effort to mitigate their losses. The Hannemans removed virtually every item of value they had placed on the property that was reasonably removable, and deducted the value thereof from their
damages. As a result, the damages were mitigated by approximately $8,000.00. Given the circumstances of this case, the Hannemans could have done little else by way of mitigation. Moreover, the district court's reliance upon Mr. Kjell's testimony was misplaced. The cost of restoring the house after the removal of items by the Hannemans represented an irrelevant consideration by Swenson since she had no ownership interest in the house from which the salvaged items had been taken. Hanneman's mitigative actions were beneficial to Swenson, and thus could not serve to further reduce Swenson's liability to the Hannemans. Ordinarily, a fair rental value of the property would be a proper offset against payments ineffectually applied to the purchase price of the property during its occupancy by the putative purchaser. In this instance, however, we have determined that such an offset is unwarranted. The Hannemans agreed to purchase property that included a house that was uninhabitable. They lived and worked on the property under conditions that were substantially less than desirable. The Hannemans not only made the road to the
property usable, they worked in excess of 2,000 hours in an effort to restore the premises to a habitable condition. Although we have concluded that the Hannemans must receive as damages, an award for the time and materials expended on the property, they will not be compensated for the period of time they had to endure living conditions that would not have induced them onto the property as renters. As buyers, they executed and made payments under a promissory note that was to result in their eventual ownership of 5.88 acres. The Hannemans relied upon their contract with Swenson and invested approximately $53,000.00 into what they thought would be their permanent home. There is no evidence in the record that would support the proposition that the Hannemans, as temporary renters, would have invested the same amount of time and money in the delapidated and uninhabitable *284 house at issue. Swenson's breach of the contract to convey 5.88 acres deprived the Hannemans of the opportunity to purchase and make habitable a home in which they could build an equity and enjoy the pride of ownership. Thus, we conclude that the district court clearly erred when it calculated the amount of the Hannemans' "out-of-pocket" damages. Hermann Trust v. Varco-Pruden Buildings,
The Hannemans are entitled to the total amount of their investment, less the amount of their mitigation, together with interest from July 22, 1976. Therefore, we affirm Swenson's liability to the Hannemans, but direct the district court, upon remand, to recalculate the actual "out-of-pocket" damages suffered by the Hannemans. The amount of Swenson's $7,500.00 judgment against Downer must also be increased accordingly.

2. The Court's Decision to Dismiss Jacobsen
The Hannemans also contend that the district court erred in dismissing their action against Jacobsen. The contention is based upon Jacobsen's alleged vicarious liability for Downer's negligent survey under the doctrine of respondeat superior. However, the doctrine does not apply where, as here, there is no relationship of "superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists." Wells, Inc. v. Shoemake, 64 Nev. 57, 64, 177 P.2d 451, 455 (1947).
Downer was an independent contractor over whom Jacobsen exercised no control. Moreover, the precision and expertise with which surveyors must perform their work does not lend itself to control by laypersons. As one author noted:

The surveyor is isolated in his calling and therein lies his responsibility.... Dishonesty in ordinary business life cannot long be hid and errors in accounts quickly come to light, but the false or faulty survey may pass unchallenged through the years, for few but a surveyor himself are qualified to judge it.

Walter G. Robillard and Lane J. Bouman, Clark on Surveying and Boundaries § 2.04, p. 30 (6th ed. 1992) (quoting A.C. Mulford, Boundaries and Landmarks 88, 89 (1912)). Additionally, NRS 625.330(3) makes it unlawful for a surveyor to sign, stamp or seal any plat, map, report or document relating to land surveying which the surveyor himself did not prepare or for which he did not have "responsible charge of the work."

For the reasons stated above, we affirm the district court's finding that Downer acted as an independent contractor whose negligence cannot be imputed to Jacobsen. The action against Jacobsen was properly dismissed by the district court.
Swenson challenges the district court's finding that her failure to convey 5.88 acres of land to the Hannemans was a breach of contract. Swenson argues that no legal or factual bases exist to support the court's finding because no written contract for the sale of real property was introduced at trial. Swenson cites NRS 111.210, the statute of frauds respecting real property, to support her argument. That section provides in relevant part:

1. Every contract ... for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

NRS 111.210(1).

Swenson's reliance upon the foregoing statute is misplaced. The statute of frauds does not require the existence of a formal written contract to validate a land sale transaction as long as some "note or memorandum" memorializing the transaction exists. See Ray Motor Lodge v. Shatz, 80 Nev. 114, 119, 390 P.2d 42, 44 (1964) (stating that separate writings considered together may satisfy statute of frauds even if neither is a sufficient memorandum in itself).
In the instant case, the district court concluded that the property description in the sales listing, "together with the surrounding circumstances of the land sale transaction, created a contract for the sale of 5.88 acres." The legal description contained in the grant, bargain and sale deed refers to the Record of Survey which Downer filed in 1966 and which shows Parcel H (the subject parcel) as consisting of 5.88 acres. Additionally, the promissory note between Swenson and the Hannemans corroborates the sale of 5.88 acres. These writings, when considered together, satisfy the statute of frauds and evidence a contract for the sale of the subject property.

Swenson further argues that even if a contract did exist, its terms merged into the deed as a matter of law. She contends, therefore, that under the doctrine of merger, any obligations she owed to the Hannemans derived solely from the deed. Since the property was conveyed to the Hannemans by grant, bargain and sale deed, Swenson claims to have warranted only that she had not conveyed the same real property to another and that the property was free from encumbrances.[5] Swenson also insists that if, after delivery and acceptance of a deed containing no express or implied warranties, the title proves defective, a buyer generally has no remedy for failure of consideration.
unless elements of fraud or rescission are present. Swenson claims that there was no showing that she breached the special warranties contained in the grant, bargain and sale deed, and that the Hannemans failed to plead either fraud or rescission in any event.

Swenson’s argument is overly simplistic and fails to take into account the exceptions to which the doctrine of merger by deed is subject. The merger by deed doctrine has been described as follows:
The general rule concerning a contract made to convey the property is that once a deed has been executed and delivered, the contract becomes merged into the deed, because it has accomplished the purpose for which it was created. The terms in the deed which follows the contract of sale become the sole memorial of the agreement which was once contained in the contract of sale. This does not mean that a contract no longer exists, just that the deed controls as the contract, rather than the terms of the prior sales contract. Clark v. Cypress Shores Develop. Co., 516 So. 2d 622, 626 (Ala.1987) (citations omitted; emphasis added). Stated differently, when the terms of the deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls. Dobrusky v. Isbell, 740 P.2d 1325, 1326 (Utah 1987). Whether merger is applicable “depends upon the intention of the parties, and intention in such cases is a
question of fact to be determined by an examination of the instruments and from the facts and circumstances surrounding their execution." Webb v. Graham, 212 Kan. 364, 510 P.2d 1195, 1197 (1973); see also Szabo v. Superior Court, 84 Cal. App. 3d 839, 148 Cal. Rptr. 837, 840 (1978) ("courts have looked to the intention of the parties to determine whether or not the deed was intended as the complete and final embodiment of the agreement"); Kartheiser v. Hawkins, 98 Nev. 237, 239, 645 P.2d 967, 968 (1982) (stating that parties' intentions are determined from all the circumstances surrounding the transaction). Consonant with the foregoing authorities, Swenson's attempt to avoid her contractual obligations to the Hannemans by resort to the doctrine of merger by deed is without merit for several reasons. First, although a grant, bargain and sale deed contains only two express warranties, the Swenson deed expressly conveyed to the Hannemans the land "shown on Parcel `H' on that certain Record of Survey recorded November 25, 1966, as File No. 34665, Official Records of *286 Douglas County, Nevada." As indicated previously, the Record of Survey shows that Parcel "H" contains 5.88 acres. Second, the terms of the deed and contract are not at variance. The deed and the
documents that compose the contract all purport to convey 5.88 acres to the Hannemans. Finally, the record reflects that the Hannemans expected to receive, and Swenson intended to convey, 5.88 acres of land, upon which was situated a "fixer-upper" house. Indeed, Swenson admitted that she believed she was selling the Hannemans 5.88 acres and that no one would have paid $35,000.00 for only 1.5 acres.

For the reasons noted above, we conclude that the district court correctly determined that Swenson breached her agreement to convey 5.88 acres to the Hannemans.

4. Downer's Negligence

Downer contends that his actions did not fall below the standard of care for licensed surveyors because he made the proper assumptions when reaching his conclusions concerning the location of the northern boundary of Jacobsen's property. In particular, Downer claims that field notes are presumptively correct until rebutted by a preponderance of the evidence and, therefore, he was required to assume that the calls and distances contained in the field notes were accurately measured and recorded. In contrast, the district court heard expert testimony that Downer was not entitled to rely upon the calls and distances in the field notes once he located the monuments and, if
he could not locate a monument, he was required to reset the monument by a double proportionate measurement.

We conclude that substantial evidence supports the district court's determination that Downer failed to meet the requisite standard of care. In addition to the cumulative evidence presented at trial, we have previously recognized that the location of monuments prevails over calls and distances:

The trial court thus fully recognized, as a matter of law, that the original monument evidencing the corner common to sections 16, 17, 20 and 21, if found and identified (or, if destroyed or obliterated, if its location could be fixed), would control the situation irrespective of the field notes and, undoubtedly, irrespective of the testimony of the defendants' witnesses hereinafter referred to.

Backer v. Gowen, 73 Nev. 34, 39, 307 P.2d 765, 768 (1957).[6] Moreover, the district court expressly disbelieved Downer's testimony and relied instead upon the testimony of Neil Forsythe, a cadastral surveyor for the BLM, who indicated that the standard of care requires a surveyor to establish the four corners of a given section by identifying the location of the original survey monuments. Downer contends that Forsythe was not qualified to render an opinion as to the standard of care because
he is not a licensed surveyor in Nevada. Downer's contention lacks merit for two reasons: First, a person need not be licensed to qualify as an expert; rather, the witness must simply possess "special knowledge, skill, experience, training or education" relating to the subject matter. NRS 50.275. Forsythe, a BLM surveyor for over thirty-five years, was qualified to testify on the subject of surveying methods. Second, employees of the federal government who have been authorized under federal law to conduct surveys need not be licensed unless they are performing private surveys within the state. NRS 625.490(4).[7]

*287 The district court is better suited to rule on the qualifications of persons presented as expert witnesses and we will not substitute our evaluation of a witness's credentials for that of the district court absent a showing of clear error. The district court did not err in allowing Forsythe to testify as an expert.

5. Downer's Duty to Subsequent Purchasers

Downer contends that he owed no duty to subsequent purchasers of the subject property. We disagree. Surveyors may be held liable for the damages that result from
their mistakes, misrepresentations, or negligence. See generally Dag E. Ytreberg, Annotation, Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property, 35 A.L.R.3d 504 (1971). Lack of contractual privity between the parties is not a defense in an action for tortious negligence. Long v. Flanigan Warehouse Co., 79 Nev. 241, 245, 382 P.2d 399, 402 (1963) (the absence of contractual privity is not a defense to tort liability). A surveyor's duty has been held to extend to subsequent purchasers who relied upon the survey to their detriment. Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Cook Consultants, Inc. v. Larson, 700 S.W.2d 231 (Tex.Ct.App. 1985). Downer fully understood that his survey would affect future purchasers of the divided Jacobsen tract. We conclude, consistent with the authorities cited above, that Downer indeed had a duty to the Hannemans as foreseeable subsequent purchasers of the property, and that Downer breached that duty, thereby causing damage to the Hannemans. Unfortunately, the district court properly found that Downer's negligence was the actual and legal cause of the Hannemans' damages, yet inexplicably assessed damages only against Swenson. This was error. Upon remand, the district court shall enter judgment for the
amount of Hannemans' recalculated damages against both Swenson and Downer, jointly and severally. Of course, the modified judgment must again provide that Swenson may recover over against Downer any and all sums the Hannemans recover from Swenson.

Finally, Downer invokes the statute of limitations as a bar to the Hannemans' claims against him. Downer's references to NRS 11.203, 11.204, and 11.205 are misplaced. These three statutes all apply to actions related to an aspect of construction that eventuates in damage to the plaintiff. Our legislature has not enacted a specific period of limitations for surveyors, and therefore the "catch-all" statute, NRS 11.220, applies.[8] The Hannemans were placed on notice that they may have had a cause of action against Downer in 1981. The complaint against Downer was filed by the Hannemans in 1984, well within the four-year period of limitations specified under NRS 11.220. Therefore, Downer's attempt to avoid liability based upon the expiration of the period of limitations is meritless.

We have reviewed the remaining issues not heretofore discussed and have determined *288 that they are without merit and need not be addressed.
CONCLUSION

For reasons discussed above, we reverse the inadequate award of damages to the Hannemans, and remand to the district court with instructions to recalculate and increase the damage award to the Hannemans consistent with the views expressed in this opinion. The district court is also directed to enter judgment against Downer for the full amount of Hannemans' damages so that Swenson and Downer are jointly and severally liable for Hannemans' total damages. The district court shall also provide judgment in favor of Swenson against Downer for any and all sums that the Hannemans may recover against Swenson in satisfaction or partial satisfaction of their judgment. The judgment entered below is affirmed in all other respects.

NOTES

[1] A "corner" is a point determined by the surveying process, which sets or establishes the boundaries of a subdivision. A "monument" is a physical object that marks the corner point. Types of monuments include a marked wooden stake or post, a marked stone, an iron post with an inscribed cap, a marked tree, or a rock with an "x" at the exact corner point. "Accessories" are part of corner monuments and consist of bearing trees or objects, mounds of stone and pits dug in the sod or soil, that aid in identifying
the corner position. Bureau of Land Management, U.S. Dep't of Interior, Technical Bulletin 6, Manual of Instructions for the Survey of the Public Lands of the United States, Ch. V, § 5-4, p. 129. "Field notes" are the written record of the survey that "identifies and describes the lines and corners of the survey and the procedures by which they were established." Id. at Ch. VIII, § 8.1, p. 183.

[2] The Hannemans were divorced in 1976 and unless otherwise stated, "Hanneman" refers to Eldon Hanneman.

[3] Hanneman initially deposited the monthly payments into a bank account; however, Hanneman withdrew the funds in 1988 and used them to purchase his current residence.

[4] In addition to the $7,500.00 down payment, the Hannemans paid Swenson $200.00 per month for approximately seven years, paid all taxes and insurance on the property for approximately eleven years, and purchased approximately $15,000.00 of building materials. Moreover, the Hannemans spent in excess of 2,000 hours improving the property. Hanneman conservatively valued his time at $10.00 per hour (he was then making between $15.00 and $18.00 per hour as a carpenter).
[5] NRS 111.170 states, in relevant part:
1. The words "grant, bargain and sell" in all conveyances made after December 2, 1861, in and by which any estate of inheritance or fee simple is to be passed, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants, and none other, on the part of the grantor, for himself and his heirs to the grantee, his heirs, and assigns:
(a) That previous to the time of the execution of the conveyance the grantor has not conveyed the same real property, or any right, title, or interest therein, to any person other than the grantee.
(b) That the real property is, at the time of the execution of the conveyance, free from encumbrances, done, made or suffered by the grantor, or any person claiming under him.
[6] We also noted in Backer that the trial court's conclusion was supported by the U.S. Department of Interior, Bureau of Land Management, Manual of Survey Instructions § 354 (1947), which provided the controlling methodology for Downer's survey.
[7] NRS 625.490(4) provides:
1. Any state, county, city or district employee directly responsible to a professional land surveyor.
2. Any subordinate to a professional land surveyor of this state, insofar as he acts as a subordinate.
3. Registered professional mining engineers engaged solely in surveys made for mining and milling purposes or facilities pertaining thereto.
4. Officers and employees of the United States Government who have qualified under federal regulations and have been authorized to make surveys for the government, but such a governmental employee shall not engage in private practice as a land surveyor in Nevada unless he is registered under this chapter.

[8] NRS 11.220 entitled "Actions for relief not otherwise provided for" provides: "An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

In Woods v. Label Investment Corp., 107 Nev. 419, 812 P.2d 1293 (1991), the parties were involved in a boundary problem that resulted in an encroachment on an adjacent...
lot. Although a surveyor was not sued, in the course of the decision we stated that "NRS 11.190 provides a six-year limitation period for contract actions and a two-year limitation on tort actions." The reference to a two-year period of limitation for tort actions was overbroad, as 11.190(4)(d) (the two-year provision) applies only to personal injury and wrongful death actions. NRS 11.190(3)(d) provides a three-year period of limitation for fraud which, of course, is a tort. Moreover, we have expressly held that NRS 11.220 (the so-called "catch-all" statute) "is the applicable statute for suits concerning tortious damage to real property." Oak Grove Inv. v. Bell & Gossett Co., 99 Nev. 616, 621, 668 P.2d 1075, 1078 (1983). To the extent that our statement in Woods may be construed to apply to tort actions other than those for personal injury or wrongful death, it is hereby disapproved. Tort actions, such as the instant action, that are not expressly addressed by a specific statute of limitations are subject to the four-year period of limitations provided under NRS 11.220, the catch-all statute.
The BLM monument at the SE corner of Section 4 has been removed by person or persons unknown at this time.
Remains of the NE 1881 bearing tree burnt and down – axe marks visible in burnt out blaze.
Axe marks visible at bottom of charred blaze just right of cellphone.
Another bearing tree (Circa 1982) just south of the “empty” mound of stone.
Axe marks and scribing visible in the charred face.
Mound of stone surrounding the AMd corner that was accepted by BLM in their 1982 dependent resurvey.
This monument still exists in the tall grass
Rebar still alongside BLM monument.
AM
S 4
1988
1982
The corner that BLM was accused of “dragging original bearing trees” from another location north of this point.
The Indian Allotment post on top of the mound of stone.
Jimmy Jones (PLS 3740) Aluminum cap/rebar wedged between the rocks stamped in 1981 – the year before BLM completed its first dependent resurvey of Sections 4 and 9.
This wood post for Indian Allotment “IA 118” continues to survive winter after winter and even a couple of fires through the area.
Remains of a burnt and fallen bearing tree from the 1982 BLM dependent resurvey.
Scribing plainly visible on the 1982 vintage fallen bearing tree.
Another burnt and down bearing tree.
Visible remnants of axe marks and scribing on a 1982 bearing tree.
The view north along the line between Sections 4 and 5.
Zoomed in on the home a few hundred feet north of the 1/4 corner for Sections 4 and 5.
The W 1/4 of Section 4.
West 1/4 of Section 4 was refurbished during the 1991 BLM survey for the Parcels in the NE 1/4 of Section 5.
The SE corner of Parcel “E” (APN ending in 006) is the 1/4 corner between Sections 5|4.
1/4 corner for 5|4 and AP 5 for P(arcel) E
The concrete has deteriorated around the Highway 395 R/W pin in the lower right portion of the above slide.
Close up of the squared steel rod along the Highway R/W.
The 1982 bearing tree has been harvested for fence posts or firewood.
Heading NW from the W 1/4 corner of Section 4 to locate the “Downer” boulder in place. Measurements lead us just in front of or just inside the double door portion of the garage.
One of these big boulders around the yard may be the subject boulder but we were not inclined to snoop with no apparent resident at home.
This is a view westerly a few hundred feet south of the line between Sections 4 and 9. The homes near the center bottom of the above image occupy the subdivision surveyed by Robert Downer in 1965 and 1966 for Stoddard Jacobsen.
A zoomed in view looking westerly towards the SW corner of Section 4 (in the center of the frame) from about a mile away.
The view looking easterly near the section line between Sections 4 and 9.
A variety of panorama views of hillsides that used to be covered with pinyon pine and juniper. Extensive, wind driven fires over the past 30 years have devastated the forest cover and destroyed thousands of bearing trees.