SURVEY EVIDENCE AND PROCEDURES

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INTRODUCTION and DISCLAIMERS

_I Am Not Your Attorney._

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case.

JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

I. Know the Law that Governs Your Practice

"Ignorance of the law is no excuse." The professional service provider is governed by the law in all areas of his or her practice.
JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

More specifically, the ancient equity maxim is *ignorant juris non excusat*. This is commonly translated as “ignorance of the law is no excuse.” This is not a new proposition. … A fundamental premise of our legal system is that parties are presumed to know the law, and ignorance of the law is no excuse. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. This concept is also applied in the non-criminal, regulatory law context.


JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

Understanding and applying the correct law (including the laws of evidence) are unquestionably part of the surveyor’s duties.


JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

(A) Surveying shall mean any professional service performed for the purpose of determining land areas, *the monumenting of property boundaries*, the platting and layout of lands and sub-divisions thereof, including the topography, the alignment and the preliminary grades of streets, the preparation of: maps, record plats, field note records and property descriptions representing such surveys.

Ohio Admin. Code, Sec. 4733-31-01. Surveying defined.
(B) The adequate performance of such work involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences and the relevant requirements of law for adequate evidence to the act of measuring, and locating lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water.

Ohio Admin. Code, Sec. 4733-31-01. Surveying defined.

II. The Surveyor Owes a Duty, Not Only to the Client, but to all Adjoiners as Well

In a perfect world, the surveyor would be an uninterested third party as he/she surveys any particular boundary line. Owing as much of a duty to his/her client as to the client’s neighbor.

In order to safeguard the life, health, property and welfare of the public and the state of Ohio, to maintain integrity and high standards of skills and practice in the professions of engineering and surveying, the following rules of professional conduct, promulgated in accordance with Chapter 4733. of the Revised Code, shall be binding upon every person holding a certificate of registration as a professional engineer or as a surveyor.

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The … surveyor shall: 
(A) Protect the safety, health and welfare of the public in the performance of professional duties. … 
(B) Undertake to perform assignments only when the registrant's consulting support are qualified by training and experience in the specific technical fields involved.

Ohio Admin. Code, Sec. 4733-35-03. Responsibility to the public.

III. The Only Boundary Line that Matters
is the “Property” Boundary Between the Coterminous Landowners

The “Ultimate Issue” in any boundary dispute case is the “property” boundary between the disputing parties. No other line really matters.
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Federal Rules of Evidence
Rule 704.
Opinion on Ultimate Issue. (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Ohio Rules of Evidence
Rule 704.
Opinion on Ultimate Issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

In all courts, evidence is the purview of the jury (or judge as "trier of the facts" if there is no jury); the law is always in the purview of the court. A Georgia decision permitted the surveyor to testify as to his opinion on the ultimate issue of the case without invading the province of the jury, so long as the subject matter was an appropriate one for opinion evidence. This is quite unusual. North Carolina still retains the majority approach in that the expert land surveyor cannot give an opinion as to where a true boundary line is located, for that decision is the ultimate fact in issue to be determined by the jury from the evidence presented during the trial.

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Rule 704, provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact.

Green Hi-Win Farm, Inc. v. Neal, S.E.2d 614, 616, 617 (N.C.App. 1986).

IV. The True Boundary Between Two Coterminous Landowners is a Question of Law and of Fact.

The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact.

LAND SURVEYOR
MYTHOLOGY

The Law is for Attorneys and Judges, not for Surveyors.

• Ignorance of the law will not be an excuse.

LAND SURVEYOR
MYTHOLOGY

Only the Judge can Determine where the Boundary Line is,
And Nobody knows what the Judge will do.

• When the proper law is applied, Judges do that same thing over and over again.

LAND SURVEYOR
MYTHOLOGY

My only Duty is to my Client and to Stake his Deed,
I owe no Duty to Anyone Else.

• Third Party beneficiary liability is alive and well.
LAND SURVEYOR MYTHOLOGY

Surveyors are the Sergeant Fridays of the Professions, “Just the facts Ma’am, just the facts.”

- Fact is, trained monkeys can gather facts.

JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

To be a successful professional surveyor, one must have more than a narrow technical education. Technical education has to do with things. Employees at a lower professional scale deal with things; professionals deal with people, situations, and ideas.


Browns’ Technician v. Professional

Technicians Deal with:
- Things
- Monuments
- Measurements
- Equipment
- Facts
- Etc.
Browns’ Technician v. Professional
Professionals Deal with:
- Things such as Facts
- People
- Situations
- Ideas

JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES
Monuments are facts; the field-notes and plats indicating courses, distances and quantities are but descriptions which serve to assist in ascertaining those facts.

Myrick v. Peet, 180 P. 574, 576 (Mont. 1919).

V. There are only Two Functions of the Land Surveyor:
(1) Original Surveyor, or
(2) Following Surveyor
The surveyor is either an original surveyor setting our original lines for the first time for a landowner, or a following surveyor finding the lines that have already been established.
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The federal statute governing the survey of public lands before they are conveyed into private ownership has remained relatively unchanged since its original enactment. The current codification of the provision pertinent to this case, 43 USC § 752, provides in part that "boundary lines actually run and marked in the surveys . . . shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended . . . ."


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That provision has led to the long-settled rule that the original survey, as actually run "on the ground," controls, even if the survey was done incorrectly and the boundaries are in error. United States v. Doyle, 468 F.2d 633, 636 (10th Cir 1972). In government surveys, the line actually run upon the ground by the original surveyors is the true line.


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While the original surveyor has a right or responsibility to establish new boundaries when he surveys previously unplatted land or subdivides a new tract, the sole duty of all subsequent or following surveyors is to locate the points and lines of the original survey by locating existing boundaries. No following surveyor may establish a new corner or line, or correct erroneous surveys of earlier surveyors, when they track the original survey in locating existing boundaries.

McGee v. Young, 606 So.2d 1215, 1217 (Fla.App. 1992)
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In resurveying a tract of land according to a former plat or survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. [Emphasis in original].


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These rules are intended to be the basis for all surveys relating to the establishment or retracement of property boundaries in the state of Ohio. [Emphasis added].

Ohio Admin. Code, Sec. 4733-37-01. Preamble

VI. Property Law is a State Matter; It has Nothing to do with the Federal Government

All property law issues will be decided under State law, the Federal Government has nothing to do with it.
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The guiding legal principles are not in dispute. Where there is no controlling federal legislation or rule of law, questions involving ownership of land are determined under state law, even where the Government is a party. The rule is recognized implicitly by the federal statute permitting resurveys. See 43 U.S.C.A. § 772.


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JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.


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JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

43 USC § 772. Resurveys or retracements to mark boundaries of undisposed lands

The Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now [on Mar. 3, 1909] provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.
VII. Thou Shalt Remember that “Intent is King.”
When is comes to conveyances, the intent of the Grantor and Grantee is King.

How Do We Find Intent?
1. Start with the Deed
2. Search the Four Corners
3. Deed is only Evidence of Title, not Proof of Title
4. Ambiguities
5. There will always be some level of Conflict between the Written Document and what we find on the Ground.

The intent of the parties to a deed controls its interpretation. When a deed is worded in clear and precise terms and its meaning is evident upon its face, there is no need to go beyond the four corners of the document. If the intention of the parties is apparent from an examination of the deed from its four corners, it will be given effect regardless of technical rules of construction.

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We consistently have held that what boundaries a deed refers to is a question of law, while the location of those boundaries on the face of the earth is a question of fact. If facts extrinsic to the deed reveal a latent ambiguity, then we determine the intent from contemporaneous circumstances and from standard rules of construction. A basic rule is that boundaries are controlled, in descending priority, by monuments, courses, distances, and quantity, unless this priority produces absurd results. The physical disappearance of a monument does not end its use in defining a boundary if its former location can be ascertained.


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It is a fundamental precept of property law that courts should construe instruments so as to give effect to the intent of the parties. Yet, any court undertaking the dissection of such an instrument in order to ascertain the intent of the parties is faced with a task which, by its very nature, is plagued with the difficulties and uncertainties that necessarily accompany any probe into mental processes. Fortunately, however, the burden placed on the courts in scrutinizing deeds is facilitated by a body of judicially and legislatively created guidelines for the construction of deeds conveying property.

Brashier v. Burkett, 350 So.2d 309, 311 ( Ala. 1977)

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JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

Initially, the court should seek to ascertain the intention of the parties by looking to the entire instrument. The court should be careful to try to give meaning to every clause and provision of the instrument.

Brashier v. Burkett, 350 So.2d 309, 311 ( Ala. 1977)
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Second, the court should look to the factual situation and the circumstances existing at the time the instrument was created.

*Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)*

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JEFF’S 10 COMMANDMENTS
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Finally, the court may look to the subsequent acts of the parties to determine the correct construction of the instrument.

*Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)*

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In the context of a surveyor’s inability to locate original monuments or the original survey lines, lines of possession may become significant precisely because they give effect to the conveyer’s intentions. This is particularly true when a conveyance contains a written statement describing these intentions. Accordingly, where a deed contains such a recitation of the parties’ intentions, a surveyor should compare all of the conflicting descriptive elements, such as lines of possession, monuments, and acreage, and give the most weight to the element or elements which best effectuates the intentions of the parties to the deed.

The issue here is not of a disputed boundary. It is what the deed means. It is an application of the deed to the land, and not of the land to the deed. ... There is no difficulty in locating and establishing the line when it is ascertained how the deed requires it to be run. The boundary is doubtful only because the meaning of the language of the deed is doubtful, and the problem is not how or where to establish bounds answering the calls of the deed but to say what the calls of the deed are. ... That the evidence would be admissible to show where bounds are is not a reason to make it competent to show where they should be.

*Smart v. Huckins*, 134 A. 520, 522, 523 (NH 1926)

When the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. ... The general descriptions contained in the boundary line “fit” two possible alternate interpretations on the ground. Therefore, it was proper and necessary for the court to receive parol evidence from both parties indicating where the boundary line was commonly understood to lie.


Here the court found that there is no official or original plat or survey by which the boundary line can be located, and the evidence shows that the different surveyors do not agree on the location of the boundary line. This clearly creates sufficient uncertainty on which to base a finding of a boundary line by acquiescence.

*Jensen v. Bartlett*, 286 P.2d 804, 806 (Utah 1955)
VIII. Monuments are the Physical Manifestation of the Intent of the Grantor and the Grantee.
The only reason monuments have their high standing is that the courts generally assume that they are the physical manifestation of intent.

Prima facie, a fixed visible monument can never be rejected as false or mistaken in favor of mere course and distance as the starting point, when there is nothing else in the terms of the grant to control and override the fixed and visible call. The general rule that courses and distances must yield to natural or artificial monuments rests upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties.

Myrick v. Peet, 180 P. 574, 576 (Mont. 1919).

Thus, Plat E-52 depicts the northern boundary monuments as being on the east-west quarter section line. However, Best's placed monuments are located 138 feet south of the east-west quarter section line for Section 32. Furthermore, Best located the east quarter corner of Section 32 outside of Highway 191 when it is actually located near the centerline of Highway 191. Consequently, the District Court was correct in determining that the inconsistencies between the references on Plat E-52 and the location of Best's monuments create an ambiguity.

Olson v. Jude, 73 P.3d 809, 816 (Mont. 2003)
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These fundamental survey principles provide that the parties' intent is paramount to all other considerations when interpreting surveys and conveyances. In the case sub judice, the Certificate of Dedication on Plat E-52 clearly shows that the Zollingers intended that the northern boundary of the Big Horn Tract extend to the east-west quarter section line and not to Best’s erroneously located monuments. Best failed to survey the Big Horn Tract pursuant to the Zollingers’ clearly expressed intentions.

Olson v. Jude, 73 P.3d 809, 817 (Mont. 2003)
JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

HOW DOES OHIO LAW COME DOWN ON THIS ISSUE?

The facts in this case support the trial court’s conclusion that the boundary was set by the doctrine of acquiescence. The Ohio Supreme Court recognized the doctrine of acquiescence in 1874 in the case of *Bobo v. Richmond* (1874), 25 Ohio St. 115, when it held that:

McGregor V. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)
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"Where the boundary line of adjoining landowners called for in their deeds, and ascertainable with certainty by survey, had been altered by agreement of the parties, and the occupancy by each up to the agreed line, by improvements and otherwise, had been acquiesced in and continued for a sufficient length of time to bar a right of entry, under the statute of limitations: Held, that an answer setting up these facts constitutes a good defense to an action by one of such owners, or his grantee with notice, for the recovery of the land lying between the two lines."

McGregor v. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)

JEFF’S 10 COMMANDMENTS
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Appellate courts have applied the doctrine of acquiescence to boundary disputes similar to the dispute in the instant case. In Richardson v. Winegardner, 1999 Ohio App. LEXIS 5151 (Nov. 2, 1999) … the Third Appellate District explained the doctrine as follows:

McGregor v. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)

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"The doctrine of acquiescence is recognized in some states as a part of the doctrine of adverse possession, and in others as part of the doctrine of estoppel. Acquiescence rests upon the practical reality that the true location of most boundary lines is uncertain between two property owners, and that neighbors may establish between themselves a boundary evidenced by monuments, such as a line fence, and when these agreements are followed by possession, the boundary so fixed will be conclusive upon them. [Emphasis added]."

McGregor v. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)
JEFF'S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

“The doctrine is applied when adjoining landowners occupy their respective properties up to a certain line, and mutually recognize and acquiesce in that line as the property boundary for a certain period of time, usually equal to the twenty one (21) year statutory time period for adverse possession pursuant to R.C. 2305.04.”

McGregor V. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)

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In Ballard v. Tibboles, 1991 Ohio App. LEXIS 5367 (Nov. 8, 1991), Ottawa App. No. 91-OT-013, unreported, the Sixth Appellate District stated:

McGregor V. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)

JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

“Various jurisdictions tend to delineate different elements for acquiescence because this doctrine is frequently confused with and mingled with the elements of the separate doctrines of adverse possession, estoppel and agreement. Generally, however, the following two requisites must be present in order to apply the doctrine of acquiescence. First, the adjoining land owners must mutually respect and treat a specific line as the boundary to their property. Second, that line must be treated as such for a period of years, usually the statutory time period required for adverse possession.”

McGregor V. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)
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As demonstrated by the modern case law in Ohio, contrary to appellants’ contention, adjoining landowners do not need to specifically agree to a certain boundary line different than the line described in the deed before the doctrine of acquiescence applies. The doctrine is applicable when adjoining landowners mutually respect and treat a specific line as the boundary to their property for at least twenty-one years.

McGregor V. Hanson, 2000 Ohio LEXIS 2666 (Ohio App. 2000)

ANYWHEREVILLE U.S.A.

BRIEF HISTORY:
• 1987 – Developer buys an open field.
• 1987 – Developer hires engineering and surveying firm.
• 1988 – Boundary & Topo complete.
• 1989 – Engineering drawings complete.
• 1991 – Infrastructure complete and Plat Recorded.
• 1992 – Monuments set and Lots sold to Builder.
• 1994 – All houses complete and Lots sold to Homeowners, and Fences go up.
• 2008 – You’re hired to survey Lot 9, Block A.
Where a deed describes property by reference to plat or map, grantee takes title in accordance with the boundary so identified; but where discrepancy exists between call in deed for monuments and courses and distances shown by plat referred to, general rule that monuments control courses and distances will be followed.

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If there is a call for a monument, that monument, if discovered undisturbed and uncontradicted by the remainder of the writings, is conclusive. A deed that calls for bearing and distance but does not call for a monument either directly, indirectly, or by reference, and is not required by law cannot be altered by giving control to a monument found in the vicinity of the bearing and distance termination.


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JEFF’S 10 COMMANDMENTS
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In the eyes of the law, chronology plays an important role. If monuments can be proven to have been set immediately prior to or coincident with the creation of the description, they are held to be emblematic of, and the physical control of, the written words, and more especially if cited. In contrast, if the timetable shows a material spread between the creation of the deed in words and the subsequent setting of the points on the ground, the monuments cannot be claimed as superior to calls.

Wattles, Gurdon H., Writing Legal Descriptions, Sec. 8.8.

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In Kimms v. Libby, 87 Neb. 113, 126 N. W. 869, the following language is found: "Where the true line can be ascertained and parties by mistake agree upon an erroneous line as their boundary, believing it to be the true line, they will not be concluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run or equitable reasons exist for establishing an erroneous line."

Myrick v. Peat, 180 P. 574 (Mont. 1919)
JEFF’S 10 COMMANDMENTS
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A monument is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purposes of determining the location of a boundary, even though this means either the shortening or lengthening of distance, unless the result would be absurd and one clearly not intended, or all of the facts and circumstances show that the call for course and distance is more reliable than the call for monuments.

*Bugg v. Fancher, 2007 OhioApp.LEXIS 1898 (Ohio App. 2007)*

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Thus, when reviewing the evidence involved in a boundary dispute, courts should first consider natural and permanent monuments. Natural boundaries are next to be considered, followed by artificial marks, adjacent boundaries, course and distance, with course controlling distance. Area is the least important consideration.

*Bugg v. Fancher, 2007 OhioApp.LEXIS 1898 (Ohio App. 2007)*

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While tangible landmarks generally prevail over courses and distances, the court is permitted to consider other evidence if it concludes the use of a landmark would create an absurd result or the landmark is less reliable than course and distance.

*Bugg v. Fancher, 2007 OhioApp.LEXIS 1898 (Ohio App. 2007)*
IX. Not all Evidence is Good or Relevant Evidence.
The Courts will only hear relevant evidence. During the course of a survey, you’re likely to run across both good (relevant) and bad (irrelevant) evidence.

Fed. Rules of Evidence
Rule 801. Definitions
The following definitions apply under this article:
(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802. Hearsay Rule
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
JEFF’S 10 COMMANDMENTS
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Can “Sonny-Boy” (in the year 2008) testify as to where the original GLO surveyor set the section corner in 1810?

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

BEST AVAILABLE EVIDENCE
Manual of Surveying Instructions 1973

6-4. A dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. …
6-4. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey. …

6-5. An independent resurvey is an establishment of new section lines, and often new township lines, independent of and without reference to the corners of the original survey. In an independent resurvey it is necessary to preserve the boundaries of those lands patented by legal subdivisions of the sections of the original survey which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey. This is done by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey. These tracts represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions.
The basic principles of protecting bona fide rights are the same in either the dependent or the independent resurvey. Each is intended to show the original position of entered or patented lands included in the original description.

The dependent resurvey shows them as legal subdivisions, the independent resurvey as segregated tracts. Each is an official demonstration by the Bureau of Land Management according to the best available evidence of the former survey. There is no legal authority for substituting the methods of an independent resurvey in disregard of identified evidence of the original survey.

WHAT IS BEST AVAILABLE EVIDENCE?
After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons.

Monuments have special significance because monuments indicate the location of property at issue on the ground. The search for monuments must continue until the monuments are located or until there is an explanation for their absence. If necessary, the surveyor should consult former surveyors, landowners, residents, or other knowledgeable parties to determine monument sites or obtain other information tending to show where a piece of property should be located.

Testimony of neighbors and informed residents concerning boundaries is an important source of information for resurveys. As stated in one treatise, “[a] diligent, thorough, and complete search for all evidence is the fundamental essence of land surveying.” Through these investigative efforts, the surveyor attempts to reach his or her goal: the "location of land boundaries in accordance with the best available evidence" even though the best evidence may be "mere hearsay or reputation."
For a corner to be lost it "must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information." (Citation omitted). The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position.

Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.

There is no clearly defined rule for the acceptance or non-acceptance of the testimony of individuals. It may be based upon unaided memory … or upon definite notes and private marks. The witness may have come by his knowledge casually or… had a specific reason for remembering. Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced.
5-7. Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories. No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of the surveyor, bearing in mind the relation of one monument to another and the relation of all to the recorded natural objects and items of topography.

5-8. No decision should be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. The retracements will indicate the probable position and will show what discrepancies are to be expected. Any supplemental survey record or testimony should then be considered in the light of the facts thus developed.

"PRINCIPLE 5. Evidence is not proof. Evidence leads to proof. A consideration of all evidence and conclusions to be drawn from evidence, in accordance with the law of evidence, may produce proof."

CHAPTER V
Restoration of Lost or Obliterated Corners

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

5-5. Even though its physical evidence may have entirely disappeared, a corner will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.
CHAPTER V
Restoration of Lost or Obliterated Corners

5-9. An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

5-20. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.

STATE OF IDAHO V. BARNETT
Supreme Court of Idaho

In November 1977, the State hired Charles Cuddy, a registered land surveyor to conduct a survey of the boundary line separating the state land from the Barnetts'. Mr. Cuddy concluded that he could not definitively locate the northeast corner of the section of land owned by the State. Mr. Cuddy determined that the corner was "lost," as opposed to "obliterated." As a result he fixed the corner using the method referred to as proportionate measurement. This method placed the boundary 35 feet south onto the Barnett property.
Judge Maynard, after hearing all the evidence concluded that though the evidence was conflicting, the State had not met its burden of proving by a preponderance that the fence line separating these properties was not the true boundary line. He accorded greater weight to the analysis of Mr. Burcham holding that sufficient indicia of the corner established that the corner was "obliterated" and not "lost." Therefore, he rejected the State's redrawn boundary line based upon proportionate measurement.

The Court of Appeals reversed the district court. The Court of Appeals held that a party seeking to establish that a property corner is "obliterated" must come forward with evidence showing that although there are no remaining traces of the original corner monument, the point may be recovered beyond a reasonable doubt by other acceptable evidence. Our review centers upon the Court of Appeals holding that a party seeking to recover the location of an "obliterated" corner must sustain the burden of proving the location of that point beyond a reasonable doubt.

At the urging of the State, the Court of Appeals zeroed in on the "beyond reasonable doubt" language underscored in § 5-9 of the manual quoted above. However, the manual has never been adopted as a rule of civil procedure in the courts of this state. Nothing in the record demonstrates that it was intended to serve as anything but a rule for the guidance of surveyors in the field in their analyzing evidence found at the scene.
The only reference in our statutes to the manual is contained in Idaho Code § 31-2709 quoted above. As stated therein, the only relationship between the courts of this state and the manual is that surveys or resurveys should conform with the manual and with the other BLM publications mentioned in the statute in order to be admissible as legal evidence of a survey or resurvey in any court within this state. No mention whatsoever is made in the statute regarding the respective burdens of proof for the respective parties to a survey dispute.

We agree with the Barnetts that to affirm the Court of Appeals opinion in this case would create an untenable situation for private landowners whose property lines abut state lands. If affirmed, the Court of Appeals opinion would allow the State to resurvey a line, introduce evidence of a survey which states the corner is a "lost" corner not an "obliterated" corner, and then the private landowner would be saddled with the highest standard of proof that exists in civil or criminal law of proving that the corner is obliterated beyond a reasonable doubt.

The effect of such an affirmance would be to change the long standing allocation of the respective burdens of proof in a civil trespass action. This we are not persuaded to do.
The BLM manual and the BLM circular entitled "Restoration of Lost or Obliterated Corners and Subdivisions of Sections, A Guide for Surveyors" (1974) are not statutes -- even though the Court of Appeals appears to have treated them as statutes.

The weight of authority is convincing that the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence.

The dissenting opinion appears to argue that the "substantial evidence" test is unprecedented. As BLM well knows, and hence its petition for reconsideration in this case, the standard enunciated here comports with the agency's own interpretation of the Survey Manual, which it wrote, and the actual manner in which it has consistently applied the provisions of the manual throughout the years in thousands of survey decisions.
The entire thrust of the Survey Manual is to recognize corners as existent, rather than lost, if at all possible. The Board's prior decision, requiring proof beyond a reasonable doubt that a corner is existent, understandably caused a stir among survey professionals and BLM management.

In Stoddard Jacobsen v. BLM (On Reconsideration), we found that "the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence." The standard adopted by Stoddard Jacobsen (On Reconsideration), was derived from Manual section 5-5, dealing with lost corners, which provides that "[i]f there is some acceptable evidence of the original location of the corner, that position will be employed."

There is no reason why this language would not apply with equal authority to determination of an "obliterated corner." An obliterated corner is defined as one at whose point there are no remaining traces of the monument or its accessories, but, whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of interested landowners, competent surveyors, other qualified local authorities, or by some acceptable record evidence. (Manual section 5-9).
JAMES O. STEAMBARGE
116 IBLA 185 (October 4, 1990)

For either an existent corner or an obliterated corner there must be some evidence of the original corner location. Consistent with our decision in Stoddard Jacobsen, supra, we hold that a corner is shown to be obliterated if there is substantial evidence of a perpetuated corner location.

LAWYERS TITLE INSURANCE CORP. v. BLM
117 IBLA 63, (December 3, 1990)

This holding is consistent with Stoddard Jacobsen v. BLM (On Reconsideration), in which we held that "the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence."

HOWARD VAGNEUR
IBLA 96-151
June 27, 2003, Decided

The proper standard for BLM to apply in the course of a dependent resurvey is to consider a corner "existent" (or "found") if such a conclusion is supported by substantial evidence. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
We have long recognized that original lines are to be reestablished under a dependent resurvey by recovering or restoring the original corners by any of three methods, in descending order of importance.

First, an "existent" or "found" corner can be recovered by finding evidence of the monument and/or its accessories. Survey Manual, § 5-5, at 130.

Second, an "obliterated" corner, where there are no remaining traces of the monument or its accessories, can be recovered where the corner's location has been perpetuated or where other acceptable evidence establishes its location. Survey Manual, § 5-9, at 130.
Third, where a corner cannot be considered existent or obliterated based on substantial evidence regarding its location, it will be regarded as a "lost corner" to be restored by reference to one or more interdependent corners by the method of proportionate measurement.

When a dependent resurvey is performed 100 years or more after the original survey, the location of original corners must be based on the "best evidence available of the positions of the original corners" at the time of the resurvey.

Thus, while little evidence remained on the ground of the location of the northwest section corner of section 2, BLM identified a situs for the corner which closely matched Adams’ and Monroe’s record bearing and distance to other nearby corners (which were accepted). The fact that a corner stands in a place that is in proper relation to neighboring found section corners contributes to a finding that BLM’s determination that the corner is "existent" is supported by substantial evidence.
Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

JEFF’S 10 COMMANDMENTS ON SURVEYING EVIDENCE AND PROCEDURES

X. Thou Shalt Be an Expert Evaluator of Evidence Not Simply an Expert Measurer.

The boundary surveyor must be an expert evaluator of evidence. Measurements are simply one piece of evidence that must be evaluated along with all of the other evidence.

What Every Lawyer Should Know About Title Surveys

Mitchell G. Williams and Harlan J. Onsrud,

The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client’s next door neighbor. The surveyor’s opinion is founded on experience and applicable legal precedents. Unlike the attorney, the surveyor does not see himself primarily as an advocate for his client. …
Merely locating the lines described in a deed on the ground is not adequate for establishing the physical limits of a property ownership. …

A surveyor is guided by legal principles in his evaluation of the evidence for a boundary line location. One such principle is the presumed priority of conflicting title elements that determine boundary line location. … The resolution of conflicts between written and unwritten rights is one of the most difficult problems for both surveyors and lawyers. …

If the surveyor’s evaluation of the evidence...is eventually upheld in a court of law, it is because the surveyor has arrived at a comprehensive and well-reasoned answer rather than because he has arrived at the theoretically correct answer. Again, there are no “true” answers waiting to be discovered; only well-reasoned answers.
NEWFOUND MANGMT CORP, Plaintiff,
v.  
SEWER, et al, Defendants.  

U.S. DISTRICT COURT FOR THE DISTRICT OF 
THE VIRGIN ISLANDS, DIVISION OF ST. 
THOMAS AND ST. JOHN 

885 F. Supp. 727; 1995 U.S. Dist. LEXIS 6522 
March 27, 1995, Decided 

[Excerpts from the case, not the full text]
NEWFOUND MANAGEMENT CORPORATION, Plaintiff,
v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS AND ST. JOHN

885 F. Supp. 727; 1995 U.S. Dist. LEXIS 6522
March 27, 1995, Decided

[Excerpts from the case, not the full text]

GENERAL SURVEYING PRACTICES

Background Research

The court will first set forth basic principles of surveying based on its review of relevant treatises and case law as well as the expert testimony offered at trial by the parties. A surveyor should strive first to locate and examine all historical records, deeds, prior surveys, maps and drawings in preparation for conducting an original survey. (Citation omitted). If the surveyor is not performing an original survey then the surveyor must also carefully review the original survey, as well as subsequent surveys or drawings. The purpose of thoroughly researching the history of a parcel of land is to ensure that the surveyor will be able to incorporate the most complete and accurate data into his or her survey. If a surveyor does not complete such research, the surveyor might perform the survey without having the benefit of essential information. For instance, the surveyor might not adequately search for crucial monuments or might misinterpret other field or documentary evidence. In addition, if a surveyor knows that his or her survey will be used in a particular manner, a surveyor should review relevant documents and field surveys of adjacent parcels of land to ensure that his or her particular survey will be reliable and consistent with other existing surveys, so as to discourage litigation.

Note: At the outset, the court recognizes that a surveyor is a licensed professional with specialized training who is presumed to be impartial.

The surveyor should at all times maintain the highest degree of personal ethics with respect to his [sic] work, and not be influenced one way or another in the face of facts which convince him that a certain course is wrong. He should be as free from prejudice or influence favorable to one or the other party as a judge on the bench or a juror in the box.

On occasion, a surveyor may be forced to give up work if a client asks the surveyor to falsify boundaries or deliberately draw an incorrect map to benefit the client.

When a surveyor goes on the land and relocates an original surveyor's monuments, this subsequent survey is technically known as a "resurvey." This section of the court's opinion, however, uses the terms interchangeably.
Field Surveys

After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons. Monuments have special significance because monuments indicate the location of property at issue on the ground. The search for monuments must continue until the monuments are located or until there is an explanation for their absence. If necessary, the surveyor should consult former surveyors, landowners, residents, or other knowledgeable parties to determine monument sites or obtain other information tending to show where a piece of property should be located. Testimony of neighbors and informed residents concerning boundaries is an important source of information for resurveys. As stated in one treatise, "[a] diligent, thorough, and complete search for all evidence is the fundamental essence of land surveying." (Citation omitted). Through these investigative efforts, the surveyor attempts to reach his or her goal: the "location of land boundaries in accordance with the best available evidence" even though the best evidence may be "mere hearsay or reputation."

The Centrality of the Original Survey

Since the physical position of monuments referenced in a conveyance reflect the original boundaries of a particular parcel, a subsequent surveyor must attempt to conform his or her survey as closely as possible to the prior surveyor's work. Hence treatises and courts frequently recite an admonishing maxim, namely that a surveyor must follow in the footsteps of the original surveyor. The purpose and result of this principle is to give effect to the intentions of the parties at the time of the survey as well as ensuring the continuity of boundaries over time. Accordingly, "the general rule governing the determination of boundary lines by resurvey is that the intent of the new survey should be to ascertain where the original surveyors placed the boundaries," not to determine new modern boundaries. (Citation omitted).

DETERMINING THE INTENT OF PARTIES TO A CONVEYANCE

While a surveyor must aspire to walk in the exact steps of an original surveyor, sometimes a surveyor may be unable to find monuments placed by the original surveyor because the monuments may have been obliterated or lost. When a surveyor is unable to follow the precise "footsteps" of his or her predecessor, then a surveyor must attempt to track the original surveyor's work using whatever recoverable evidence that exists. (Citation omitted). Ultimately, a surveyor may only be able to "say with a great degree of certainty, 'this is where the surveyor walked.'" (Citation omitted).

Original Survey Lines or Lines of Possession?

When a surveyor has difficulty retracing the original surveyor's steps, either because field evidence is missing or conflicting, certain principles guide his or her evaluation of existing field evidence. First, because original lines control other information contained in the conveyance, a sur-
veyor should determine whether or not a line of possession, such as a fence, marks the location of the original survey line. (Citation omitted). For instance, if the possession line is marked by an old boundary fence erected at approximately the same time as the original surveyor ran the lines, the fence may memorialize the survey line itself. (Citation omitted). A surveyor's determination that a line of possession corresponds with an original survey line should be made according to the best evidence available which may include testimony of residents and the evaluation of the age of fencing or other natural monuments. In addition, where surveyors disagree on the location of property lines and where a true survey line may be uncertain, monuments, such as fences which mark a possession line and which were established soon after the original survey, will control.

In the context of a surveyor's inability to locate original monuments or the original survey lines, lines of possession may become significant precisely because they give effect to the conveyer's intentions. This is particularly true when a conveyance contains a written statement describing these intentions. Accordingly, where a deed contains such a recitation of the parties' intentions, a surveyor should compare all of the conflicting descriptive elements, such as lines of possession, monuments, and acreage, and give the most weight to the element or elements which best effectuates the intentions of the parties to the deed.

Monuments

Existing and undisturbed monuments called for in a conveyance are afforded the most weight and are given precedence over distance, direction or area. (Citation omitted). In turn, natural monuments like a well-known tree or large rock, take precedence over artificial monuments like a fence, stake or ditch, because they are fixed and naturally occurring. Since monuments or objects afford greater certainty than computations of courses or distances, the "true intention of the parties will more probably be ascertained by adopting the call for natural monuments." (Citation omitted). If a monument is obliterated the testimony of residents, witnesses, or other surveyors may reestablish its original location.

Note: The Bible itself guides the contemporary surveyor's respect for even artificial monuments, "Cursed be he that removeth his neighbor's landmark."

Acreage

In contrast to monuments, the most credited elements of a description according to the canons of construction, quantitative elements, such as stated acreage, have the least relative importance. "In the determination of boundaries of land, quantity or area has been variously declared, with qualifications, ... the least certain or reliable element of description, ... without weight or effect, ... . the last element to be resorted to." (Citation omitted). When a conveyance includes a description of acreage combined with the words "more or less," the element is a recognized approximation. As such, acreage is less reliable as a means of determining the location and boundaries of the described property when more substantial evidence exists.

Consequently, if an individual purchases property from a seller who intended to convey certain defined property described in the conveyance by metes and bounds and approximate acreage "more or less," the stated acreage loses its authoritative value if a subsequent survey shows that the property is larger or smaller than the stated acreage. (Citation omitted). The purchaser's holdings are
limited by the seller's intent to convey the certain parcel as described by metes and bounds. The stated acreage does not entitle the purchaser to any more or less property. In Thorp, the court stated the "phrase 'more or less' indicated merely that 13 acres was the approximate and not the precise area of the parcel of land which was conveyed by designation. While a survey may demonstrate that a stated acreage amount is incorrect, a survey may not carve out (or eliminate) parcels of adjacent land and add them to the first parcel to increase (or diminish) the acreage to conform to the quantitative description in the deed. Similarly, in Pendall v. Virgin Islands Title & Trust Company, where plots of land were pointed out to the purchaser and described by metes and bounds on a survey plan, the deed's description by metes and bounds prevailed over an inconsistent reference to acreage.

The Cumulative Weight of the Evidence

Even though monuments usually control other inferior descriptive elements, occasionally, upon examination of all of the different elements, a surveyor may conclude he or she should follow the inferior elements called for in a conveyance rather than a particular monument. Surveyors should be sensitive to the weight of the evidence when all the relevant elements are considered. For instance, a surveyor may locate property according to the distances and area described in a deed rather than relying on a monument because the distances and area taken together seem to better reflect the original intentions of the parties to the conveyance. Better surveying practice requires a surveyor to evaluate initially all of the available evidence, even if ambiguous, regardless of its character. Then the surveyor should draw his or her conclusions based on the most persuasive information, rather than blindly relying on an abstract ordering scale to evaluate evidence on his or her behalf. (Citation omitted.)