

OPINION by A. H. HUDSPETH,  
Attorney at Law,  
Carrizozo, New Mexico

re:

Dividing line between lots  
3 and 4, section 19,  
township 11 south, range  
13 east, N.M.P.M.



Carrizozo, New Mexico,  
January 14, 1926.

James E. Cree, Esq.,  
Tusculum House,  
North Berwick, Scotland.  
Dear Mr. Cree:

Your son Charles has handed me field notes, plats and other data - transmitted herewith - and requested me to give you an opinion as to the ownership of a narrow strip of land running east and west, about the middle of the south half of section 19, township 11 south of range 13 east.

#### STATEMENT OF FACTS

My understanding of the facts is:

That on the 15th of December, 1879, patent was issued to George A. Purington for lot 4 (southwest quarter of southwest quarter) of section 19, township 11 south of range 13 east, and that on the 10th of September, 1884, patent was issued to William E. Anderson for the south half of southeast quarter, and southeast quarter of southwest quarter of said section 19.

That in the year 1885, Brandon Kirby "cash" entered lot 3 (northwest quarter of southwest quarter), the northeast quarter of southwest quarter, and the northwest quarter of southeast quarter of said section 19, upon which entry patent was issued the 3rd of October, 1890.

That in 1885, Brandon Kirby, by warranty deed, conveyed this land to your father, James Cree, and that you inherited from your father, who died 25th of May, 1891. Apparently, your father's will was filed in the probate court of Lincoln County, and later withdrawn and taken to Scotland, where it was duly proved. There are some entries in the probate records of Lincoln County indicating that service was had on the heirs, and an irregular decree admitting the will to probate. No copy of the will has been found in the Lincoln County records. By deed, pursuant to your father's will, all the lands of which he died seized situate in Lincoln County, New Mexico, were conveyed to you by his trustees, by deed dated April 18, 1893, which appears of record in Book "P", at page 491. Your mother also conveyed her dower interest in these lands to you, by deeds appearing at pages 438 and 499 of said Book "P", of the deed records of Lincoln County.

Purington was an army officer, and never used or occupied lot 4 of section 19, and left Fort Stanton, where he was stationed when he made the entry, soon thereafter.

The Anderson Cattle Company, the successor in interest of William E. Anderson, ran cattle on the open range in township 11-13 for some years after your father took the deed from Kirby.

You and your father used lot 3, and the Ruidoso River, where it flows through section 19, as a stock-watering, in the conduct of your open-range cattle business, beginning in 1885, and continuing for more than twenty years thereafter. You were the largest stockgrowers occupying this range, and it was



generally known as your cattle range, although there were some small stocks of cattle owned by others ranging with yours over this section of country at the time and after the Anderson Cattle Company withdrew. You had certified maps of the official survey of these lands, showing the Ruidoso River to be upon lot 3 of section 19, and acting upon the assumption that these maps were correct, you claimed the land through which the river flowed. However, you did not fence any part of the land, nor did any one else fence any lands in that section - in other words, there was no dispute during the twenty years that you used this part of the Rio Ruidoso as a stock-watering, as to ownership, and the only use made of it by you was as an open-range stock-watering.

In 1886, H. C. Fellows established the west boundary of township 11-13, and in 1867, R. B. Wilison sub-divided the township. Both surveys were duly approved.

In running the west line of this township, Fellows noted the Rio Ruidoso as:

	"North on west boundary of section 19
23 chains	Rio Ruidoso River 12 links wide runs east
40 chains	Set a stone 13 X 12 X 6 for a 1/4 cor."

There is no reference on this page of the field notes to bearing trees to this quarter corner of section 19, but on another page of the field notes there is a reference to bearing trees for this and other corners.

You will note that Fellows places the dividing line between lots 3 and 4 some three chains south of the point where the west line crosses the Rio Ruidoso, and the certified maps of the survey which you had, and acted upon, conform to these field notes, and so locate the river on your land.

In 1917, C. W. Devendorf, a United States Surveyor, surveyed the boundaries of the Mescalero Indian Reservation, of which the west boundary of township 11-13 forms a part. The southwest corner of the township is in place and well marked. Devendorf, running north on this township line, found the quarter corner of section 31, but was unable to find any other of the original corners between that point and the quarter corner of section 19. Devendorf re-established all missing corners. Devendorf's survey reaches the Rio Ruidoso several chains short of the distance indicated by the original survey made by Fellows - in other words, the division line between lots 3 and 4, according to the Devendorf survey, would place the river in lot 4. At the quarter corner on the west boundary of section 19, Devendorf claimed to have found the original bearing tree marked by Fellows, and placed an iron post at the point where he claimed Fellows had placed the original corner, solely by reference to the bearing tree. If Devendorf is correct in re-establishing this corner by this bearing tree, then the line between lots 3 and 4 will be on the north side of the Rio Ruidoso - in other words, the river at that point would be in lot 4. In addition to the Rio Ruidoso, which, it will be admitted, has not changed its location since the original survey, at the point where this west boundary line crosses it, there is another natural object some miles to the north - a bluff some 60 to 70 feet high - noted in the Fellows' survey, and also in the Devendorf field notes. The indications are that the same discrepancy in measurements between Fellows and Devendorf, that has been noted as to the Rio Ruidoso, applies to



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this bluff. Devendorf claimed to have found some of the original corners north of the quarter corner on the west boundary of section 19, but I shall not discuss this matter, since your son's plats and notes cover these matters fully.

At the time copies of the Devendorf field notes were obtained, his work had not been platted - for want of funds in the Surveyor General's office - and of course had not been approved.

Under date of September 15, 1915, you executed a written lease to Judge Edward L. Medler, for himself and associates, covering a part of this land, to be used for cabin sites. The south boundary of the Medler tract is described as 100 feet to the south of the Rio Ruidoso, following the sinuosities of the stream, and the north boundary some distance to the north of the river. The following summer, Judge Medler and associates took possession, constructed cabins etc., which have been occupied each summer since that time, under that lease and renewals thereof. About the time of the making of this lease, Judge Medler wrote Mrs. Purington, the widow of the patentee, with reference to the boundary line between lots 3 and 4, stating that he had the field notes of the Fellows' survey, and the certified plat, and was taking a lease from you.

Later on, H. E. Carter bought from the Puringtons lot 4, and in 1924 had private surveyors run the dividing line between these lots, and claimed the Devendorf survey to be correct. In 1925, he started to build a wire fence on this line as established by his private surveyors, which was cut by Judge Medler. Your son, at about the same time, started building a fence on or near the line as claimed by you, on the south side of the Rio Ruidoso, which was cut, presumably by Carter. Some sort of truce was made by your son and the Carters. Carter platted a part of the land on each side of the river claimed by him to be included in lot 4, and has sold some of the lots. I understand some of your tenants have bought from Carter the land lying north of the river, claimed by him to be in lot 4.

You paid taxes on lot 3, and the Puringtons and Carter paid the taxes on lot 4.

#### OPINION

#### Surveys

Your rights are in no way affected by the Devendorf survey.

Syl.: "Original surveys of public lands by the United States Government, on the faith of which property rights have been acquired, control over subsequent government surveys affecting such rights."

Pitts Montana Copper Co. v. Vanina (Mont.)  
227 Pac. 46

Galt et al. v. Willingham et al., 300 Fed.  
761

United States v. State Investment Co. (Mora  
Grant) U.S. Sup. Ct. 68 L. Ed. 262



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I assume, however, that the Devendorf measurements are approximately correct, and that the distance from the bearing tree to the quarter corner on the west boundary of section 19 to the corner as re-established by Devendorf, is accurate.

3C-a  
8p 663

The public land surveys of the United States are governed by sections 2395, 2396 and 2397 of the revised statutes of the United States. It is the duty of surveyors to note natural objects, like streams; also bearing trees to corners. The law provides the method of dividing quarter sections, but government surveyors are not required to establish quarter-quarter corners, and in this case, the line between lots 3 and 4 is a point equidistant between the quarter corner on the west boundary and the southwest corner of section 19. No corner was placed by the government surveyor at the point of intersection of the line dividing lots 3 and 4 with the west boundary of the section, the law and regulations not requiring the establishment of such corners.

I am of the opinion that the court will hold that the dividing line between lots 3 and 4 will be the point midway between the quarter corner as re-established by Devendorf and the southwest corner of the section.

I am persuaded that the dates of the entries will have considerable bearing with the court or jury. Purington's entry, made some years prior to that of Kirby, was no doubt made for the purpose of acquiring the land through which the river ran. The corners were at that time probably in place, but even without this evidence, it is my opinion that the bearing tree to the quarter corner of section 19 would control as against the call locating the Rio Ruidoso.

Your son's plausible argument to the effect that the Fellows' measurements were short throughout the six miles, in my judgment would have no bearing on the case, since we would not be able to go beyond the quarter corner of section 19, unless it could be shown that the bearing tree found by Devendorf was not the bearing tree marked by Fellows, and even in case this bearing tree should be discredited, we would be confined to the distance between the two nearest established and recognized corners on this west boundary of the township, and my understanding is that you would gain little or nothing by a sub-division of any part of the line if the northwest corner of the township (which is the southwest corner of the township to the north) as found by Devendorf, is recognized. In other words, in order for your contention as to the dividing line between lots 3 and 4 to be upheld, the Fellows' notes as to the location of the river must control the establishment of the line, or the court would have to find that there is a strip of unsurveyed land between township 11-13 and township 10-13.

#### Estoppel

It has been suggested that Judge Medler's letter to Mrs. Purington might estop Carter from asserting title to this strip, but I am of the opinion that this evidence would be insufficient.

#### Adverse Possession

The Supreme Court of New Mexico has held that a fence is not required to establish adverse possession - Baker v. de Armijo, 17 N.M. 391 - and they have in other cases upheld



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the title of range lands by adverse possession.

Jenkins v. Maxwell Land Grant, 15 N.M. 291.  
First Nat'l Bank v. Tome, 23 N. M. 272  
Manby v. Voorhees, 27 N.M. 521.

Our adverse possession statutes were changed in 1899 and 1905, but I do not think it necessary to discuss these statutes, since in my opinion you <sup>father</sup> and your possession of this land through which the river runs was not sufficiently exclusive and clearly defined to give you title.

Respectfully submitted,

*A. H. Hudspeth*

AHH/J



