

Course 3: Survey Evidence Analysis Study Guide

COURSE DESCRIPTION:

This set of videos and other teaching aids addresses one of the most complex tasks in cadastral surveying, the analysis of the field evidence and it's correlation with the written record. The course is essentially presented with three unique sessions on the subject from instructors of varying backgrounds and experiences. Practical on-the-ground advice is offered, as well as a thorough discussion of the legal concepts and issues involved in the analysis of corner evidence.

COURSE OBJECTIVES:

Upon completion of this course, students will be able to:

- Provide legal and historical backgrounds for evidence analysis procedures
- Discuss proper use of evidence, including confusing evidence situations
- Practice reading of and interpretation of field notes and plats
- Present proper markings on monuments









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VIDEO LECTURE TITLE:

Evaluating Corner Evidence – Part 11 (33 minutes)

ICON LEGEND

 WEB COURSE	 EXERCISE	 DIAGRAM	 READING ASSIGNMENT	 PROBLEM	 HANDOUT	 2009 BLM MANUAL	 QUIZ
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EVALUATING CORNER EVIDENCE – PART 11

Resurvey Principles

Let's move on to basic principles of resurveys. We've talked about inviolate rules pertaining to the constitution and federal statute law; now let's talk about some basic principles.

In the Manual Chapter 5, Section 10, dependent resurveys defined: a dependent resurvey is retracement and reestablishment of the lines of original survey. In their true original positions according to the best available evidence of the position of the original corners in legal contemplation and in fact the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

That's the definition of a dependent resurvey; did the local surveyor conduct a dependent resurvey? Can you make that finding? Manual 5-28: bona fide rights in dependent and independent resurveys. The basic principles of protecting bona fide rights in the resurvey to show the original position of alienated lands included in the original description.

The resurvey is an official demonstration by the BLM according to the best available evidence of the former survey. What is the best available evidence? We'll be talking more about that. Manual 5-29: corner of the original survey unchangeable.

The position of a tract of land described by legal subdivision is absolutely fixed by the original corners and other evidence of the original survey and not by occupation or improvement unrelated to the original survey or the by the lines of a resurvey which do not follow the original. So I circled occupation or improvements unrelated to the original survey, that's significant. Under fundamental law the corners of the original survey are unchangeable, even if the original survey was poorly executed it still controls the boundaries of land alienated under it or lands patented under it. Manual 5-36: resurvey restores original conditions. A resurvey is an official remarking of the original lines upon a plan where by existing evidence of the original survey is given primary control over the positions of the lines to be reestablished.

The resurvey is designed to restore the original conditions of the official survey according to the record. A resurvey is based upon identified original corners and other acceptable points of control. A resurvey is



HANDOUT A copy of Bob Dahl's presentation that he uses during topics 9-12 can be found in the Handout section at the end of the Evaluating Corner Evidence –Part 9 study guide.

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based upon the restoration of lost corners by proportionate measurements in harmony with record of the original survey. And resurvey is based upon some flexibility allowable in applying the rules of proportion measurement, some flexibility, in order to protect the bona fide rights claimants.

Particularly in those cases where no objection is found to adopting a point acceptably located under the rule of good faith and only at slightly at variance with the theoretical position. Now, here you beginning feel some tension between a rigidly following the rules of proportioning measurements. For instance, meaning you have come to the conclusion that the corner is lost versus accepting a location that is been locally adopted that may not rigidly follow the rules of evidence and may not rigidly follow the rules for restoration of lost corners we're going to always be in this tension of, do I have locally accepted conditions? Am I looking at an obliterated corner?

A perpetuation of the original corner as evidence by a local fence corner? Or am I looking at a local fence corner that was not set in relation to the original survey or the best available evidence of the original survey and therefore will not influence my resurvey and it is a lost corner and the mathematical primary method of restoration will be implemented.

We're always having these tensions. Manual 6-3: the authority of the Secretary of the Interior. The principles of a resurvey and original survey apply to the resurvey of an official resurvey and generally to the resurvey of a local resurvey. Let me say again.

The principles of a resurvey of an original survey, when you're resurveyor number one, apply to the resurvey of an official resurvey when you're resurveyor number two and generally to the resurvey of a local survey. Prior official resurvey, official resurveys, official federal authority resurvey and local surveys subsequent to the original survey must be considered in context of the objectives of each government resurvey.

The objectives of a government resurvey are A: the adequate protection of the existing rights acquired under an original survey and faithfully located by subsequent survey in the matter of location on the Earth's surface. Adequate protection of existing rights acquired under an original survey and faithfully located in the manner of location on the Earth's surface.

The second objective of a government resurvey is to proper marking of

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the boundaries of the remaining federal interest lands. Once you've identified the bona fide rights of the private land what's left over is the federal land.

General rules of resurvey, these general rules are accepted as a means of protecting bona fide rights in the execution of resurveys. The general rules are applicable in cases, the general rule, later on we're going to talk about exception to the general rules right now we're talking about general rules. General rules are applicable in cases; one, showing fairly coordinate relation between conditions on the ground and the record of the original survey.

Two, the original survey was made faithfully and is supported by reasonably good field note record. When those existing conditions of a good original survey then the general rules will be applicable.

Corner Classifications

Let's talk about **existent, obliterated and lost corners**. The Manual provides guidance on the acceptability on physical evidence and testimony. Manual 6-11, an existent corner is one whose original location can identified by substantial evidence of the monument or its accessories by reference to the description in the field notes or located by acceptable supplemental survey record some physical evidence or reliable testimony.

For you who have been following your Manual reading your section 6-11, you'll notice what I read does not match identical with what's in the 1973 edition. You probably have some language of "beyond reasonable doubt" where what I read was "substantial evidence."

The term substantial evidence is inserted in response to **Stoddard Jacobsen and Robert C. Downey v. the Bureau of Land Management on consideration 103 IBLA 83**. The Interior Board of Land Appeals has changed the standard without going into the discussion on why they did that and how they did that and the full implementation and impact of that, the standards have changed from beyond a reasonable doubt to substantial evidence. So we need to know what substantial evidence is it pertains to the recovery and evidence of an original corner.

A corner is existent or found if such conclusion is supported by substantial evidence. The substantial evidence standard of proof is such

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relevant evidence as reasonable mind might accept as adequately support a conclusion. Substantial evidence is defined by the courts as, more than a scintilla of evidence but less than a preponderance of the evidence. Even though its physical evidence may have entirely disappeared a corner will not regarded as lost if its location can be recovered through the reliable testimony of one or more witnesses who have dependable knowledge of the original location. IBLA has changed the standard for evidence to prove existent corner that definition proactive, prospective it is not retroactive.

Prior to Stoddard Jacobsen decision in 1988, what was the standard that IBLA had supported and the courts had supported? They had supported the language in the 1973 beyond a reasonable doubt. The substantial evidence standard will not be applied to a 1930 evaluation that used beyond a reasonable doubt. From 1988 on that substantial evidence has been the standard by the Bureau of Land Management and it will incorporated into the next addition to the Manual.

Manual 6-12: the need for **collaborative evidence**. What's the definition of collaborative evidence? I recommend that you purchase *Black's Law Dictionary* or the equivalent to begin to get the generic definition of these terms. The need for collaborative evidence is in direct proportion to the uncertainty of the original feature in doubt or dispute. The shakier the corner evidence is around the corner the more you need the topography calls to tighten it up. Collaborative evidence. The firmer the physical evidence of the corner the less the topography has to agree.

Discrepancies in the record 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 relation to all to the recorded natural objects and items of topography. The records of official surveys fall under the doctrine of presumption of regularity. The doctrine of presumption of regularity that is, the official record is correct unless it establish by a preponderance of the evidence otherwise. The presumption is, that the surveyor did what the record said that's the presumption, you have to prove otherwise. 6-16, the retracement will indicate the probable position and will show that discrepancies are to be expected.

Any supplemental survey record or testimony should then be considered

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in the light of the facts thus developed. What's an example of a supplemental survey record or testimony? A local survey record. This language in sections 6-12, 6-13, and 6-16 you might think about your describing the evidence that you have found during your survey that this is what the judge or the IBLA Judge or Judicial Judge is going to hold you up against. I think it just makes sense to use the same language that their going to use. Can you make a finding that you have collateral evidence that's substantiates a position with weak physical evidence? That's the kind of language you want to think about using.

Let's go to 6-17: an obliterated corner. And again as you follow along in your Manual you're going to see that I'm not going to use the term "beyond reasonable doubt" I'm going to use "substantial evidence" for the same reason we talked about in existent corner. An obliterated corner is one at whose original position 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 by substantial evidence by the acts or reliable testimony of the interested landowners, competent surveyors, other qualified local authorities or witnesses, or by some acceptable record evidence.

Continuing on an obliterated corner a position or location that depends upon the use of collateral evidence, not collaborative but collateral evidence can be accepted only as dually supported generally through proper relation to known corners and agreement with the field notes regarding distances to natural objects, stream crossings, line trees and off line tree blazes etc. or reliable testimony. Manual 6-18: the greatest care is necessary in order to establish the bona fide character of the record intervening after the destruction of an original monument. The bona fide character of that local survey, can you establish it? Or can you not establish it? How do you go about establishing the bona fide character of that intervening record?

Full inquiry may bring to light various records relating the original corners and memoranda of private markings and the surveyor should make use of all such sources of information. We have rich opportunities for research possibilities that's another way to say not all the relevant survey records are in the county court house, but we are held accountable for them to locate them.

The manner of boundary disputes should be carefully looked into as so far as adverse claimants may base their contentions upon evidence of the

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original survey, if such disputes have resulted in a boundary suit the record testimony and the court's decision should be carefully examined for information that may shed light upon the position of an original monument. That's another way of saying "talk to the locals" it don't take very many talks if they know you're a surveyor before they start talking about if there's issues in the neighborhood or there's been disputes or somebody didn't like what somebody did, somebody's great grandfather messed with somebody's grandfather. Those are all relevant, possible collateral evidence.

Finally, **lost corners** 7-2 and again you'll see the substitution of substantial evidence for beyond a reasonable doubt. I'm not an attorney, in general terms the judges and the legal profession when they were reviewing the language in the Manual they landed on that "beyond a reasonable doubt" in their world was used for criminal cases and that substantial is a standard used in civil cases. So they determined that the proper standard is substantial evidence and when you read these cases that I cited over here starting with Stoddard Jacobsen you'll be able their analysis. Why they evolved the way they did.

A lost corner is one whose location can not be determined by substantial evidence either from substantial evidence, more than a scintilla less than a preponderance and certainly less than beyond a reasonable doubt, either from traces from the original marks or from acceptable evidence or reliable testimony that bears upon the original position and whose location can be restored only by reference to one or more independent corners.

Implicit with this paragraph is the test; if the corner is lost does the restorative method and the position of the restored corner protect bona fide rights as to location? In other words once you determine that a corner is lost now you got to make sure select the proper restoration procedure that protects **bona fide rights**. Thus if substantial evidence of the location of the original corner exists that position will be employed in preference to the rule that would be applied to a lost corner. In addition, once a corner is considered lost it is the surveyors responsibility to ensure that the restoration method and the restored position comply with statutory protection of bona fide rights requirements delineated in 43 US Code 7772.

Well we all know how to establish a lost interior section corner the primary method in the Manual is double proportion. But if the facts are such that for whatever reason, if the facts are such that to do a double

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proportion method was to make a finding that you're going to impair bona fide rights for different reason and we'll have case studies on that to apply double proportion would impair bona fide rights then it's incumbent upon you to pick a different restoration method a three way proportion or a two way proportion.

Manual 7-1, 7-4, 7-5, and 7-7 provides rules for lost corners and that proportionate measurement harmonizes survey practice, survey practice as practiced by the original surveyors. How they were supposed to do it, the rules and regulations. Proportionate measurements harmonizes the surveying practice with legal and equitable considerations.

In the Manual 7-8, 7-16, 7-53, 7-54, and 7-56, 7-57 describe proportionate measurement methods. 7-5 the manifest errors in measurements are removed from the general average difference and placed where the blunder was made prior to proportionate measurement. Got a section corner, section corner, section corner, section lines, lost quarter corner. Record says eighty chains turns out it's seventy-five chains there's a call for a creek, here the record is ten chains, clear creek hasn't moved. Eighty is the record; seventy-five is the measured, record of ten. When you measure from here to here you get five chains that's measured. Record from here is seventy chains, seventy chains is record.

Here to here you measure seventy chains measured. You got a lost section corner on an East West line the standard method for reestablishing a lost quarter corner is midpoint on line. If you determine you have a manifest error in the measurement then that will be removed and the general average will be placed where the blunder was made so now you're going to proportion between here and here. Proportioning in general terms just removes the systematic and random errors not the blunders.

Indexing

Another part of portioning that we need to be aware of 7-57 is index correction. You know I spent half my career in surveying trying to learn what the rules, are the first half of my career in learning what the rules are and then discovered the second half of my career is about learning the exceptions to the rules.

And remember we talked the general rules are applicable when you don't have blunders. The original survey was faithfully done in a workman like fashion.

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Special Cases

Now 5-75 and 5-76 begin to talk about identification of exceptions to the general rules. It is an axiom among experience cadastral surveyors that the true location of the original lines and corners can be restored, if the original survey was made faithfully and was supported by a reasonable good field note record.

That is the condition for which the basic principles have been outlined and for which the general rules have been laid down. The general rules can not be elaborated to reconstruct a grossly erroneous survey or a survey having fictitious field notes that leads us into the exceptions to the general rules. The Manual provides exceptions to the general rules where rigid application of them, the general rules, will be contrary to legal requirement to protect bona fide rights as to the location.

In general terms, the Manual has three exceptions to the general rule. One good faith location rule exception, two satisfactory local condition exception and three local points of control exception. I want to talk about on page 48 of your handout is a sheet that describes a little more in detail bona fide and good faith. This is a sheet that has title **43 USC 772** and you remember that's the **General Resurvey Act** and the Secretary of the Interior may conduct resurveys provided that no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entry men or owner of land affected by such resurvey or retracement.

We need to get a handle on bona fide and what is bona fide? **Bona fide** is Latin for good faith. In bona fide in or with good faith, honesty, openly and sincerely without deceit or fraud truly actually, without pretense, innocently in the attitude of trust and confidence without notice of fraud, real, actual, genuine made with the earnest intent. Neither spurious nor specious nor counterfeit.

Bona fideism has been in Public Land Survey System since the beginning now bona fideism clearly goes back 3,000 4,000 years. In the Public Land Survey System is started out generally bona fideism as to the entry men. Remember the Public Land Survey System was about conveying getting land marked and identified and described and then conveyed from the government to the citizen. For the first part of the PLSS it was about, was the entry man a bona fide settler?

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For example, believe it or not there was some folks in the 18th, 19th century that tried to bend the rules and they would do different things that they would make an entry on land that they were not qualified to make or they would fudge about the amount of time they have stayed on the land or the amount of improvements they've made on the land. And it became a land office business to determine who was a bona fide settler from people that were not bona fide settlers. Did they intend to follow the law?

Then as you read in the 1820's, 1830's, 1840's era and then particularly up into the 1900's bona fideism as to location. Cause that's what the surveyor deals with is, did they locate themselves in good faith by bona fide? Because it was early recognized in some of the public land system townships that the monumentation of the original survey was poorly done or not done at all or there was a long period of time between the survey and the entry men coming or there was townships where the surveys were very poorly done they were not in any relationship to each other that was apparent to the settlers.

All types of factual situations where the settlers did not have a good grid to locate on. Well did the government rush out there and correct it all? No, the settlers were for the most part left to their own devices many of them did business they best they knew the best they could cause you know they all had money right? No they were settlers.

Of course there were numerous surveyors just hanging around, no there weren't very many surveyors. The survey would cost more than the land would cost. That reality went on for years and years and years and then Judges and courts have said "Surveyors you just can't go in and lay out your surveyed grid over the top of these local conditions." That's why in the Manual they have these survey exceptions, bona fide error a mistake made unintentionally inadvertently on good faith. Bona fide purchaser, one who has purchased property for value without any notice of any defects in the title of the seller. Good faith, Good faith. We're going to talk a lot more about good faith.

Good Faith is an intangible abstract quality with no technical meaning or statutory definition and it encompasses among other things an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. And an individual's personal good faith is concept of his own mind and his inner spirit and therefore may not be conclusively be determined by his protestations only. Honesty of intent

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and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intent. Do you to prove the fence corner or do you have to disprove the fence corner? Was that fence corner located in good faith? Meaning, good faith in that giving the existing conditions did the settler attempt to locate their land without taking unfair advantage of others? One of your findings in a complex area with discrepancy between monuments may come down to good faith determination.

That sort of sets the stage to where the next video lecture is going to go to. We're going to explore in much more detail the exceptions to the general rules, the good faith location rules, satisfactory location conditions and the local points of control. So that ends this part of this video lecture. Thank you.