

Chapter C

Fundamentals of Property Rights and Boundaries

C1

Introduction

The special boundary problems includes what is commonly referred to as "hiatuses," "overlaps," Junior-Senior " corners, " Junior-Senior " surveys " and state boundaries.

There is no anticipation in the system of rectangular surveys that a hiatus or overlap would (or could) occur; the various manuals of surveying instructions do not mention them at all. In strictly legal contemplation they do not and cannot exist because all must have an ownership, there is no such thing as "no-man's land". Conversely, it is not possible for two different persons to hold a clear free title to the same tract of land. Hiatuses and overlaps are therefore as much legal problems as they are problems for the surveyor. Every land surveyor has been confronted by small hiatuses or overlaps (junior-senior conflicts in title descriptions) and may at some time be confronted with a larger discrepancy which is then termed either a hiatus or an overlap. He must make a surveying decision and follow some course of action or he must make a recommendation for a surveying solution to the problem. Since hiatuses and overlaps are property ownership problems, the final decision is vested in higher governmental authority or in a court of competent jurisdiction. There is no statutory law pertaining to these problems, except that no surveyor resurvey may be executed in a manner that will adversely affect vested rights of the land owners. The surveyor can and must develop the facts, relationships and evidence; and make his decisions based on sound knowledge of the precedents of case law.

Hiatus

Hiatus is a latin word meaning "to gape," such as to yawn. As used in surveying it is a gap or open space where none was supposed to exist. A hiatus may occur where the first surveyor in an area surveyed and monumented a tract of land and a later surveyor surveyed an adjoining tract with the intent of having a common boundary with the first, but in fact monumented another line some distance away (not in conflict) and, after title has passed, it is discovered that there are in fact two separately monumented lines. The space, or gap, between the two lines is called a hiatus.

In the public land states, all of the land was public domain belonging to the United States. In the plan of the rectangular system of surveys the townships and sections were surveyed as boundary lines. Thus: the east boundary of one township was to be also the west boundary of the township adjoining it to the east; the north boundary of one section was to be the south boundary of the section north of it, and so on. It was soon discovered that land surveying was not an exact science. What could be done in theory could not be transferred exactly to the land surface. Because of poor instrumentation, rough terrain and human frailties, errors occurred in placing the survey monuments on the ground. If a settler bought land the government, he relied upon the survey monuments for making his improvements. If an error was discovered and the monuments were "corrected" or moved, he would have title to a tract of land but would never know for sure where the boundaries of that tract were located on the ground. The Act of Congress dated February 11, 1805, 2 Stat" 313, 43 U.S.C. 752, fixed the corners and monuments established as the true corners of the sections and subdivisions thereof, regardless of whether they were in the "correct" place or not.

The government as the right to make and correct surveys of its public lands, but once a private right has been acquired, based on an official survey the corners are unchangeable even though a better job might have been done. In the case of Haydel v. Dufresne, (1855) 58 U.S. 23, the Supreme Court said, "This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other grounds than an opinion that they could have the work in the field better done----- than the Department of Public Lands could do." In the now famous case of Cragin v. Powell (1888) 128 U.S. 691 it was said, "That the power to make an correct surveys belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases----- are unassailable by the courts, except by a direct proceeding,-----." It was also stated, " It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself with all its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself." (emphasis added). See also Lindsey v. Hawes, (1863) 67 U.S. 554.

It is now a well settled principle of law that the monuments established by a government surveyor, along with the plat and field notes absolutely control the boundaries of lands patented on the basis of those monuments, plat and notes.

Two comparatively recent judicial decisions dealt specifically with the question of ownership of hiatus lands and are as clear as to interpretation. One was United States v. Weyerhaeuser Company and the other was United States v. Macmillan.

United States v. Weyerhaeuser Company, 392 F. 2d 448 (1967) Certiorari denied 393 U.S. 836.

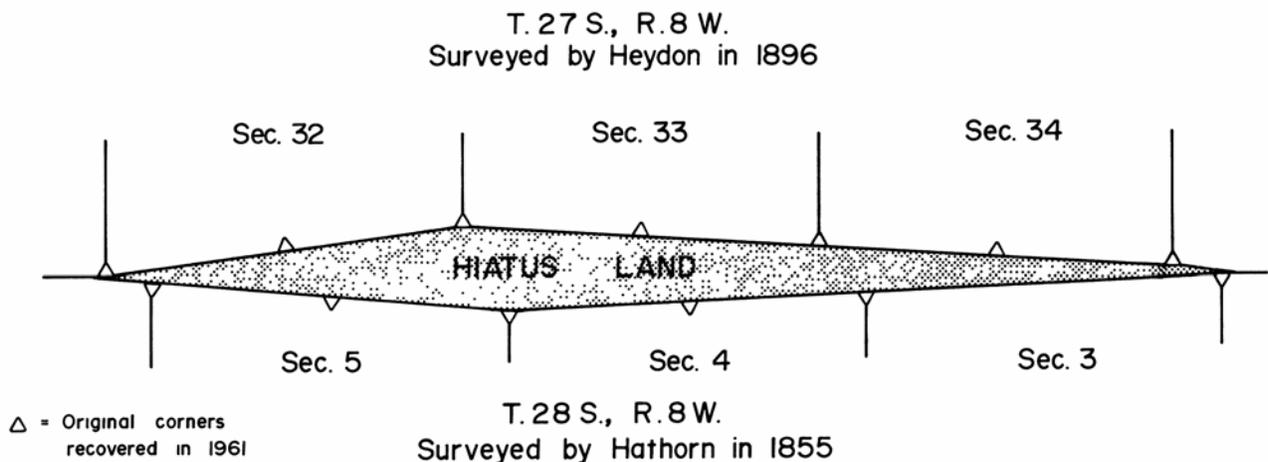
This case dealt with a hiatus between Tps. 27 and 28 S., R. 8 W., Willamette Meridian, Oregon. Briefly, the facts are: The Sixth Standard Parallel South was surveyed by Dennis Hathorn in 1855, through ranges 8, 9 and 10 west. Hathorn set his standard corners to refer to T. 28 S., R. 8 W., and subdivided that township with the standard corners referring to sections 1 through 6. The line was reported as being surveyed due west. The plat and field notes were approved July 7, 1856.

In 1896 William Heydon received a contract to survey T. 27 S., R. 8 W. Heydon's instructions were to retrace the Standard Parallel through range 8 west and establish corners for sections 31 through 36, T. 27 S., and subdivide that township. Heydon reported finding the Hathorn standard corners of sections 1 and 2, 2 and 3, but did not find Hathorn's corners along the north boundaries of sections 3 and 4" He reported finding the standard 1/4 corner of section 5 and the standard corner of sections 5 and 6, and the standard corners west of there. Heydon set his corners for T. 27 S., at 40 and 80 chain intervals varying distances west of Hathorn's standard corners. Heydon subdivided T. 27 S., R. 8 W. and his survey was approved September 10, 1897.

Beginning in 1876 patents were issued for sections 3, 4 and 5, T. 28 S., R. 8 W. Patenting of sections 31 through 36, T. 27 S., R. 8 W. began in 1899.

In 1961 it was discovered that the lines marked by the Hathorn and Heydon monuments along the Sixth Standard Parallel, and north boundary of sections 3, 4 and 5, T. 28 S., R. 8 W., did not coincide. All of the 1896 Heydon monuments for sections 32, 33 and 34 were found, and all of the 1855 Hathorn standard corners for sections 3, 4 and 5 except the standard 1/4 corner of section 3. The Hathorn line deviated southerly from a true west line, whereas the Heydon line deviated northerly, leaving a gap or hiatus between the two lines as evidenced and proven by the original monuments. The Bureau of Land Management resurveyed the two lines and surveyed the hiatus, designating it as sections 32, 33 and 34, T. 27 1/2 S., R. 8 W. The plat was approved on February 6, 1962. This "half" township varies from zero to a maximum of 4.65 chains in latitudinal width over the 3 miles from the Hathorn standard corner of sections 2 and 3 to the Heydon corner of sections 31 and 32, and contains 45.95 acres. See the accompanying sketch.

The Weyerhaeuser Company was the successor in title to sections 32, 33 and 34, T. 27 S., R. 8 W. Weyerhaeuser filed suit in U.S. District Court for recovery of damages for the timber cut in the right-of-way of a BLM road and to clear title to the hiatus. They argued that Heydon was supposed to have retraced the Hathorn line, and should have done so. Further, that the plat on which their title was based showed the south boundary of T. 27 S., R. 8 W., was the Sixth Standard Parallel South. Since Hathorn had already surveyed the Standard Parallel, Heydon could not survey another one, creating two standard parallels. The government argued that the monuments on the ground marked the boundary of lands conveyed, that the hiatus was public land and that the government could survey and dispose of it as it saw fit.



The United States District court ruled in favor of Weyerhaeuser and the government appealed to the U.S. Court of Appeals, 9th Circuit. The Circuit Court reversed the District Court, ruling that the limit of Weyerhaeuser's title was the Heydon line as marked by his monuments. As to the argument that there could be only one Sixth Standard Parallel the Circuit Court said, "----we think that it cannot be said that there is but one sixth parallel until we have a combination of the ideal surveyor, using ideal instruments in an ideal terrain. Until that combination is available, land titles will be dependent upon the deficiencies and uncertainties which afflict the world as it is."

A writ of certiorari was denied by the Supreme Court, October 14, 1968, 393 U.S. 836. The 9th Circuit Court decision thus carries the same judicial weight as though it were rendered by the Supreme Court of the United States.

United States v. Macmillan, 331 F. Supp. 435 (1971)

This case dealt with a hiatus between Tps. 32 and 33 N., R. 49 E., Mt. Diablo Meridian, Nevada. Though somewhat more complex and created by different circumstances than in the Weyerhaeuser case, the decision by the U.S. District Court for the District of Nevada follows the Weyerhaeuser decision. Briefly the facts are:

In 1869 A.J. Hatch surveyed the exterior boundaries and subdivisional lines of T. 33 N., R. 48 E., establishing the southeast and northeast corners of that township. In 1871 Hatch surveyed the west and south boundaries, west two miles of the north boundary, and surveyed the subdivisional lines of the west two ranges of sections in T. 32 N., R. 49 E. In 1872 Hatch surveyed the south and east boundaries and subdivisional lines of T. 34 N., R. 49 E. In 1874 Hatch surveyed the remaining east four miles of the north boundary, the east boundary and additional subdivisional lines in T. 32 N., R. 49 E., including the line between sections 1 and 2, but not the remaining lines of sections 2, 3 and 4. In the same year (1874) Hatch surveyed the westerly part of the north and south boundaries and west range of sections in T. 33 N., R. 50 E. The plats were all approved, those for T. 33 N., R. 50 E. and T. 32 N., R. 49 E. on October 14, 1874.

Therefore at that time (1874) Hatch had surveyed what was intended to be (under the rectangular system) the four exterior boundaries of T. 33 N., R. 49 E., and most of the subdivisional lines adjoining.

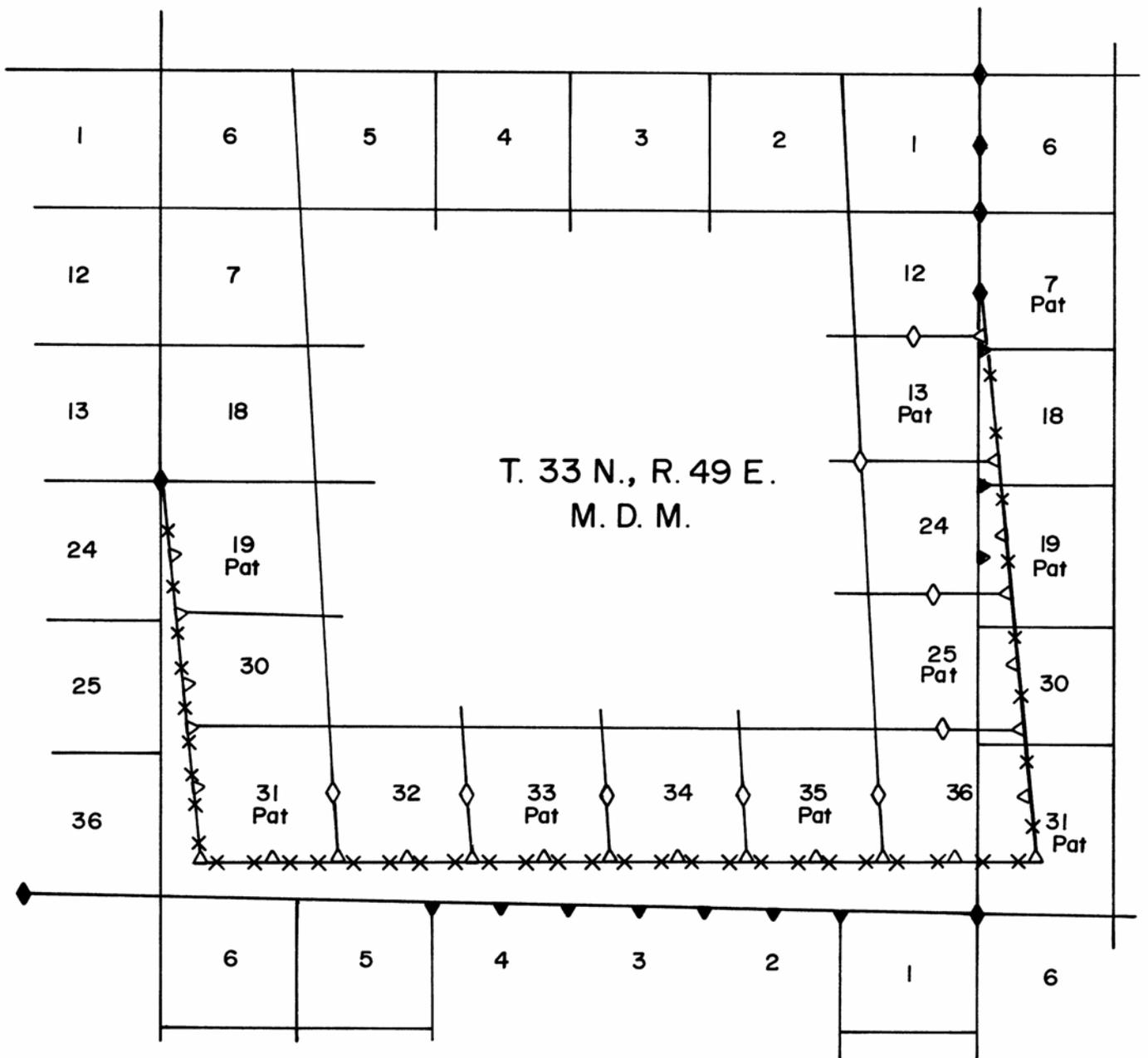
In 1893 H.B. Maxson received a contract to subdivide T. 33 N., R. 49 E. Maxson's field notes indicate that he retraced the Hatch east boundary of T. 33 N., R. 48 E., and did not find the southeast corner of that township nor any corners in the south 3 miles. He did find the corner of sections 13, 18, 19 and 24 and the corners north of there. Maxson reported resurveying the south 3 miles by surveying due south, 40 and 80 chains and "reestablished" the corner of Tps. 32 and 33 N., Rs. 48 and 49 E. He then "resurveyed" the "south boundary," running East, setting corners at 40 and 80 chains. He reported finding "traces" of a few of the Hatch corners and "destroyed" them. Maxson set his own corner for Tps. 32 and 33 N., Rs. 49 and 50 E., reported finding the Hatch township corner and destroying it. He then ran North, setting his own corners for T. 33 N., Rs. 49 and 50 E., reported finding some Hatch corners but again destroying them. Maxson repeated this same procedure along the north boundary. He then subdivided T. 33 N., R. 49 E. from the corners he had himself established. The Maxson plat of T. 33 N., R. 49 E., was approved on December 23, 1893.

On June 20, 1902, most of the odd numbered sections in these townships were patented to the Central Pacific Railway Company. Macmillan (and others) are successors in title to section 31, T. 33 N., R. 49 E.

From 1914 to 1920 retracements of the Maxson and Hatch surveys (in the course of completion surveys in adjacent townships) revealed the following situation:

The Hatch corner of Tps. 32 and 33 N., Rs. 48 and 49 E. was lost. This corner was restored by double proportionate measurement between recovered original Hatch corners 3 miles north, 2 miles east, 3 miles south and 1 mile west. From the restored corner the southwest corner of T. 33 N., R. 49 E. established by Maxson was located N. 16° 49' E., 2.32 chains distant. The field notes indicate that Maxson corners were found along the south 3 miles of the west boundary but none of the Hatch corners. Most of the Hatch corners along the north boundary of T. 32 N., R. 49 E. were recovered. All of the Maxson corners along the south boundary of T. 33 N., R. 49 E. were found, located from about 2 chains to more than 12 chains north of the Hatch corners. From the Hatch corner of Tps. 32 and 33 N., Rs. 49 and 50 E., the Maxson southeast corner of T. 33 N., R. 49 E., was located 11.60 chains north and 2.27 chains east.

The original Hatch $\frac{1}{4}$ corner of sections 7 and 12 on the east boundary was found and at the same point the corresponding Maxson $\frac{1}{4}$ corner of the same sections. Northerly therefrom, only the Maxson corners were found. In the south $4\frac{1}{2}$ miles of the east boundary the recovered Maxson corners were found to the north and east of the recovered Hatch corners. Thus the Maxson survey overlapped the previously surveyed T. 33 N., R. 50 E., as monumented by Hatch, in the south $4\frac{1}{2}$ miles. See the accompanying sketch.



T. 33 N., R. 49 E.
M. D. M.

◆ ▼ ————— = Hatch Corners and lines

◇ △ ××× = Maxson Corners and lines

U.S. v. Macmillan - Conditions Found

The General land Office surveyed the hiatus lands by extending the Maxson section lines southerly to an intersection with the Hatch north boundary of T. 32 N., R. 49 E., where closing corners were established. The south "half" of sections 32, 34 and 36 were lotted because those sections were still public domain. The hiatus lands south of the Maxson south boundary of the patented sections 31, 33 and 35 were lotted and were given appropriate areas and lot numbers pertaining to those sections.

The Maxson lines between sections 12 and 13, 13 and 24, 24 and 25, 25 and 36 were resurveyed but terminated with closing corners on the Hatch west boundary of T. 33 N., R. 50 E. lots and areas were created in the vacant sections 12, 24, and 36 against the Senior Hatch line, eliminating the overlap of the Maxson survey of those sections into the patented sections in T. 33 N., R. 50 E.

In instructions for the method of survey to resolve the hiatus and overlap, the Commissioner of the General Land Office made the following comment:

"The only rights affected by this revision or extension survey in T. 33 N., R. 49 E. are those of the Central Pacific Railway Company in sections 13, 25, 31, 33 and 35. In sections 13 and 25 the railroad suffers a certain decrease in area, but this is more than offset by the increase obtained in sections 31, 33 and 35, and the adjustment, therefore, is not only equitable, but is advantageous to the railroad company."

The plat of survey was approved October 18, 1921 and is approximately as indicated in the accompanying sketch.

On August 4, 1964, the Bureau of Land Management issued a permit to the State of Nevada for removal of gravel from lot 5, section 31. Macmillan challenged the right of the Bureau to issue the permit on the grounds that it was patented land. In an action in the U.S. District Court, District of Nevada, the United States asked the court to declare lot 5 public domain. Macmillan argued that all of section 31 was patented land and that since lot 5 was in section 31 it was patented, and that the letter from the Commissioner of the General Land Office proved this contention. The government argued that title had passed to the railroad for only the section 31 surveyed by Maxson and that his survey, monuments, plat and notes marked the boundaries of the patented lands.

The court ruled that the hiatus was public land, subject to survey and disposal as the government saw fit, and that the letter from the Commissioner did not and could not pass title. If the government chose to survey the hiatus as additional lots appended to T. 33 N., R. 49 E. it had the right to do so, or survey those lands in any way they saw fit.

Even though only title to lot 5, section 31 was involved, the decision should extend to all of the hiatus lands south of the Maxson boundary. See also *Rust-Owen Lumber Co.*, 52 L.D. 228 (1927).

After deciding the issue of lot 5 the court then indulged in dicta concerning the overlap along the east boundary. Their findings on the east boundary were dicta, because that matter was not argued before the court, nor was it really part of the action. The court said "We find the law to be that when two officially accepted surveys conflict and result in an overlap, the survey which is Senior in time controls." Later in the decision the court stated, "While overlaps are controlled by the survey which is Senior in time, hiatus lands remained in the public domain," and quoted from the concurring opinion in the *Weyerhaeuser* case. While it is generally true that a senior survey controls the limits of a junior survey (as will be seen later in this discussion), in this case the patents to the railroad were all issued on the same date and all of the lands were public domain immediately prior to the patent. Lands in T. 33 N., R. 49 E. were patented based on the Maxson plat while those in R. 50 E. were based on the Hatch plat. The 1921 survey plat only relotted the public lands in sections 12, 24 and 36, limited on the east by the Hatch monuments. It does not pretend to resolve the limits of the patented lands in sections 1, 13 and 25; that matter has not been decided and was not at issue in the *Macmillan* case.

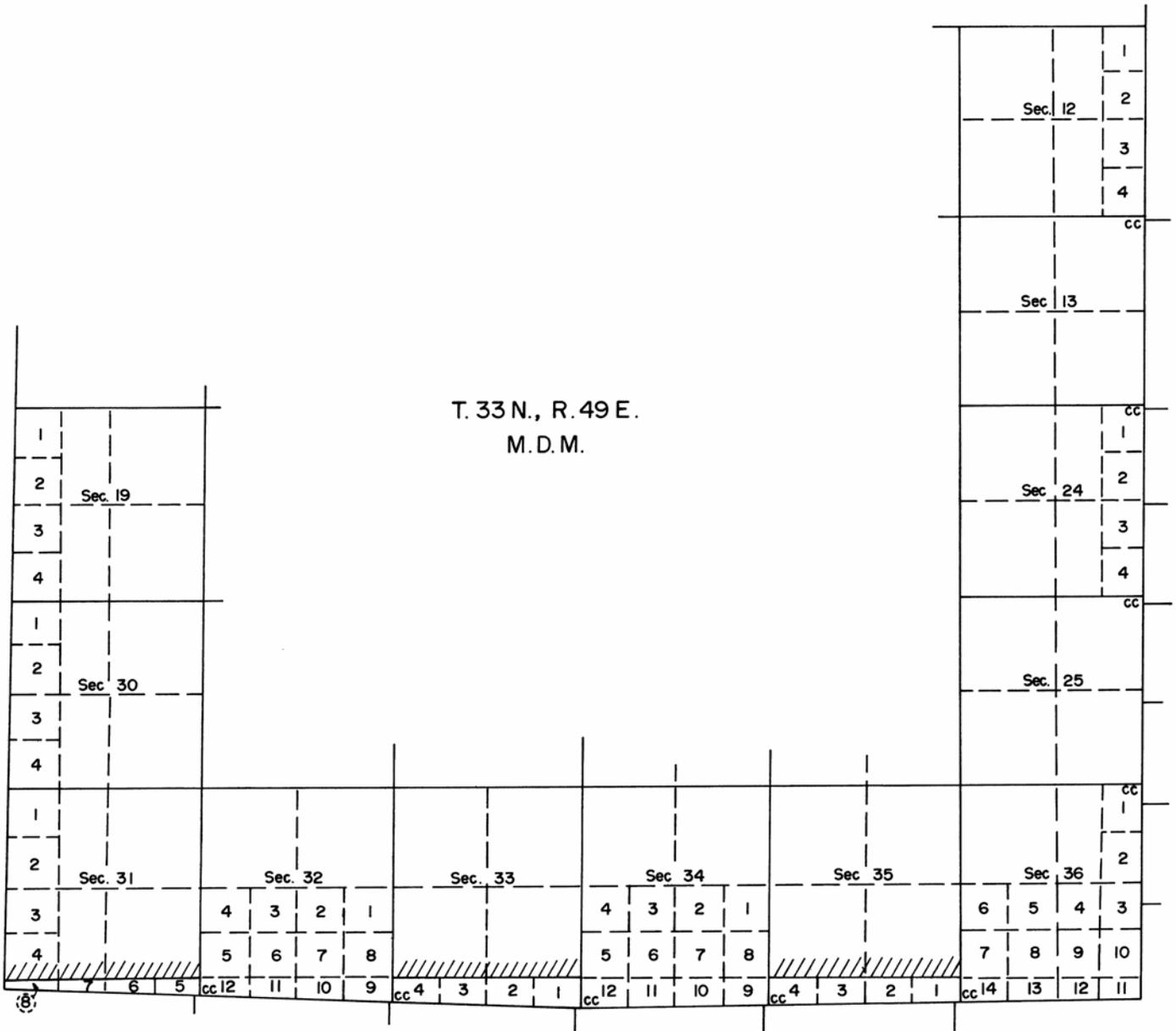
In both *Weyerhaeuser* and *Macmillan* the monuments of both surveys existed on the ground, presenting conclusive evidence of the position of the lands surveyed. In *Weyerhaeuser* the hiatus was caused by human error in running the survey lines; in *Macmillan* the cause was an improper procedure (and some fiction) on the part of the second surveyor. But in both cases the monuments were found on the ground. It sometimes occurs that the field note record may be such that a hiatus is suspected. Or perhaps an excessively long distance from found subdivisional corners within the township to corresponding corners on the exterior boundaries may lead one to suspect a hiatus.

A suspected hiatus based on some conflicting distances in the field note record was the subject of an unreported land decision, *MMW Land Company, et al.*, A-30544 dated January 17, 1967. The argument was that a hiatus existed adjacent to a township corner near Morro Bay, California. It was held in the decision that the government had no lands remaining to be surveyed (no hiatus) and the following statement made, "A true hiatus can only be shown by two separate lines, each supported by original evidence or a chain of evidence reaching back to the original monuments." (emphasis added).

As to excessive distances alone, the same evidence would be necessary. Although the case of *Vaught v. McClymond*, (1945) 155 P. 2d. 612 had nothing to do with a hiatus, the Supreme Court of Montana made the following observation, paraphrased in the KEY statement, "The points where official federal government survey established corners and set monuments of survey for section, prevail over both course and distance in determining boundaries of section." later in

that decision the court said, "The fact that the location of the corner in accordance with an inaccurate government survey will set awry the shapes of the sections and subdivisions affected thereby does not affect the conclusiveness of the survey." (emphasis added).

The conclusion to be made is that when a hiatus exists, as proven by two separately monumented lines, the land is public domain, subject to survey and disposal by the government. Any hiatus must be based on evidence and cannot be based on conflicting field notes and/or excessive distances or areas alone.



Sketch of Approved Plat

Overlaps

Title to hiatus lands is now governed by fairly well settled principle of land law. That is not the situation when dealing with the overlap problem. Many more considerations are involved, both as surveying problems and (ultimately) legal title problems concerning the lands that were surveyed in conflict. There are very few clear cut judicial decisions related to overlaps. The law on the subject is still in a stage of being developed and as a result the surveyor must proceed with much more caution and consider many more elements. Some of the elements he must consider are:

1. What is the evidence of location of the first (senior) survey? Is the evidence conclusive as to the location of the senior line? Do the monuments exist?
2. What is the evidence of location of the second (junior) survey? Is its location conclusive?
3. Was the junior survey executed and platted in a manner with its boundaries being expressly limited by the senior survey? Did the junior survey close against the senior survey (closing corners)? Did the junior survey adopt the senior corners (random and true line principle)?
4. Is the difference in location of the junior survey materially different from that of senior survey, or is the conflict merely a technical difference caused by slight errors in executing the second survey.
5. What is the ownership status?
 - a. Is all of the land in the public domain?
 - b. If partially patented, when was entry first made and when was patent issued? On what survey plat was the patent based?
 - c. What is the sequence of patents in the area of conflict? Was patent issued to lands based on the junior survey prior to a patent (in conflict) based on the senior survey?
 - d. Is a patent based on the junior survey only in conflict with public lands as marked or determined by the senior survey?
6. Was the junior survey executed at a time when all of the lands in both townships were vacant public land, and if so did the junior survey supersede the senior survey?
7. Was the junior survey a dependent resurvey and therefore expressly limited by the boundaries of the senior survey?

These questions have to be considered and the true facts developed before a surveying solution can be determined. Often there is no survey solution, but there will be a preferable survey procedure. And in the end the most well-thought-out solution may be challenged and the final decision made by the courts.

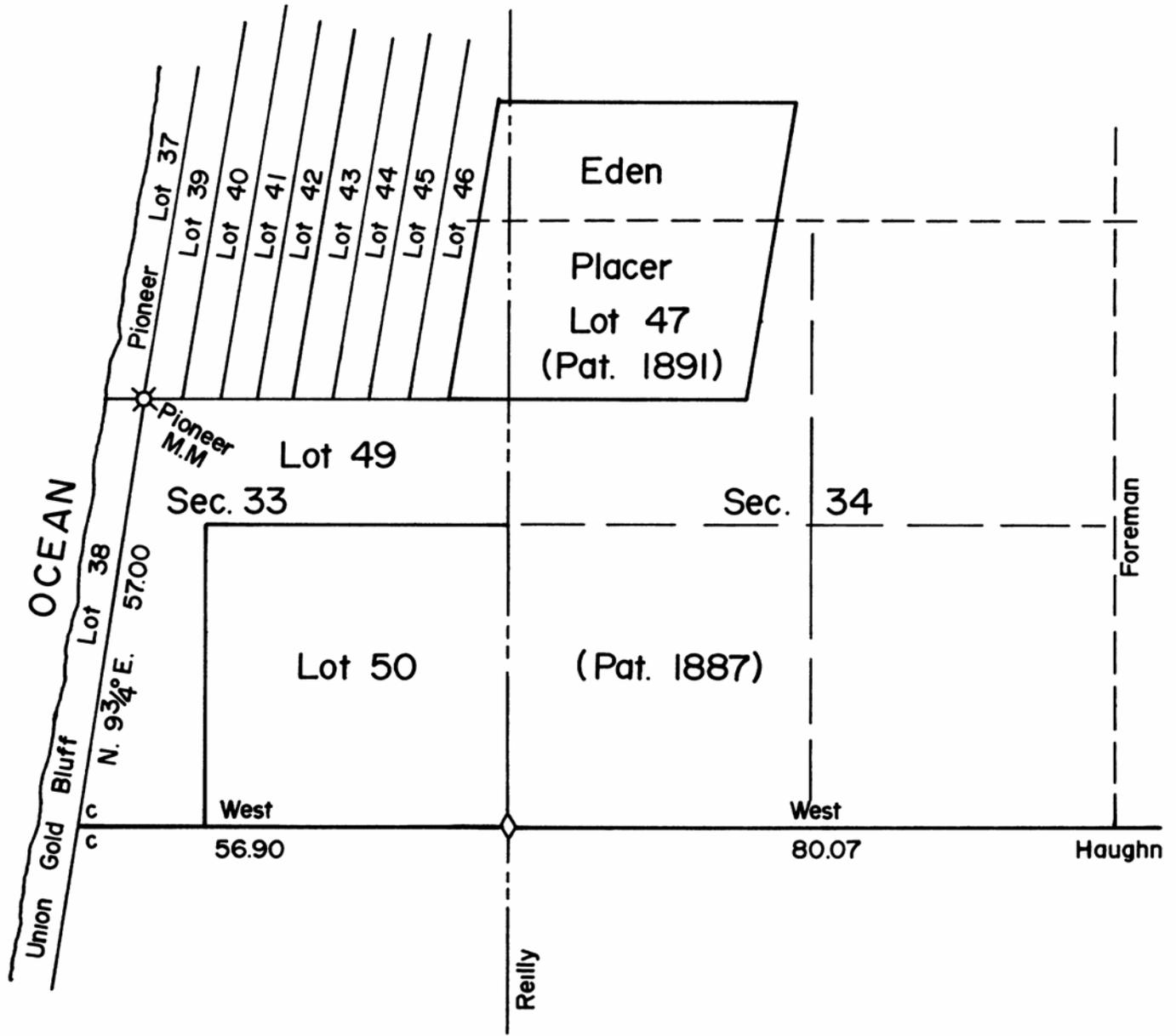
Four court decisions illustrating overlap disputes follow:

Adams v. C.A. Smith Timber Co., (1921) 273 F. 652

This case arose because of a conflict between a patented mining claim and patented quarter section both surveyed ant) monumented on the ground:

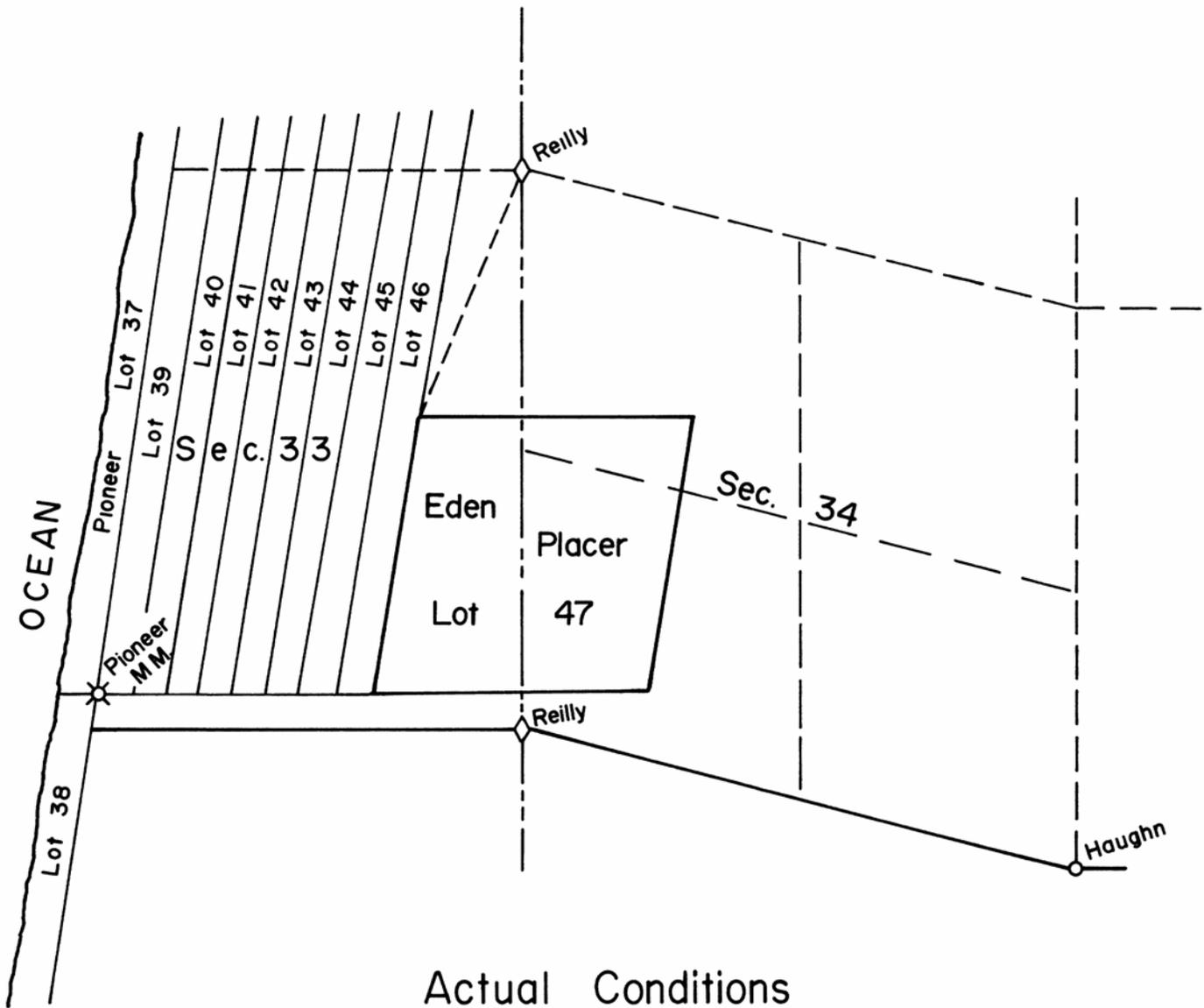
In 1873 the Pioneer Mineral Monument was established at the southeast corner of the Pioneer Placer Mine, lot 37, and northeast corner of the Union Gold Bluff Placer Mine, lot 38. In 1878 U.S. Mineral Surveyor Reilly surveyed an offset of the Humboldt Meridian northerly through Tps. 11 and 12 N., R. 1 E., establishing the northwest and southwest corners of section 34, T. 12 N., R. 1 E., as well as the other corners along that meridional section line. In 1882 John Haughn surveyed the north boundary and subdivisional lines of T. 11 N., R. 1 E. Haughn reported his north boundary as passing through the Reilly corner of sections 3, 4, 33 and 34 and closed the line between sections 4 and 33 against the Union Gold Bluff Placer, lot No. 38. From this closing corner Haughn reported a tie of N. 9 $\frac{3}{4}$ ° E., 57 chains, to the northeast corner of lot 38. Also in 1882 S.W. Foreman surveyed T. 12 N., R. 1 E. Foreman's notes, distances, and ties to mining claims conform to the ties allegedly made by Haughn. In 1888 A.T. Smith, Deputy Mineral Surveyor, surveyed the Eden Placer Mine, lot 47. His plat shows the Pioneer Mineral Monument to be due West, 39.98 chains from the southwest corner of the Eden Placer, but also ties to the northwest corner of section 34. The Eden Placer was

located June 21, 1886. The southwest quarter of section 34 was patented in 1887 and was owned by the C.A. Smith Timber Co. The Eden Placer was patented in 1891 to Edson Adams. The survey plats indicated no conflict. (See accompanying sketch.)



Purported Conditions

It was later discovered in the process of surveying T. 13 N., R. 1 E., and in subsequent investigations that the Haughn and Foreman surveys were largely fictitious and grossly in error. The true relationship of the section lines and mineral surveys were approximately as indicated in the accompanying sketch.



The Pioneer Mineral Monument was really only about 270 feet north of the line between Tps. 11 and 12 N., R. 1 E., instead of 57 chains. The patented Eden Placer, lot 47, overlapped the patented SW ¼, section 34.

Adams sued to quiet title to the Eden Placer on the grounds of the Haughn and Foreman surveys and the mining claim location in 1886. Smith claimed all of the SW ¼, section 34 on the basis of senior patent and senior survey. The District Court held in favor of Smith. Adams appealed but the 9th Circuit Court of Appeals upheld the lower court, holding that the Senior patent controlled and that a mining claim location and assessment work did not constitute adverse possession. Adams received clear title to only the portion of the Eden Placer outside the SW ¼ section 34. (For complete detail the reported case should be read.)

This case was decided on the basis of the senior patent. There is little doubt that had the Eden Placer been patented first, prior to valid entry on the SW ¼ of section 34, the Senior patent would have controlled, and the title quieted to the placer claim. The primary factor was the time in which valid rights were acquired. The next case is indicative of this critical factor.

Lindsey v. Hawes, (1863) 67 U.S. 554

This case was decided on the basis of both date of entry and the position as determined by the original survey, and concerns ownership of a part of a fractional section in Illinois.

The section was originally surveyed in 1833 and the plat approved. In April 1839 Thomas Lindsey made application on the southwest part of the fractional northeast quarter of section 36, made fractional by the Mississippi River. On June 3, 1839, Lindsey paid for the land on a cash entry and received a certificate entitling him to a patent. Lindsey then moved to Iowa and died in September 1839. His heirs did not present the certificate for patent.

In 1844 it was discovered that the original 1833 survey contained errors and a resurvey was made and approved. By this "new" survey the improvements made by Lindsey were not located on the same land by description. In 1845 Hawes made a cash entry for the same described parcel for which the previous certificate to Lindsey had been issued, with knowledge of the Lindsey entry. In August 1845 the Land Office set aside and cancelled the Lindsey entry, without a hearing. In 1848 Hawes received patent to the parcel, based on the 1844 survey.

Subsequently Lindsey's heirs sued for recovery of the land entered by Thomas Lindsey in 1839. The lower courts ruled in favor of Hawes and Lindsey's heirs appealed to the U.S. Supreme Court.

The Supreme Court overruled the lower courts and awarded the parcel to Lindsey's heirs, ruling that the 1839 Lindsey entry was valid, the land office could not set aside that entry without proper cause, and that the location on the ground must be based on the original survey in effect at the time the valid entry was made. The 1844 "corrective" resurvey could not affect the valid rights acquired under the original survey.

This decision may be the basis for the procedures followed in independent resurveys, in which boundaries of all valid entries are based on the position as determined by the original survey. It also fixes the time of entry as the basis of acquired rights over the date of patent. However, the date of patent may be the deciding factor in title disputes if entry is no part of the case.

Branson v. Wirth, (1873) 84 U.S. 32 Wirth v. Branson, (1878) 98 U.S. 118 I

In December 1817 a military land warrant was issued to Giles Edgerton for 160 acres of land in a military reserve in Illinois. On January 7, 1818, a patent was issued to James Durney for the southeast quarter of section 18. On January 10, 1818, a patent was issued to Edgerton for the northeast quarter of section 18. Apparently Edgerton thought his patent was for the southeast quarter of the section. On July 29, 1819, Edgerton deeded the southeast quarter of section 18 to Thomas Hart, "according to the patent dated January 10, 1818." Hart discovered the mistake and sought relief from Congress. On March 3, 1827, Congress passed "An Act for the of the legal representatives of Giles Edgerton." This act granted Edgerton's assignee the right to select another quarter section of land "in lieu of the quarter patented to the said Giles, on the tenth day of January, one thousand eight hundred and eighteen, which had been previously patented to James Durney---" Edgerton's assignee was issued patent to another quarter section within the reserve in 1838. The land office placed a memorandum notation on the margin of the Edgerton patent: "This patent was issued for the SE $\frac{1}{4}$ instead of the NE $\frac{1}{4}$ as recorded; sent a certificate of that fact to E.B. Clemson, at Lebanon, Ill., see his letter of 19th May, 1826." It is evident that at that point the land office thought the error in Edgerton's patent was cleared up; i.e., Durney had patent to the southeast quarter, Edgerton's assignee could (and eventually did) select another quarter section in lieu of the southeast quarter and therefore the northeast quarter of section 18 (named in Edgerton's patent) was once again vacant land. (The record does not reveal why Edgerton's assignee did not just take possession of the northeast quarter.)

On January 20, 1868, patent was issued to Edward F. Leonard for the northeast quarter of section 18. Leonard later sold the northeast quarter to Wirth. Branson claimed title to the northeast quarter as successor in title from Edgerton and through a tax title (deed) issued in 1843. In the lower court, Wirth argued that the original patent to Edgerton was in error and that Branson was estopped from claiming the northeast quarter by the act of Congress granting a lieu selection to Edgerton's assignee. Branson claimed title based on the wording in the original patent and on the tax deed, since, if the northeast quarter was really vacant land, it could not be taxed and could not be sold in default of failure to pay taxes. The lower court awarded title to Wirth and Branson appealed to the Supreme Court. The Supreme Court overruled the Circuit Court and awarded title to Branson, 84 U.S. 32. The case went before the Supreme Court again in Wirth v. Branson, 98 U.S. 118, with the first verdict upheld. Basically the Supreme Court ruled that the Edgerton patent to the northeast quarter was valid "---and that it thereby became exempt from further location until the first location should be set aside." The court further stated that "the government could not have reclaimed that quarter against its own patent, whatever deed Edgerton may have given to a third party for a different lot." Branson was not estopped against claiming title because of Edgerton's assignees being granted the right to select a lieu lot by

Congress. No action was ever taken to cancel Edgerton's patent to the northeast quarter, therefore the patent to Leonard was invalid and Branson was the legal owner of the northeast quarter of section 18.

The Wirth v. Branson case is fundamentally a "First in Time, First in Right" decision and quite firmly establishes that once the government has issued a valid patent to a tract of land it cannot convey that land again to a second party. For a similar case see Shepley v. Cowen, (1876) 91 U.S. 330. Both Wirth v. Branson and Shepley v. Cowan were favorably cited in the case of Waldron v. U.S. (1905) 143 F. 413, a well stated decision based on the first in time, first in right principle.

A second survey which overlaps a senior survey is invalid for passing title if the land has already been patented on the basis of the senior survey. This principle has already been demonstrated in Adams v. C.A. Smith Lumber Co. previously discussed, but that case dealt with fictitious surveys. Two other cases deal with different circumstances. The first in which the senior survey did not control

Russell v. Maxwell land Grant Co. (1895) 158 U.S. 253

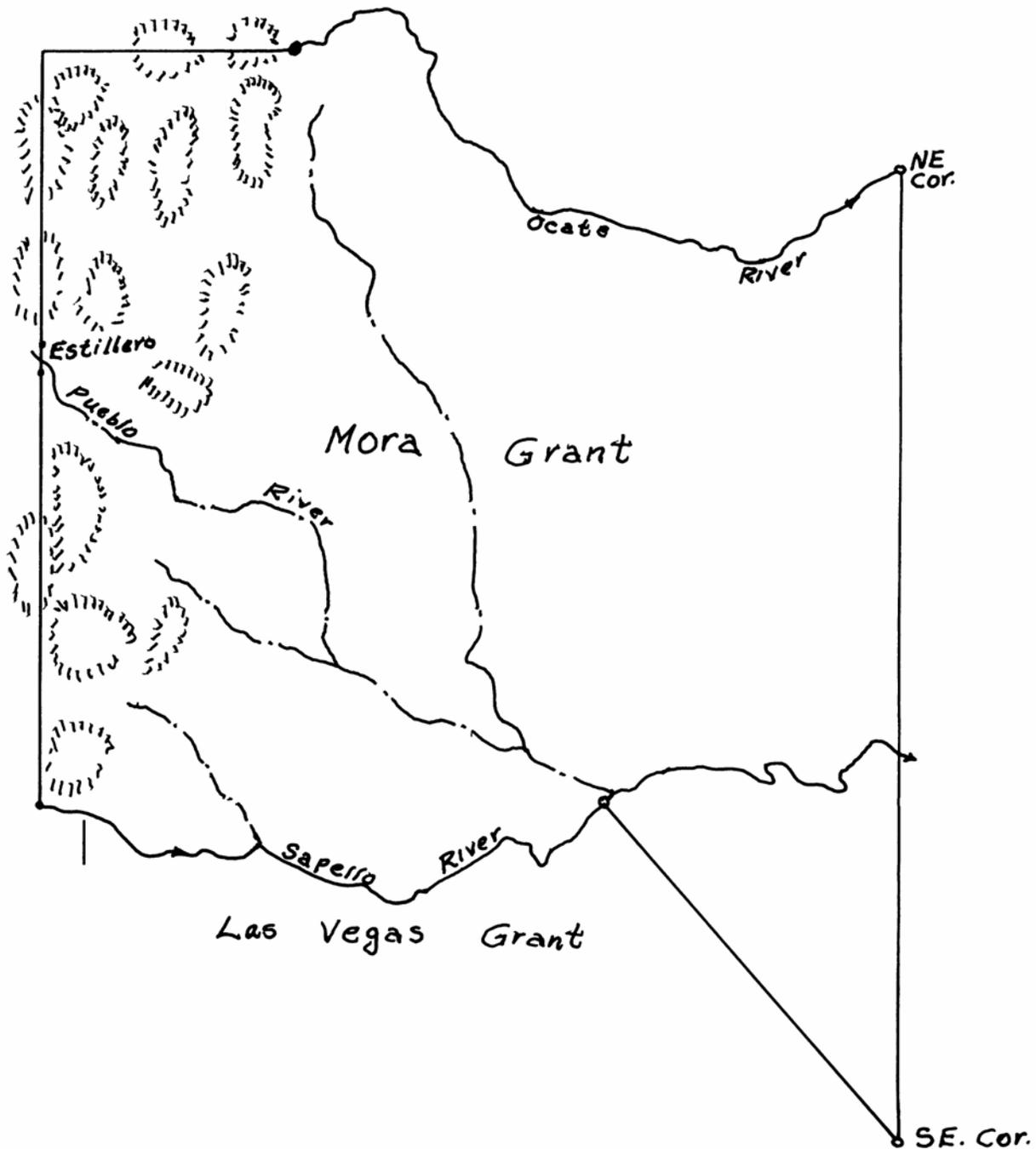
In 1871 the rectangular surveys were made of T. 33 S., R. 68 W., 6th P.M., Colorado and the plat was approved. Prior to this survey, on January 11, 1841, the territorial governor of New Mexico (at that time part of the Republic of Mexico) granted a tract of land to Charles Beaubien and Guadalupe Miranda, known as the Maxwell land Grant. This grant was confirmed (with specified boundaries) by an Act of Congress on June 21, 1860. On April 6, 1874, Richard Russell filed entry on the W $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of section 20, T. 33 S., R. 68 W. Patent was issued to Russell on September 5, 1876. The boundaries of the Maxwell Grant were surveyed and plat approved in 1878. Patent to the Grant was issued, based on the plat, on May 19, 1879. As surveyed and monumented on the ground, the parts of section 20 patented to Russell were within the boundaries of the Maxwell land Grant.

The U.S. Supreme Court ruled that the Maxwell land Grant had a valid senior title. The act of Congress had confirmed title to the Maxwell Grant in 1860, the rectangular surveys on which Russell's patent was based were not made until 1871, after title to the land had passed even though the boundaries of the Grant were not surveyed until 1878. The Court stated, "A survey does not create title; it only defines boundaries."

U.S. v. State Investment Co. (1924) 264 U.S. 206, 68 I. Ed. 639.; 285 F. 128 (Eight Circuit Court)

This case dealt with the Mora Grant boundary in New Mexico.

The grant was made in 1835, and the boundaries loosely described as: On the north the Ocate River; on the south to where the Sapello empties; on the east the Aguage de la Yegua, and on the west the Estillero. The grant was confirmed by Congress on June 21, 1860. In 1861 Thomas Means surveyed the grant boundaries. Means began at the southeast corner, ran north on the east boundary to the Ocate River, thence west up the Ocate to the base of the mountains where he raised a large mound of earth and stated that this mound was 10 miles, 40.54 chains east of the northwest corner of the grant, the northwest corner being in the inaccessible mountains. Means had located the Estillero at a gap in the mountains. He ran a traverse from the mound of earth southwesterly to the Estillero and set three stone monuments on a north-south line which crossed the Pueblo River. He then traversed along the base of the easterly side of the mountains southerly to the Sapello River, thence up that river to a position which he calculated to be due south of the monuments at the Estillero, and set a stone monument for the southwest corner of the grant. He stated that the southwest corner of the Mora Grant was 2 miles, 3.10 chains west of the northwest corner of the las Vegas Grant. Thus the only monuments ever established by Means along the west boundary of the Mora Grant were the three stones at the Estillero, which were later found, and the stone at the southwest corner, which was supposedly in line with the Estillero monuments, and which has never been found.



In 1882 Compton extended the rectangular township surveys and closed against what he thought was the west boundary of the Mora Grant; after the patent to the grant had been issued in 1876, based on the Means survey and plat. But the exact location of the west boundary of the Grant was in dispute. In 1909 Compton was directed to resurvey that west boundary. Compton accepted as the southwest corner of the Mora Grant, an unmarked stone which he found 199.55 chains west and 73.16 chains north of the northwest corner of the Las Vegas Grant. He ran the west boundary of the Mora Grant north from there to the Ocate River. The Compton boundary, as so surveyed, was located about 3 miles east of the recovered stone monuments at the Estillero, set by Means. So the rectangular surveys overlapped the "Means line" by those 3 miles. The overlap area was claimed by the government. State Investment Company, owners of the Mora Grant, contested the claim in U.S. District Court. The District Court held that the true west boundary was a line drawn through the recovered Means monuments at the Estillero, because they were the monuments on which the plat and patent were based, and that monuments hold over courses and distances and (in this case) courses hold over distances. This decision was upheld by the Circuit Court of Appeals and finally by the U.S. Supreme Court. Even though the Compton survey and rectangular surveys were approved, they were junior in time to the Mora Grant survey and patent and created an overlap of surveys, but did not determine title to the lands within the overlap. The Supreme Court said, "A resurvey by the United States after issuance of a patent does not affect the rights of the patentee; "

Both the Maxwell and Mora land Grant cases are discussed here to illustrate the fact that a senior survey does not necessarily control the position or boundaries of land titles, and that calls for certain distances from given points do not control boundary positions. Distance calls by themselves cannot create an overlap.

If a township boundary was surveyed, the township subdivided and the plat approved, and a second surveyor subdividing the township adjoining expressly states that he ran his subdivisional lines to an intersection with the senior township line, then that senior line becomes the boundary of the junior survey; even though there may be ample circumstantial evidence that the closings were never made and that by extending the lines the recorded distance, an overlap (or a hiatus) would result. This principle is quite well stated by the U.S. Supreme Court in *Newson, v. Pryor's lessee*, (1822) 7 Wheat. 10, 5 l. Ed. 382, and by the Fourth Circuit Court of Appeals in *Ewart v. Squire* (1916) 239 F. 34. Offline closing corners were part of the dispute in *See Ben Realty Co. v. Gothberg*, (1941) 109 P. 2d 455, in which the Wyoming Supreme Court held that an offline closing corner controlled the subdivisional lines of the sections involved.

Junior-Senior Surveys and Corners

The treatment of monuments set during a "junior" survey, which were intended to be on the "senior" survey line is based on the principles laid down in the judicial decisions discussed above. If a township line was previously surveyed and approved and, during the course of executing a "junior" survey which is expressly bounded by the senior survey, the surveyor placed the junior monuments small distances off the senior line, the true points may be moved to the senior line during a resurvey. If the junior monument creates a conflict (or overlap) of the junior survey into the senior survey, the true point would have to be moved to the senior line in light of the decisions.

Since the differences in position are usually small, errors are more technical in nature rather than being truly errors or mistakes. The government does not usually claim very small hiatuses if in fact a junior monument has been placed a small distance off the senior line, but not in conflict with the senior survey. It should be remembered, however, that the junior survey has resulted in an approved plat and areas returned based on the junior monuments. Therefore the original position of the junior monument must be used to control the direction of lines, proportions, etc. within the junior survey; i.e., it is treated in a manner similar to an "offline" closing corner.

A junior, corner located slightly inside (and in conflict with) the senior survey was the subject in *Van Amburgh, v. Hitt* (1893) 22 SW. 636. The case involved a junior corner of Survey No. 188, slightly in conflict with the senior Survey No. 212. The Supreme Court of Missouri held, (syllabus):

1. Of two overlapping surveys, the one first made has priority, particularly where the second is bounded with express reference to the first. (emphasis added).
2. Any calls of the second survey conflicting with monuments and calls of the first must yield thereto.

The court ruled that the junior monument, which the surveyor had expressly stated (in the junior survey) was on the senior line, could not and did not create a bend in the senior line, depriving the senior survey of about 64/100 of an acre of land. They then concluded by saying "We have carefully considered the case, but have been impressed with the view that the maxim, "deminimis lex non curat" might very well have been applied."

Black's Law Dictionary defines "de minimis lex non curat": The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles.

Most junior-senior survey overlaps and hiatuses are so small as to bring them within the scope of the "de minimis" definition.

In the event of extensive obliteration or loss of the senior corners, the junior corners, if existent, may be the best available evidence of the position of the senior line. This principle was stated by Justice Straup of the Utah Supreme Court in his concurring opinion in *Washington Rock Co. v. Young*, (1905) 80 P. 382. In this case the court also favorably quoted from *Clement v. Packer*, 125 U.S. 309, in which it was said: "It is unquestionably true that a junior survey cannot control or enlarge the dimensions of a senior survey. We understand this to mean that, when the location of a survey is or can be ascertained or determined by its own marks upon the ground its own calls and courses and distances it cannot be changed or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of the original landmarks, caused by time and other agencies from the senior survey, the location of a particular line or the identity of a corner is left in uncertainty or becomes the subject of controversy, then the original and well established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to

contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey."

These cases must be considered in their own light. However, they can be interpreted to mean that the junior survey cannot affect the monumented boundaries of the senior survey, but if the senior survey monuments have been destroyed, the junior survey monuments can be used to establish where the senior monuments were originally located. It would also be logical that in extreme cases of obliteration of a senior line (say a standard parallel) that the existent closing corners (junior), could be the best available evidence to prove the original position of the senior line, (the Standard Parallel). To be acceptable, such use of closing corners would have to be thoroughly substantiated " by surrounding recovered corners and complete investigations of all evidences of both surveys.

Consider the following situation: Suppose that the boundaries and subdivisional lines of T. 5 N., R. 10 E. were surveyed and plat approved in 1870. In 1871 a contract was let for the survey of the north, south and east boundaries and subdivisional lines of T. 5 N., R. 11 E. When the second surveyor ran his line between sections 30 and 31, he misclosed, falling some distance of the original corner of sections 25, 30, 31, and 36. The second surveyor then proceeds to resurvey the east boundary of T. 5 N., R. 10 E., returning new bearings and distances between the original corners (which he finds) and setting new corners at 40 and 80 chain intervals marked for T. 5 N., R. 11 E., and changing the original corners to refer to T. 5 N., R. 10 E., only. He then runs his lines between sections 30 and 31, 19 and 30, etc. on random and true lines into his new corners along the range line. The approved field notes and plat of T. 5 N., R. 11 E., clearly show the second surveyors bearings and distances between the original corners and that he placed his new (junior) corners on the senior (original) alignment. No valid entries of any kind were made in either township until after both plats were approved. Subsequently, an entry resulting in patent, is made for (say) the west half of section 19, T. 5 N., R. 11 E., and after that for the NE ¼ of section 24, T. 5 N., R. 10 E., leaving the remainder of section 24 as vacant public land. The patent in section 24 was of course based on the plat of T. 5 N., R. 10 E., which shows only the original (senior) survey.

During a current dependent resurvey of the public land in section 24, all of the monuments along the range line are recovered in their original positions and it is discovered that the junior corners, set in 1871 for section 19, are actually located a few links west of a straight line between the senior 1870 monuments. Where is the true boundary between the patented land in section 19 and the public land in section 24? The arguments might be presented in this order:

1. The senior survey of 1870 fully controls and the junior 1871 monuments should be moved easterly to that line. (Senior survey controls).
2. The senior patent in section 19 controls and the junior corners mark the boundary of that patent.(First in time, First in right)
3. All corners along the range line have equal weight because the second (1871) survey supersedes the first (1870) survey; the line should be run from corner to corner. (This based on the argument that since no valid rights had been acquired until after the second survey was approved, the government could, and did, survey its own land in any way it saw fit; and that an official government survey of public land does not ascertain boundaries, it creates them.)

Argument number (3) is the correct procedure. Although the specific example is hypothetical, the same problem is widely confronted in actual situations. The solution would be different if:

1. The second survey of the range line was merely a retracement instead of a resurvey.
2. The second (junior) corners on the range line were in fact closing corners.
3. Patents or valid entries had been made in T. 5 N., R. 10 E., prior to approval of the plat of T. 5 N., R. 11 E.
4. An obvious hiatus or overlap existed instead of small differences usually termed as a junior-senior corner situation, that is; two separate lines instead of a technical difference.
5. No public land remained immediately bounded by the range line. If only the SW ¼ of section 24 was public land (the rest being patented) the government has no interest in the line between private lands except insofar as it controls the remaining public land.

And the list could go on to many more possible conditions which would affect the treatment of the junior monuments.