

Written Materials for Tri-State Surveying Conference

LOST AND OBLITERATED CORNERS – STANDARDS AND CASE STUDIES©

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Cases in the court systems in the United States are generally classified as either criminal or civil cases. Cases concerning property boundaries and surveys fall within the classification of civil matters. In most situations, the plaintiff bears the burden of proof and must prove his case by the “preponderance of the evidence” standard. This standard is stated many different ways, but simply means that one side has proven its case to be more likely than not.

Criminal cases, on the other hand, employ a higher standard of proof. The prosecution in a criminal matter must prove its case “beyond a reasonable doubt.” This is “the highest standard of proof that exists in civil or criminal law . . .” State v. Evans, 116 Id. 429, 776 P.2d 438, 441 (Idaho 1989).

The 1973 *Manual of Instructions for the Survey of the Public Lands of the United States*, *Bureau of Land Management Technical Bulletin 6* provides at Section 5-9, in part, that an obliterated corner is one for which the point “may be recovered beyond a reasonable doubt.” The *Manual*, therefore, imposes the heightened criminal law standard into a civil matter. Landowners, litigants, attorneys, courts and surveyors must therefore consider how the *Manual* and the heightened standard of proof for obliterated corners applies to surveys and lawsuits. The cases analyses that follow are intended to highlight some of the complexities and conflicts

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between the *Manual* and court procedures, and to further offer some guidelines for resolving or minimizing these conflicts.

Case Study No. 1 State v. Evans, 116 Id. 429, 776 P.2d 438 (Idaho 1989). (rejection of standards in United States Manual)

The Barnetts acquired their property in 1966. Their property bordered state property. Until approximately 1977, the state and the Barnetts accepted a fence line as the property line. No one was certain when the fence was constructed, but it was believed to have been approximately 50 years old. In 1977, the state hired a surveyor, Charles Cuddy, to survey the property line. He could not definitively locate the northeast corner and determined that the corner was “lost” as opposed to “obliterated.” As a result, he fixed the corner using a proportionate method, which placed the corner 35 feet on to the Barnetts’ side of the fence. The Barnett’s surveyor, James Burcham, felt that there was sufficient collateral evidence of the original location of the corner to characterize it as “obliterated.” The Barnetts argued that the fence line was the boundary and that it was simply unfair to place the burden on them to recover the original corner “beyond a reasonable doubt” or to suffer the harsh consequences of the proportionate measurement.

Based on the conflicting testimony of the surveyors, the trial court concluded that a conflict of fact existed as to whether the corner could be re-established as an obliterated corner. The trial court placed the burden on proof on the state, as the plaintiff: “The State of Idaho, in order to prevail upon its claim now before the Court, must prove by a preponderance of the evidence that the northeast corner . . . was lost and not obliterated.” The trial court accepted the opinion of the Barnett’s surveyor, and ruled in their favor.

The appellate court referred to the *Manual* and held that the party trying to re-establish an obliterated corner had the burden to prove that corner “beyond a reasonable doubt.” The appellate Court reversed the judgment in favor of the Barnetts.

The issue on appeal to the Idaho Supreme Court was whether the trial court was to apply the “beyond a reasonable doubt” standard provided in the *Manual*.

The Idaho Supreme Court held that the *Manual* is “[B]ut a rule for the guidance of surveyors in the field in their analyzing evidence found at the scene.” *Id.* at 441. “[T]he manual has never been adopted as a rule of civil procedure in the courts of this state.” *Id.* “[T]he only relationship between the courts of this state and the manual is that surveys or resurveys should conform with the manual 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.”² *Id.* The court further held that “to affirm the Court of Appeals would create an untenable situation for private landowners whose property lines abut state lands.” *Id.*

The Idaho Supreme Court concluded that the trial court applied the correct standard and that sufficient evidence supported the trial court’s decision.

**Case Study No. 2 Maplesden v. United States, 764 F.2d 1290 (9th Cir. 1985)
(upholding determination of lost corner)**

Plaintiffs owned land that abutted the Klamath National Forest. Plaintiffs claimed damages from a forest fire. The United States alleged that 35 acres of the land for which Plaintiffs sought damages was forest land. The original survey was conducted in 1883. The

² The statute referred is General Laws of Idaho 31-2709:

31-2709. Surveys must conform to United States manual. – No surveys or resurveys hereafter made shall be considered legal evidence in any court within the state, except such surveys as are made in accordance with the United States manual of surveying instructions, the circular on restoration of lost or obliterated corners and subdivisions of sections, issued by the general land office, or by the authority of the United States, the state of Idaho, or by mutual consent of the parties.

property was resurveyed in 1972. The United States adopted the resurvey in 1977. The resurvey considered the corner to be lost and re-established the corner through proportionate measurement. Plaintiffs claimed the corner was obliterated and that it could be re-established through other evidence, including a black oak tree and a stream referenced in the 1883 survey field notes.

The District Court ruled against Plaintiffs, and accepted the resurvey. The District Court decided that there were too many streams in the area for that to reliable collateral evidence. The District Court also decided that the black oak tree was not the bearing tree in the 1883 survey field notes.

The Ninth Circuit reviewed the case only to determine if the District Court's finding of facts were clearly erroneous. The appeal did not present any legal issues. The Ninth Circuit concluded that the District Court did not commit clear error.

Comment: The Ninth Circuit did not discuss the 1973 *Manual*, possibly because the *Manual* was adopted after the resurvey. Also, Plaintiffs' case was weak and the Ninth Circuit gave it little consideration. Plaintiffs did not even call a surveyor as a witness. The analysis in this case is not detailed enough to conclude that the Ninth Circuit has rejected the standards of proof in the *Manual*.

Case Study No. 3 United States v. Citko, 517 F.Supp. 233 (E.D. Wisc. 1981) (Witness testimony can be persuasive).

The Citkos owned the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Sec. 25. The Forest Service owned the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Sec. 25. The dispute concerned the correct location of the quarter corner on the north line of Sec. 25. The government's primary witness, Mr. Resvick, the Forest Service surveyor, reviewed certain items of evidence and concluded that the evidence was insufficient to re-establish the corner as an obliterated corner. Mr. Resvick

proceeded to re-locate the corner as a lost corner. The Citkos contended that the corner was obliterated, and could in fact be re-established at a point that would have been 44 feet north of the line between the section corners.

The government introduced maps, plats and other documentary evidence in order to prove the unreliable nature of these sources of evidence. These source included notes from a junior forester with Civilian Conservation Corps who indicated that he found the genuine quarter corner for the SE corner of Sec. 24 in 1934. Mr. Resvick concluded that the junior forester did not in fact locate the corner. Mr. Resvick also reviewed a highway department plat of traverse. The plat identified distances from the northern corners to “tie.” Mr. Resvick believed the distances to “tie” were distances from the section corner to the highway, not from the corner quarter corner.

The Citkos, in contrast, based their argument on witness testimony. Mr. Resvick did not ask to interview any witnesses, and the witnesses were not disclosed until the lawsuit commenced. The court noted that “As a professional surveyor, it was incumbent upon him to make a diligent effort to find witnesses before determining there were none . . .” *Id.* at 242. One witness went into great detail about a deer hunting incident in 1927. His brother shot and wounded a deer in the area. They returned the next day, found the dead deer, and dragged it by a rope toward the Citko farm. They rested near two corner posts, one of which was marked “24” on one side and “25” on the other. He further testified that he walked that road frequently and last saw the post in 1937 while planting trees for the Forest Service.

The court accepted the testimony as credible and believed that it was corroborated by other evidence, including the highway map in that the “tie” could reference the quarter corner, and a fence was located over the claimed quarter corner.

The court recited the procedures set forth in the *Manual*, but did not specifically address the evidentiary standards. The court noted that although federal statutes generally address the need to monument corners and run lines, the federal statutes do not specifically address how corners are to be re-established. Accordingly, the disputed corner would be located in accordance with the prevailing law of the state. Wisconsin statutes require resurveys of public lands to conform to the *Manual*. The Court concluded that the quarter corner claimed by the Citkos was in fact the original quarter corner without identifying whether a standard other than the normal, civil, preponderance of evidence standard applied.