

Traversing the Law: What's federal law got to do with it?

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I read with great interest Dennis Mouland's article in the August issue of POB about the next edition of the BLM manual.

I feel that Mouland's article needs comment for at least three reasons. First, he brought up an important topic concerning the next edition of the manual and related state laws. Second, the manual and land surveyors' interpretation and use of it affect a vast geographic expanse stretching, literally, from coast to coast. This makes the manual important and relevant, not only because of this large geographic region but also because of the resulting influence on a large segment of our population. Finally, and with all due respect, I disagree with Mouland on at least one point, and I offer this response to his invitation for discussion and debate.

Too Much Emphasis

The manual is an important document, but it is totally irrelevant for many surveyors—even for surveyors in PLSS states. That is, unless the state has done something to place too much emphasis on the manual.

Let me give you an example from my home state. The entire state of Alabama was surveyed, and the last GLO deputy surveyor left the field before the publication of the first edition of the manual.[1] This means that Alabama was surveyed under special instructions, commonly believed to be General Coffee's two to three pages of instructions, put to paper on May 4, 1817,[2] but practiced from the beginning, circa 1800.

This makes Coffee's instructions highly relevant to any retracement efforts and the manual totally irrelevant. That is, unless the Alabama Legislature or our administrative board, unwittingly or mistakenly, were to turn the manual into a virtual "surveyor's bible" by enacting legislation or passing a rule making it so. We seem to have dodged that bullet. We have no state law or board rule elevating the manual above what it should be—namely, a nice book in our library. The "Standards of Practice" promulgated by our state surveying society

make a nonmandatory reference to the manual, and I am hopeful that (with cool heads in charge) it will remain that way.



One of the important points Mouland makes in his article is that "[s]everal states, mostly in the West, have formally adopted the 1973 manual by statute." [3] Going beyond Mouland's point, it is not only state legislative bodies that have done this.

Administrative boards of licensure have passed rules turning an irrelevant document into mandatory state law in numerous ways. The most common way seems to be by reference. For instance, the legislature passes a law making reference to the 1973 manual as being a mandatory element for some aspect of surveying, such as with mandatory corner record reports. The state board then passes minimum technical standards requiring that the 1973 manual be followed in all retracement work. In some cases, language from the manual has been incorporated directly into the rules and regulations affecting surveying and survey standards. Yet, the manual itself warns that it is not to be seen as anything more than advice:

The Bureau of Land Management assumes no control or direction over the acts of local and county surveyors in the matters of subdivision of sections and reestablishment of lost corners of original surveys where the lands have passed into private ownership, nor will it issue instructions in such cases. It follows the general rule that disputes arising from uncertain or erroneous location of corners originally established by the United States are to be settled by the proper local authorities or by amicable adjustment. The Bureau desires that the rules controlling the acts of its own cadastral surveying service be considered by all other surveyors as merely advisory and explanatory of the principles which should prevail in performing such duties. [4]

The overall thrust of the manual is that it was and is written for BLM employees making original surveys of the public domain or resurveying undisposed-of public lands that were previously surveyed. This work usually involves entire townships, although it can involve sections and the subdivision of sections. This is not work that private practice surveyors will normally undertake. I understand that it happens occasionally, but then we have to step back and remember what our role is as land surveyors. We are either original surveyors setting out property boundaries for the first time or we are retracement surveyors finding the lines that have already been established. The manual addresses this issue, as well.

A retracement is a survey that is made to ascertain the direction and length of lines and to identify the monuments and other marks of an established prior survey. ... [T]he retracement may be an extensive one made to afford new evidence of the character and condition of the previous survey. Recovered corners are rehabilitated, but a retracement does not include the restoration of lost corners or the reblazing of lines through the timber [emphasis added].[5]

As a retracement surveyor following in the footsteps of the original surveyor, in accordance with the strictures of the manual, you are prohibited from declaring a corner lost. Anytime any surveyor within the PLSS system has done this and proportioned an original corner position, you have violated the "law," assuming that your state has enacted the manual as law. If that is the case, then, yes, proportionate measure is a violation of the law. The exception would be if you are performing a "resurvey" of undisposed-of government land as contemplated by the manual.

Mouland advised: "Since you are going to approach your state legislature on a change anyway, might I suggest this wording: 'the applicable *Manual of Surveying Instructions* and its supplement.'" [6] My advice: Remove the wording altogether. In the example of Alabama, should our Legislature decide through misunderstanding or caprice to mandate adherence to the manual, the end result would be a complete undoing of General Coffee's original survey and the titles and boundaries established as a result. Unfortunately, this situation is happening anyway through the misunderstanding and caprice of private practice surveyors who have elevated the manual to a position it should never have held.

What Federal Law?

The statement Mouland made that prompted this response in the first place was: "The Public Land Survey System (PLSS) is the foundation of most title in the United States. Whether your state legislature understands this or not is irrelevant. The location of this title is, in many cases, a function of federal law, and the introduction of quick-fix legislation based on partial understanding has plagued many surveyors trying to conduct retracements of PLSS parcels." [7] There are portions of this statement I agree with and portions I disagree with, but at the very least this statement needs context.

Yes, the PLSS is the foundation of most title in the United States, at

least that part of the United States that was once the public domain. Whether your state legislature understands this or not may be irrelevant, but what it does about it and the laws it passes are highly relevant. The only instance where the location of this title is a function of federal law will be when undisposed-of federal land is involved. Then, and only then, there is a federal statute that gives authority to the secretary of the interior to cause the execution of surveys of the public lands.

The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.[8]

In addition, the secretary of the interior may cause the execution of resurveys or retracements of the undisposed-of public lands essential for marking these lands. However, this is not unfettered authority, and it comes with a proviso.

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 now 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 [emphasis added].[9]

There is no federal law applicable to private property rights, private property boundaries or any of the other factors associated with boundary surveying that will take place in the private sector, where the vast number of private practice land surveyors will offer their services. This includes property owned by the federal government. "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." [10] State law has exclusive jurisdiction over property boundaries with the exception of undisposed-of federal lands unless the Constitution of the United States, a federal treaty or a federal statute is directly implicated. My question remains: What federal law is controlling vis-à-vis property boundaries? There doesn't

appear to be one.

Does this mean the PLSS and the manual are totally irrelevant? By no means. But unless your state was originally surveyed under the instructions of the 1973 manual, this particular edition should be viewed for what it was intended to be: advice. Your state was probably surveyed under a different edition or may have been surveyed under special instructions before the first edition was even published. On top of this distinction, once sections are subdivided, extensive obliteration has taken place, reliance has set in and boundaries have become established. No federal law is going to trump state law in these matters. We should be studying the real guiding principles that will be applied to the boundary situation rather than a book written for BLM employees.

I totally agree with my learned colleague that the PLSS has been plagued. But it is not just ill-conceived, quick-fix legislation—it's a whole host of issues that we have discussed here in this column on many different occasions. Elevating the manual to a position it should not hold is one of those problems.

If Mouland is right, and I suspect he is, many surveyors will be visiting their legislators and state boards in the coming years to revise their statutes and rules that reference the 1973 manual. Instead of changing those references to be more generic as Mouland suggests, let's remove them altogether and put the manual in proper perspective once and for all.

References:

1- Dennis J. Mouland, "Progress on the Manual: The next BLM manual edition and your state laws," *POB* August 2008. According to Mouland, the first version of the manual was issued in 1851. The manual makes reference to 1855 (Sec. 1-1, Page 1). In either case, the GLO survey of Alabama was completed around 1850.

2- Griffin, C. David H., "Retracement of the Public Land Surveys in Alabama: The Half Mile Post Dilemma, A Dissertation," Tuscaloosa, AL 1999, at page 40.

3- Mouland, *POB* August 2008.

4- *Manual of Surveying Instructions* 1973, U.S. Dept. of Interior

Bureau of Land Management. Sec. 3-76 at page 80.

5- *Supra*, Sec. 6-7 at page 145.

6- Mouland, POB August 2008.

7- *Id.*

8- 43 U.S.Code § 2. Duties Concerning Public Lands.

9- 43 USC § 772. Resurveys or retracements to mark boundaries of undisposed lands.

10- *United States v. Doyle*, 468 F.2d 633 (U.S. App. 1972), quoting *Mason v. United States*, 260 U.S. 545, 558, 43 S. Ct. 200, 67 L. Ed. 396; *United States v. Williams*, 441 F.2d 637, 643 (5th Cir.); *Standard Oil Co. of California v. United States*, 107 F.2d 402, 415 (9th Cir.). *Doyle* also quoted in *Dykes v. Arnold*, 129 P.2d 257 (Ore.App. 2006).

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