

# SIDE SHOTS

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# A Short Analysis of a Portion of the 2009 BLM Manual

Presented Humbly by Earl F. Henderson, PLS

I want to present my humble, and only partial analysis of Parts 7-1 and 7-2 of the 2009 Manual of Surveying Instructions. For the readers' benefit, they are reprinted here:

7-1. When every means of identifying the original position of a corner has been exhausted, the surveyor will restore the lost corner by applying proportionate measurement, which harmonizes surveying practice with legal and equitable considerations involved in controversies concerning lost land boundaries.

7-2. A *Lost Corner* is one whose original position cannot be determined by substantial evidence, either from traces of 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 interdependent corners.

Thus, if substantial evidence of the position of the original corner exists, it is an existent or obliterated corner. This position shall be employed in preference to applying the rule that would be proper only in the case of a lost corner.

In addition, once a corner is considered lost, it is the surveyor's responsibility to assure that the restoration method and the restored position comply with the statutory protection of bona fide rights requirements delineated in 43 U.S.C. 772 and 773 and as described in this Manual.

Underlining has been added, although I had a difficult time not underlining the entire passage.

First, I think it's important to note that the 2009 Manual is an update from the 1973 Manual.

The BLM hasn't changed their attitudes how surveying should be performed, and they shouldn't, because the laws governing surveying haven't changed. They've simply updated the language. That being said, there's nothing that I know of in the 2009 Manual that contradicts the 1973 Manual or any previous Manuals for that matter. The processes we must use in completing a survey of the public lands are still the same.

Second, there are some differences between surveying in the Public Land Survey System and in areas not covered by that system, such as a residential subdivision, but for the most part the concepts contained herein can be applied to virtually any retracement survey because our Common Law, through various court decisions, has confirmed them. And let's be honest, retracement surveying is the vast majority of the boundary work we do these days.

Now to the heart of the matter. In 7-1 did you read the words "every means"? That's a lot of means. Sometimes a fence is just a fence and sometimes it's not. That's why we get paid the big bucks, to make that determination. And that's only one means. But when you think about the whole sentence it says that in order to proportion a corner location you must first declare it "lost" and you can only declare it "lost" if you have exhausted every possible way to restore it. There are some that feel that there is always some means so it's impossible to ever declare a corner lost. But there's no disagreement legally that proportioning a corner location is a last resort. It means you've given up. It means every possibility of finding the original location has been exhausted, just like you are if you've done that much. But it also means something more, that

your primary obligation, in every retracement survey, for every corner, is to find the original corner by the best available evidence. That should be your mindset at the outset, not the end, of every retracement survey.

But I'll bet a lot of surveyors haven't put 7-1 together with the first paragraph of 7-2. The underlined portion of 7-2 says that testimony is a means. Therefore, if you follow this to its logical conclusion, you can only proportion a corner after you've already spoken to somebody, hopefully everybody. I've even been known to call my mommy before proportioning a corner, just for moral support. How many monuments can you imagine have been proportioned with that surveyor never having picked up the telephone? I'll bet it's more than one or two. Let's say you're retracing a Quarter Section for a farmer and the other 3 Quarter Sections are each owned by different farmers, and you can't find a monument for the center of section. Big surprise huh? You can't intersect the lines from the Quarter Corners to get the center of section until you've spoken to at least 4 people. And, if all four of those people testify that the fence corner is their property corner and has been for generations since it was first surveyed, and your research shows that all four properties are described as aliquot parts, where's the center of section? I hope no one thinks it's not at the fence corner, even if the intersection point is 33' away. If all you have is the testimony and the fence corner location then that's the best available evidence of the original corner location since it's the only evidence.

And this brings us to the last underlined portion, bona fide rights. The last portion of 7-2 says



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that it's our responsibility to protect bona fide rights. What the hell does that mean? I'll tell you. First, notice that 7-2 refers to the U.S.C. so this concept is not limited to Public Lands surveys. But in the situation above, the bona fide rights of the four property owners are distinct. They each believe that the agreed upon fence corner is their property corner and their property corner is the center of section by reference to their deeds so you don't have the right to change that. In fact, you have the *responsibility* to *protect* that. The fence corner is the center of section regardless of the mathematics. This is all the more reason NOT to proportion a monument to a location other than the fence corner. If a monument is set by proportion, that surveyor has acted against the bona fide rights of the farmers because now their deed description of an aliquot part doesn't appear to go to the fence corner, the physical evidence of their long held bona fide rights, but to some new monument nowhere near the fence corner. Two farmers have gained property and two have lost property with regard to their bona fide rights. And that surveyor can be held accountable for their actions. If a surveyor did such a thing, it could lead to the end of long friendships between neighbors, to lawyers and even to law suits. And when the judge rules against the proportioned monument, who do you think these mad as hell farmers are going to come after to recoup their legal fees? Not me.