

**COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE BOARD OF PROPERTY**

**R. Neal and Linda Buterbaugh,  
Estate of Joseph W. Imler, Jr.,  
and Dutch Corner Historical Society,  
Plaintiffs,**

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**Docket No. BP-2008-0001**

**v.**

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**Allen K. Stahl,  
Defendant**

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**ADJUDICATION AND ORDER**

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Andrew C. Clark, Esquire, designee of the  
General Counsel

Kathleen M. Kotula, Esquire, designee of the  
Secretary of the Commonwealth

David Unkovic, Esquire, designee of Secretary  
of Community and Economic Development

**Department of Community  
and Economic Development  
Commonwealth Keystone Building  
400 North Street 400 Plaza Level  
Harrisburg, PA 17120**

**HISTORY**

## HISTORY

In this action Plaintiffs, R. Neal and Linda Buterbaugh, Estate of Joseph W. Imler, Jr., and Dutch Corner Historical Society (herein Caveator(s)), appeal the determination of the Department of Conservation and Natural Resources (DCNR) to grant patents to Defendant Allen K. Stahl (herein Applicant)<sup>1</sup> under the Act of November 22, 2000 (commonly known as the Public Lands Act, 68 Pa. C.S. § 6101-6114.

On April 2, 2008, Allen K. Stahl (Applicant) filed two Patent Applications with DCNR for claimed vacant and unimproved land at the summit of Evitts (also known as Dunnings) Mountain in Bedford County. The first application involved 57 acres and 70 perches of such land in South Woodbury Township. The second application was for 75 acres and 29 perches of such land in Bedford and South Woodbury Townships adjoining the first application.

By letter dated December 18, 2009 to DCNR, Neal Buterbaugh through his counsel of record in this proceeding, filed a *pro se* caveat asserting that Applicant did not follow warrant and patent procedures under the Act and that Applicant had rebuffed his attempts to resolve the dispute. On or about March 23, 2010, Buterbaugh and his wife, Linda, and Dutch Corner Historical Society (Historical Society), filed an amendment to the caveat asserting the interest of Historical Society as the grantee of a easement agreements with the Buterbaughs and that the Buterbaughs improved the

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<sup>1</sup> The case name on the Board's docket and the identification of the parties are dictated by Board regulation at 4 Pa. § 137.9 governing caveats. The Board notes that the hearing transcripts caption the matter as: "In Re: Application for Patent by Allen K. Stahl (Application[sic] # 786-NR and #787-NR) in Bedford and South Woodbury Townships, Bedford County, Pennsylvania." The caption is inconsistent with the Board's regulation at 4 Pa. Code § 137.9, which requires that the Caveator is the plaintiff or complainant in the case and the Applicant the Defendant. The parties are identified as Caveators and Applicant for ease of reference to the record.

lands claimed in the Application, and in fact were the owners of the land in question. (Exhibits 1 and 2)

On or about April 16, 2010, the Estate of Joseph W. Imler, Jr. and Historical Society filed a caveat contesting the claim of vacant and unappropriated land in Application No. 787-NR asserting that by chain of title and survey the Imler property adjoins the Buterbaugh property along the summit of Evitts Mountain.

On September 1, 2010, James J. McElwee, Professional Land Surveyor (PLS) with DCNR (PLS McElwee), filed with the Board of Property his Report<sup>2</sup> (DCNR Report) regarding the Applications on the caveats concluding that the vacant lands existed as asserted and that patents should issue to Stahl for the lands applied for. On October 22, 2011, the Board notified Caveators of the filing of the Report by DCNR and that Caveators could request a hearing before the Board. Accompanying the notice was a Citation Notice and a Case Management Order providing 30 days for the Caveators to request a hearing, and, in that event, requiring the parties to file prehearing statements on or before November 22, 2010, and for a hearing to be held on December 9, 2010. On November 19, 2010, Applicant filed his prehearing statement and on the same date Caveators filed a request for a 90-day continuance of the hearing and the filing of prehearing statements. Applicant filed an objection to the continuance. On November 29, 2010, the Board issued an order denying the request for a continuance. Caveators Prehearing Statement was filed on November 30, 2010. On

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<sup>2</sup> The Report, titled "REPORT TO THE BOARD OF PROPERTY REGARDING APPLICATIONS FOR PATENT ON EVITTS MOUNTAIN IN BEDFORD COUNTY ON CAVEAT" was filed with the Board but not served on Buterbaugh or Imler. Upon learning that service had not been made, the Board issued its notice of the filing of the Report. Owing to the length of the Report and the large survey maps accompanying it the Board provided notice of the filing to Caveators and the Applicant in lieu of service. Service of the Report on Caveators is not required under the Public Lands Act and no objection was raised with regard to the Board's procedure.

December 1, 2010, Applicant filed a motion to dismiss.<sup>3</sup>

The Board held a hearing on December 6, 2010 in Harrisburg. Caveators presented the testimony of Neal Buterbaugh, Harland Imler, Administrator for the Estate of Joseph W. Imler Jr., Applicant Stahl and Laura Jackson, a founding member of Historical Society. At the conclusion of this testimony, Counsel for Caveators renewed his request for a continuance. Counsel stated that Caveators had intended to call Rex Clark, a surveyor they had engaged to secure a survey, but who had not finished his work in time for the hearing. (N.T.I. 73)<sup>4</sup> Applicant's Counsel objected to a continuance. Prior to ruling on the Caveators' request, the Board called PLS McElwee as its witness. PLS McElwee testified regarding his Report to the Board and the connected warrant maps<sup>5</sup> that he prepared as part of his Report.

At the conclusion of PLS McElwee's testimony, the Board denied Applicant's motion to dismiss and granted Caveators' request for a continuance "for the purposes of presenting a survey." (N.T. 108)

The hearing reconvened on May 26, 2011. Norman Van Why, Professional Land Surveyor (PLS Van Why), testified on behalf of Caveators. Applicant presented the testimony of his Professional Land Surveyor, Kenneth L. Schulze (PLS Schulze), and PLS McElwee. Presiding at the hearing and rehearing were: Steven Fishman, Esquire, designee of Secretary

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<sup>3</sup> The Board denied the motion at the December 6, 2010 hearing.

<sup>4</sup> N.T.I. references Notes of Testimony of December 6, 2010. N.T.II. references Notes of Testimony of May 26, 2011.

<sup>5</sup> The connected warrant map identified in PLS McElwee's testimony was formally admitted in the record at the conclusion of the hearing as Board Exhibit 1. (N.T.II. 191-192)

of Community and Economic Development, Andrew C. Clark, Esquire, designee of the General Counsel, Kathleen Kotula, Esquire, designee of the Secretary of the Commonwealth. Bradley S. Tupi, Esquire, represented the Caveators and David J. Flower, Esquire, represented Applicant.

Following the hearing, the Board directed simultaneous filing of briefs and reply briefs. Following the filing of briefs and reply briefs the record closed on July 29, 2011.

Participating in the adjudication of this matter were: Andrew C. Clark, Esquire, Kathleen Kotula, Esquire, and David Unkovic, Esquire.<sup>6</sup>

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<sup>6</sup> On August 2, 2011, the Honorable C. Alan Walker, Secretary of Community and Economic Development, appointed David Unkovic, Chief Counsel of the Department of Community and Economic Development, as his designee to the Board. Based on Secretary Walker's designation, Chief Counsel Unkovic is authorized to participate in all matters pending before the Board including the above matter. See *Boulis v. State Board of Chiropractic* 729 A.2d 645 (Pa. Cmwlth. 1999).

## FINDINGS OF FACT

1. Plaintiffs, R. Neal, Linda , and son Bruce N. Buterbaugh own a tract of land on Evitts Mountain. (Record)

2. Plaintiff Estate of Joseph W. Imler, Jr., owns a tract of land on Evitts Mountain; Harland Imler (Imler), Joseph's son, is administrator of the estate. (Record)

3. Plaintiff Historical Society is a non-profit corporation created to preserve and protect the natural resources and historical record of Dutch Corner an early permanent settlement in Western Pennsylvania; in furtherance of its purpose, it has entered into trail agreements or options with Caveators to allow the use of certain trails on the Buterbaugh or Imler properties. (Exhibits 1, 11, 31, 32, 33)

4. Defendant Allen K. Stahl filed applications for the issuance of warrants or patents for claimed vacant and unimproved land located between the Buterbaugh and Imler properties. (DCNR Report)

5. The applications were accompanied by a survey map prepared by PLS Schulze which identified the location of the vacant land in the Kochendarfer and Brumbaugh Warrant and 26 surrounding warrants which served as the required survey map under the Act for both Applications. (DCNR Report, p.2)

### Application # 786-NR

6. Application # 786-NR seeks approval of a patent for 57.44 acres located on the

east side of Evitts Mountain in South Woodbury Township, Bedford County Pennsylvania.  
(Board Record, DCNR Report)

6. This land was part of a Warrant granted on August 18, 1851 for 250 acres to Samuel Kochendarfer and Jacob Brumbaugh. (Exhibit 46)

7. Caveator Neal Buterbaugh (Buterbaugh) claimed 2.03 acres of asserted vacant land within the patent area at the top of the mountain. (N.T. 18)

8. Buterbaugh and his family have hunted and rode horses on the 2.03 acres since he purchased the property in 1994. (N.T. 26)

**Application #787-NR**

9. Application #787-NR seeks approval of a patent for 75.18 acres located on the east and west sides of Evitts Mountain in South Woodbury and Bedford Townships in Bedford County Pennsylvania. (Board Record, DCNR Report)

10. The land covered in Application #787-NR is located to the west and south of Application #786 and the two tracts adjoin. (Exhibit 46)

11. Members of the Imler family believe that the Estate's property extended over the summit of the mountain to adjoin the Buterbaugh Mountain tract. (N.T.I. 41-42)

12. Imler's knowledge of the property line of the Imler tract in relation to the Buterbaugh tract was derived from information provided by his parents. (N.T.I. 50)

13. The Imler family used the land on the summit of the mountain for hunting, horseback riding and hiking. (N.T.I. 47, 54)

14. The Imler family did not erect any fencing or other markings to define the boundaries of the property. (N.T.I. 52, 55-56)

*DCNR Review*

15. The conveyance of land from the Commonwealth to private parties involved five documents: 1) an application to have the land surveyed; 2) a warrant issued to the deputy surveyor of the district to survey the land for the applicant; 3) the survey; 4) the return of survey (also known as the return) prepared by the surveyor general and filed in the land office containing a description of the land based on the survey ; and 5) the issuance of a patent signed by the governor which is the first document to vest title in a private hand. (DCNR Report p. 5-6)

16. Warrants, the first source of title in private hands, state quantity such as acres, and patents describe the lines and distances of the warrant. (N.T. 98-90, 99)

17. James McElwee, a professional land surveyor with DCNR, is responsible for reviewing applications for warrants and patents on vacant or unappropriated lands in the Commonwealth. (N.T. 78-82)

18. PLS McElwee evaluated the Stahl Applications by first creating a connected warrant map of the area proceeding initially from known watercourses and land features. (DCNR Report, Board Exhibit 1)

19. PLS McElwee concluded that vacant land existed as depicted on the Schulze survey based on the southwest lines of the connected warrant map. (*Id.*, N.T.I. 83)



20. The warrant records show that the Buterbaughs' land is located on the southwest side of the mountain and is taken from the William Ross Warrant. (N.T.I 84)

21. The William Ross Warrant was issued in 1795 and resurveyed in 1831. (Exhibit 43)

22. Imler's land is situated on the northeast side of the mountain bounded on the southwest boundaries of the Cisna, McCurdy and Adair Warrants, all located on the north side of the mountain. (N.T.I. 84)

23. The Cisna, McCurdy and Adair Warrants along with other warrants in the area were originally issued and surveyed in the late 1700s and were resurveyed in 1831. (Exhibit 36)

24. None of the connected warrants for the Buterbaugh or Imler properties reference the top or summit of the mountain. (N.T.I. 84)

25. Based on the warrant connections, McElwee concluded that vacant lands existed at the summit of the mountain in the area described in the Schulze survey; this vacant land includes the 2.03 acres Schulze found in an earlier survey performed for Buterbaugh. (N.T.I. 85)

**Caveator's Expert**

26. Norman S. Van Why, Professional Land Surveyor, was engaged by Caveators in February 2011 to review the record and render an opinion as to whether vacant lands exist as depicted in the Schulze survey. (N.T. II. 12)

27. PLS Van Why did not perform a survey of the land at issue in the Applications.

(N.T.II. 89)

28. PLS Van Why relied on an unrecorded 1886 resurvey to conclude that Buterbaugh's boundary line actually extended 27 rods (445.5 feet) encompassing most of the vacant land claimed by Applicant. (N.T.II. 22-23, 110-112)

29. The resurvey was performed by John B. Fluck in 1886 on the Benjamin W. Garretson Warrant and would propose to relocate the lines of the William Ross and Cisna Warrants. (Exhibit 42)

## CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter under Section 1207 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 337 and Section 6113 of the Public Lands Act, 68 Pa. C. S. § 6113.
2. Caveators have not shown by a preponderance of the evidence that the vacant land as depicted on the Schulze survey and as confirmed by DCNR does not exist.
3. Caveators have not shown by a preponderance of the evidence that any vacant land claimed by the Applicant had been previously improved by them jointly or severally.

## DISCUSSION

This matter is brought under the Public Lands Act (Act), 68 Pa. C.S. §§ 6101-6114 which provides pertinently:

### **§ 6103. Application**

**(a) Commonwealth rights.**--The right of a person to a patent for vacant or unappropriated lands is subject to the right of the department [DCNR] to formally acquire for the department on behalf of the Commonwealth and have vacant or unappropriated lands patented to the Commonwealth for State forest purposes or State park purposes as provided by section 6105 (relating to acquisition determination).

**(b) Survey.**--A person may apply for a warrant to have a survey made of any tract of vacant or unappropriated land.

**(c) Investigation.**--The department, with the cooperation of the commission, shall investigate to determine whether office rights have been granted for a tract of land and whether the tract of land is vacant or unappropriated if an applicant does all of the following:

- (1) Completes an application prescribed by the department.
- (2) Gives 30 days' notice of the filing of the application by publication once a week for three successive weeks in a newspaper of general circulation in the area where the land is situate. The applicant must furnish proof of publication to the department.
- (3) Submits a certified abstract of title.
- (4) Submits the survey under subsection (b).

### **§ 6113. Caveats**

**(a) Authority.**--A person with a claim on land for which a warrant application has been made under this chapter may file a caveat with the department.

**(b) Costs.**--The caveator must deposit with the caveat a filing fee determined by the department and, in the case of vacant land, purchase money. The purchase money shall be returned to the caveator, less costs incurred by the board, if the board decides against the caveator and the caveator does not appeal the decision. If the caveator appeals the decision, the purchase money shall be held and disposed

of as directed by the court making the final decision on the appeal.

**(c) Limitation.**--A caveat must be filed prior to the granting of the patent. No caveat shall be recognized for land after the patent of the Commonwealth has been granted for the land.

**(d) Procedure.**--Upon filing of a caveat, the department shall notify the original applicant and forward the application for warrant and the caveat, with all related instruments, to the board for decision.

**(e) Effect.**--The filing of a caveat shall suspend issuance of the patent until the board disposes of the matter.

**(f) Perfection.**--If the board decides in favor of the caveator, the caveator must proceed promptly to perfect title under this chapter and in compliance with regulations of the department, or the caveator shall be deemed to have abandoned the claim and right.

### **§ 6112. Prohibition of warrants**

**(a) General rule.**--Except as set forth in subsection (b), a warrant or other office right shall not issue for public land if any of the following apply:

(1) Settlement has been made on the land. This paragraph does not apply if the settlement has been abandoned continuously since January 1, 1935. If the settlement has been abandoned continuously since January 1, 1935, the land shall be deemed to be vacant or unappropriated.

(2) The land is totally or partially cleared and fenced.

(3) The land is otherwise improved, used or occupied and held by defined boundaries. This paragraph does not apply if the improvement has been abandoned continuously since January 1, 1935. If the improvement has been abandoned continuously since January 1, 1935, the land shall be deemed to be vacant or unappropriated.

Caveators also contend that they have improved the claimed vacant land under Section 6101, 68 Pa. C.S. § 6101, which defines "unimproved lands" as lands which show no signs of occupancy or cultivation.

### **Burden of Proof**

In this proceeding, the Caveators bear the burden of proving their case "by establishing a preponderance of evidence which is substantial and legally credible." *Lansberry v.*

*Pennsylvania Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Caveator's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1949). A preponderance of the evidence is tantamount to a "more probable than not" standard. *Commonwealth v. \$6,425.00 Seized from Esquilin*, 880 A.2d 523 (Pa. Cmwlth. 2005). The Caveators therefore have the burden of proving their claims with evidence that is substantial and legally credible, not by mere "suspicion" or by only a "scintilla" of evidence. *Lansberry*, 578 A.2d at 602.

In this case the Caveators have presented alternative theories to sustain their objections to granting the patent applications to Stahl. Caveators present two distinct arguments. At the December 2010 hearing, Caveators presented evidence through the testimony of Buterbaugh and Imler and the Historical Society to support their contention that, assuming vacant lands exists as Applicant claims, they have acquired prior rights to the vacant land by having improved it under Section 6112 of the Act. The Board agreed to continue the hearing at Caveators' request to allow their expert to complete his survey. At the May 26, 2011 hearing, Caveators did not introduce a survey, but offered the testimony of their expert, PLS Van Why who opined that an 1886 draft survey of the Benjamin Garretson Warrant relocated the lines of the James Ross and Cisna Warrants. Caveators contend that the vacant land is already owned by Stahl, the Buterbaugh's, Imler and Elizabeth Smouse.<sup>7</sup> In brief the Caveators

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<sup>7</sup> Elizabeth Smouse is not a necessary party to this matter because the disputed property here is claimed by Buterbaugh, Imler and Stahl. See *Pennsylvania Game Commission v. K.D. Miller Lumber Co.*,

contend that the Imler tract extends over the top of the mountain to a line on the western side of Evitts Mountain and adjoins the Buterbaugh Mountain Tract leaving no vacant land for the Applicant to claim.<sup>8</sup> (N.T.I. 11)

Applicant presented evidence through the expert testimony of PLS Schulze and PLS McElwee that a vacancy exists between the Buterbaugh and Imler land as claimed based upon PLS Schulze survey and work done by PLS Van Why and the connected warrant map of PLS McElwee. Schulze's opinion was supported by a survey with the Application and PLS Elwee's opinion was based on the connected warrant map of the area that he prepared.

Based on the following discussion the Board concludes that Caveators failed to prove by a preponderance of the evidence that no vacant land existed in the area claimed by Applicant.

### Summary of Testimony—

#### December 6, 2010 Hearing

In 1994, Neal Buterbaugh, his wife Linda, and son Bruce bought a 50-56 acre tract of land on the westerly side of Evitts Mountain in Bedford County known as "Mountain Tract" from Don Rogers. (N.T.I. 16-17, Exhibit 4) About two years after they bought the property, Neal Buterbaugh informally surveyed the tract himself and located the corners of his property with a compass and tape measure. (N.T.I. 17, 29) In 2007 and 2008 Buterbaugh hired Kenneth L. Schultze, PLS, to conduct a retracement survey to establish the southern line of his

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*Inc.*, 654 A.2d 6 (Pa. Cmwlth. 1995). She was not identified by DCNR as a landowner entitled to receive notice of the filing of the Application for a Patent.

<sup>8</sup> Caveators concede that their case does not encompass all land claimed in the Applications. (N.T.I.

property. (Exhibit 2, N.T.I. 22) The survey found a triangular tract of 2.03 acres of vacant land between the Buterbaugh line and the line of the Cisna Warrant. (Exhibit 2) Buterbaugh put up barricades<sup>9</sup> and a tree stand and signs with his name on it and no trespassing in the 2 acre parcel. (N.T.I. 24-25)

Harland Imler testified that he is the son of Joseph W. Imler, Jr., and the administrator of his estate. Imler testified that his parents lived on the property for 64 years and told him that their property went over the mountain and to the other side bordering the Buterbaughs' Mountain tract. In the area he observed stone piles which he assumed were survey markers indicating where the boundaries were. (N.T.I. 40-43) He testified that his family has used the land over the top of the mountain for recreation, hiking and hunting, and that his family uses a trail over the summit of the mountain to where they have erected tree stands they use during hunting season. (N.T.I. 46-47, 54) He also confirmed Buterbaugh's testimony that barricades on the south side of the mountain had been removed and stated that his own tree stands had been demolished.

Laura Lee Jackson, environmental center director for the Bedford Area School District, testified that she was involved in the formation of Historical Society. She testified that Dutch Corner has been designated as a rural historic district by the Pennsylvania Historical and Museum Commission, that many trails connected early settlers to either side of the mountain; the trails were used to haul timber from the summit to the settlers homes and farms in the valleys and that the Historical Society wished to preserve the trails for future generations. (N.T.I. 63-65) She testified that Historical Society's interest in the proceeding

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<sup>9</sup> Applicant, who was called to testify by Caveators, denied any responsibility or knowledge of who



was a concern that Applicant proposes to use the land as part of a wind energy project which would make the area no longer available for public uses. (N.T.I. 67)

The Board called PLS McElwee who testified concerning DCNR proceedings. PLS McElwee testified that he is the land surveyor the Department has assigned to review the sufficiency of all applications for patents on vacant or unappropriated land in the Commonwealth. (N.T.I. 80) After determining that the Applications were complete, McElwee testified that his first task was to construct a connected warrant map because such a map was not was available for this area. (N.T.I. 80) In his Report he noted:

The warranting title history of this general area is extremely complicated. The relevant position of the warrants that I've mentioned are not based upon the official connected warrants of the area because there aren't any. That being the case I had to create one. (Report, page 5)<sup>10</sup>

McElwee testified that his conclusions were based on the connected warrant map that he created. He explained that in Pennsylvania the warrant is the initial source title, followed by a survey and finally, a patent to the ultimate "owner." He testified that none of the warrants from which the Imler property is taken "go to the top of the mountain." (N.T.I. 99) As to Buterbaugh, McElwee testified that while a filler warrant was put in between the Kochendarfer/Brumbaugh and King Warrants, the William Ross Warrant, not Kochendarfer/Brumbaugh, was the source of title for Buterbaugh and "the William Ross Warrant does not go to the top of the mountain." (N.T.I. 99-100)

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destroyed the tree stand or removed the barricades.

<sup>10</sup> The Report was not admitted into evidence in this proceeding. Notwithstanding, because a copy of the Report was served on the parties, the Board construes it as part of the record of the case.

May 26, 2011 Hearing

Caveators presented the testimony of Norman S. Van Why (Van Why) as their expert. A Professional Land Surveyor licensed in Pennsylvania since 1975, Van Why has been conducting surveys in Bedford County since 1976. (N.T.II. 7) He described himself as a “boundary surveyor” who performs retracement surveys which involve an examination of documents which describe the real property as issue which was his method of arriving at his opinion in this matter. In addition, he testified that he relied on documents he acquired in 1981 of the survey documents of the Canard<sup>11</sup> family of surveyors for Bedford County. (N.T.II. 10-11)

Through PLS Van Why, Caveators introduced Exhibits of many surveys and title documents of other property owners in the disputed area. As identified by Exhibit 49, PLS Van Why found no gap between the Kochendarfer and William Ross Warrant. (N.T.II. 21) PLS Van Why testified that he believes that the line of the Ross Warrant should extend to adjoin the Garretson Warrant to comply with the evidence and findings of a surveyor’s report by John Fluck<sup>12</sup> in 1886. (N.T.II. 22) To do so would move the line 27 rods (445 feet). (N.T.II. 23) When asked whether as a result, in his opinion the Buterbaugh property abuts the Imler property, PLS Van Why testified:

By warrants, protractions out no, only by lands as claimed [by caveators Buterbaugh and Imler] and as shown on prior surveys and reconstruction of other surveyors line going down in towards the William Cessna line. I have drawings and old surveys that shows that. (N.T.II. 23)

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<sup>11</sup> The family is identified in the transcript as “Kennard”.

<sup>12</sup> Throughout the transcript John Fluck is referred to variously as Flock. This appears to be a transcription error. The Exhibits clearly show that a single individual is being referred to and the correct

PLS Van Why also found the vacancy of 2.03 acres claimed by Buterbaugh in his caveat. (N.T.II 24)

He also identified a connected draft of the Benjamin Garretson Warrant which follows the Fluck drawing showing an extension of the William Ross Warrant. (Exhibit 36) and a copy of a survey he prepared for an unrelated party also based on the Fluck survey of the Benjamin Garretson Warrant (Exhibit 38) and deeds which follow it. (Exhibits 38-41 N.T.II. 35-41) PLS Van Why testified that Surveyor Schulze found the common warrant line but John Fluck found in 1886 a blazed chestnut oak and counted the rings back to 1831, the date of the resurvey by John Bennett. (N.T.II. 54-57, Exhibit 36)

### **Findings and Conclusion**

Caveators contend no vacant lands exist in the area claimed by Applicant and as found by DCNR. The evidence on this issue rests on the testimony and evidence relied upon by the professional land surveyors. The determination of which opinion prevails in turn depends upon the credibility and weight the Board gives each witness.

The veracity of a particular witness is a question which must be answered in reliance on the ordinary experiences of life, common knowledge of the natural tendencies of human nature, and observations of the character and demeanor of the witness. *Danovitz v. Portnoy*, 399 Pa. 599, 161 A.2d 146 (1960).<sup>13</sup> Applicant and Caveators accepted each other's surveyor as an expert, as well as PLS McElwee. All three are competent in the field of land surveying evidenced by their possession of a license issued by the State Registration Board for

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spelling is Fluck. (N.T. 45)

<sup>13</sup> Caveators post hearing brief attacks the credibility of PLS Schultz contending his demeanor and a record of civil penalties is less than professional. The Board is not persuaded by Caveators argument.

Professional Engineers, Land Surveyors and Geologists. All three testified as to their opinion and the documentary and physical evidence which formed the basis for their opinions. The Board finds the testimony credible and concludes that the conflict in the testimony must be resolved by determining how much weight should be given to the testimony and opinion of the expert witnesses. *Pennsylvania Game Commission v. Keown*, 471 A.2d 937 (Pa. Cmwlth. 1984).

The Board concludes that PLS Van Why's testimony does not conclusively establish by a preponderance of the evidence that the vacant land claimed by Stahl in his Applications as found by PLS Schulze and as confirmed by PLS McElwee is in fact already owned. Van Why's documentary evidence on this issue is bottomed on draft resurvey made by a John Fluck in 1886 of the official boundary by John Bennett in 1831. According to the evidence Fluck's survey was not recorded. There is no evidence of a corrected Warrant having been accepted contemporaneous with Fluck's survey. Both PLS Schulze and PLS McElwee testified that the existence of Fluck survey did not affect or otherwise alter their opinion.

The original title to all lands in Pennsylvania is the Warrant. Patents granted by the governor and subsequent deeds and other documents of title cannot grant more than the Warrant nor can a subsequent document, except by agreement or compromise, alter it. Fluck's resurvey of the Garretson proposes to change the boundary of senior William Ross and Cisna warrants. No evidence of an agreement or compromise exists in this record. Thus, Fluck's resurvey cannot form the basis for a finding in this case.

The Board finds persuasive PLS McElwee's testimony and the Board accords great weight to his analysis and conclusions. As McElwee noted, because no connected warrant

map of the area existed, he was obliged to create one. The Board finds no error of law or flaw in his method of creating such a map, in particular locating first water courses. The Board also agrees with PLS McElwee's conclusion that because the lines of the original warrants prevail in a determination of whether vacant lands exist, the resurvey of the Garretson Warrant 55 years later could not affect the boundary lines of the 1831 surveys.

Secondly, the Board finds that the Caveator's evidence does not establish improvement of the land by Buterbaugh and Imler. In their brief, Caveators contend that the barricades and tree stands erected by them qualify as an improvement under Section 6101 of the Public Lands Act. As set forth above, Section 6112 prohibits the granting of a warrant or other office right for vacant lands if it is shown one of following: (1) that settlement has occurred on the land; (2) the land has been partially cleared or fenced; or (3) the land has been "otherwise improved, used and held by defined boundaries." The surveyors have described this land as mountain top land from which most of the timber has been removed, leaving logging trails and a rocky terrain. It is plain "settlement" has not occurred on the mountain top. There is no evidence in the record of fencing or clearing. The definition of "unimproved lands" in Section 6101 is lands which show no signs of occupancy or cultivation. Improved land therefore means land that shows signs of occupancy or cultivation. That Neal Buterbaugh intended to claim the 2.03 acres of vacant land by putting barricades on trails in that area is undisputed. But he did not file a claim under the act to purchase it. Plainly, both Buterbaugh and Imler were using the land when they erected tree stands for hunting game. To conclude, however, that such activity constitutes occupancy or cultivation stretches the plain meaning of the words "occupancy" or "cultivation" well beyond recognition. Indeed, case law

interpreting prior public lands statutes recognizes improvements to the land such as growing crops, fencing and erecting structures for human habitation. Thus, in *Goodman v. Losey*, 1842 WL 4760 (PA), 3 Watts & Serg. 526 (1842), the Supreme Court held that to so acquire title to vacant lands it is necessary to show that the land has been cultivated or improved in such a fashion as to support a family.

Caveators reliance on *Bixler v. Hoverter*, 491 A.2d 958 (Pa. Cmwlth.1985), is similarly misplaced. Bixler filed an application for a patent on 9.5 acres of vacant land in Perry County to which the Hoverters filed a caveat. The Board of Property concluded that the Hoverters had improved the land under Section 14 of the former Act by building a tote road to carry lumber and cutting timbers and removing the lumber from the land before Bixler filed her application. The Court affirmed finding road construction and lumbering substantial evidence of improvement. A makeshift barricade to deter ATVs and tree stands are *de minimus* acts and by comparison hardly like making substantive changes to the land by building a road and removing lumber.

Finally, the Board finds no merit to the Caveators' argument that DCNR's acceptance of publication in the *Altoona Mirror* as "a newspaper of general circulation in the *area* where the land is situate" was not in accordance with Section 6103(c)(2) of the Act, 68 Pa. C.S. § 6103(c)(2) (Emphasis added). Caveators contend that DCNR should have required publication in the *Bedford Gazette*. Presumably, Caveators' position is that the Act requires publication in the *county* where the land is situate. Plainly this is not the language of the Act. Nor does it make sense that the legislature would have intended to mean county when it wrote area. In multiple statutes the Legislature requires publication in a newspaper of general

circulation in the county. One must conclude that the Legislature in the Public Lands Act purposely chose not to do so. The Board also finds that Caveators have failed to raise this issue timely insofar as there is no evidence in the record that DCNR abused its discretion in accepting Applicant Stahl's proof of publication.

Therefore, the following order is entered.

**COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE BOARD OF PROPERTY**

**R. Neal and Linda Buterbaugh,  
Estate of Joseph W. Imler, Jr.,  
and Dutch Corner Historical Society,  
Plaintiffs,**

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**Docket No. BP-2008-0001**

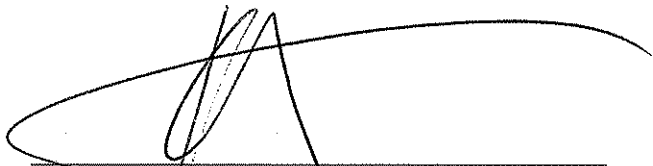
**v.**

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**Allen K. Stahl,  
Defendant**

**ORDER**

**AND NOW**, this 17<sup>th</sup> day of October, 2011, in consideration of the foregoing findings of fact, conclusion of law and discussion, the Board of Property hereby finds that the evidence fails to establish that Applications #787-NR and # 786-NR for patents as approved by the Department of Conservation and Natural Resources should be denied. It is herby **ORDERED** that the caveats of the Plaintiffs in this matter be, and the same hereby are, **DISMISSED**.

  
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 Kathleen M. Kotula, Esquire  
 Pennsylvania Department of State  
 Designee of Carol Aichele  
 Secretary of the Commonwealth  
 Chairman, Board of Property



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Date of Mailing: October 17, 2011

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