

ATTORNEY GENERAL OPINION NO. 92-3

TO: Mr. David Curtis
Board of Professional Engineers and
Professional Land Surveyors
600 South Orchard, Suite A
Boise, Idaho 83705

Per Request for Attorney General Opinion

QUESTIONS PRESENTED

1. Does the existence of an original Government Land Office (GLO) or Bureau of Land Management (BLM) survey, a properly recorded corner perpetuation and filing form, a properly recorded subdivision plat or a properly recorded record of survey indicating the presence of the land survey monument, either with or without visual presence, constitute "adequate evidence" of a public land survey corner monument under Idaho Code § 55-1613?

2. In the event that the land survey monuments are not depicted on the plans, could the engineer who prepared and sealed the plans or someone else acting in reliance upon the engineer's plans be held liable for their destruction?

3. In the event that the land survey monuments are depicted on the plans, could the owner of the project, the contractor, or someone else acting in reliance upon the engineer's plans be held liable for their destruction?

4. Assuming the ability to prove identification of the responsible party, could that party be held liable for damages for the accidental or unintended destruction of land survey monuments?

5. Would the Board of Professional Engineers and Land Surveyors have standing and authority to institute legal action to cause land survey monuments to be replaced and to recover damages and costs incurred in prosecuting such actions from a party accidentally or unintentionally damaging said land survey monuments?

CONCLUSION

1. The existence of an original GLO or BLM survey, a properly recorded corner perpetuation and filing form, a properly recorded subdivision plat, or a properly recorded record of survey indicating the presence of a monument—together with visual presence of that monument—would constitute "adequate evidence" of a public land

survey corner monument as defined by Idaho Code § 55-1613. Such monuments must therefore be referenced by a surveyor prior to the time construction or other activities disturb them and must subsequently be reestablished and remonumented under the supervision of a surveyor.

2. An engineer who prepares and places his or her seal on plans where land survey monuments set by a professional land surveyor are not depicted may be statutorily liable, pursuant to Idaho Code § 54-1234, if the engineer or the engineer's agent willfully defaces, injures, or removes a monument. The potential liability created by the statute is not exclusive and extends to any person who willfully defaces, injures or removes a monument set by a professional land surveyor.

3. A project owner, contractor or other party may be statutorily liable for the willful defacement, injury or removal of a land survey monument set by a professional land surveyor. A civil action for resulting damages suffered by an affected party is also authorized by the statute.

4. A party responsible for the accidental or unintended destruction of a land survey monument cannot be held statutorily liable pursuant to Idaho Code § 54-1234.

5. The Board does not have standing or authority to institute legal action to cause land survey monuments to be replaced and to recover costs and damages incurred in prosecuting such actions from a party damaging land survey monuments.

ANALYSIS

As a preliminary matter, it is useful to reference several statutory definitions used throughout this opinion that are terms of art in the surveying and engineering profession.

A "property corner" is a geographic point on the surface of the earth, and is on, a part of, and controls a property line. Idaho Code § 55-1603(a).

A "public land survey corner" is any corner actually established and monumented in an original survey or resurvey used as a basis of legal description for issuing a patent for the land from the United States government to a private person. Idaho Code § 55-1603(c).

A "monument" is a physical structure that occupies the exact position of a corner. Idaho Code § 55-1603(f).

"Survey" means the locating and monumenting of points of lines which define the exterior boundary or boundaries common to two (2) or more ownerships, except those

boundaries defining ownership in established and ongoing mineral extraction operations, or that reestablish or restore public land survey corners in accordance with established principles of land surveying by or under the supervision of a surveyor. Idaho Code § 55-1902(3).

It is also important to note that Idaho follows the Rectangular System of survey, which divides land into a series of rectangles. *See* Idaho Code §§ 55-1701, *et seq.* A surveyor cannot survey land accurately unless the monuments, from which corners are located, are preserved, protected and perpetuated.¹

I.

In 1967, the Idaho Legislature enacted the Corner Perpetuation and Filing Act. The purpose of the Act, to paraphrase the declaration of policy in Idaho Code § 55-1602, is to protect, perpetuate and locate in a systematic fashion public land survey corners. The Act grants to the Board of Professional Engineers and Professional Land Surveyors (Board) authority to promulgate rules concerning how to file the information necessary for a proper "corner record." *See* Idaho Code § 55-1606.

In 1978, in conjunction with a recodification of the organic statute establishing the Board set forth in chapter 12, title 54, Idaho Code, the legislature enacted Idaho Code § 55-1613, which provides:

Monuments disturbed by construction activities—Procedure—Requirements. When adequate evidence exists as to the location of a public land survey corner, subdivision, tract, or other land corners, such monuments shall be referenced by or under the direction of a surveyor prior to the time when construction or other activities may disturb them. Such corners shall be reestablished and remonumented under the supervision of a surveyor.

(Emphasis added.) Your first question asks what constitutes "adequate evidence" of a public land survey corner or similar monument for purposes of Idaho Code § 55-1613. The significance of the question is that such monuments must be referenced by a surveyor prior to the time construction or other activities may disturb them and must thereafter be reestablished and remonumented under the supervision of a surveyor.

You ask, in particular, whether the existence of an original Government Land Office (GLO) or Bureau of Land Management (BLM) survey, a properly recorded corner

¹ For a history and explanation of the Rectangular System, *see* Fundamentals of Land Measurement by John S. Hoag, furnished and redistributed by Stewart Title of Idaho, Inc.

perpetuation and filing form, a properly recorded subdivision plat or a properly recorded record of survey indicating the presence of the land survey monument, either with or without visual presence, constitutes "adequate evidence" of a public land survey corner under Idaho Code § 55-1613.

No Idaho appellate court has directly addressed this section of the code. However, several cases have held that surveys conducted in accordance with the United States Manual of Surveying Instructions (Manual) constitute legally admissible evidence in court proceedings. *See Hook v. Horner*, 95 Idaho 657, 517 P.2d 554 (1973).

Further, since 1967, Idaho law has required the public filing for record of all surveys that establish or restore a corner. *See* Idaho Code § 55-1604 and § 55-1904, *et seq.* Similarly, subdivision plats referenced in your question have also been required by law to be recorded since 1967. *See* Idaho Code §§ 50-1301, *et seq.* One of the purposes of requiring public recording of land survey monuments is to put the world on notice as to the existence and location of land survey monuments.

While what constitutes "adequate evidence" can only be determined upon a case-by-case review, it is our opinion that a court would conclude that if "visual presence" of a monument was present, along with GLO or BLM surveys or any of the recorded items listed above, the requirements of Idaho Code § 55-1613 would be triggered. As explained in *Hook, supra*, public recordings of such surveys and visual evidence of a monument should suffice to put a reasonable person on notice that a land survey monument is present. Therefore, it is our opinion that public recording of a survey performed in accordance with the manual, in conjunction with visual presence of a land survey monument, constitutes "adequate evidence" as referenced in Idaho Code § 55-1613.

A more difficult question is presented where there is not sufficient *indicia* of "visual presence." Neither "adequate evidence" nor "visual presence" is statutorily defined. For this reason, the Board, with its expertise and knowledge, may want to draft legislation that would define minimal standards to establish what constitutes "adequate evidence" in the context of Idaho Code § 55-1613. Absent sufficient *indicia* of visual presence it is unlikely that a court would find "adequate evidence" sufficient to trigger the requirement of remonumentation. The Board should also consider adopting administrative rules pursuant to the Idaho Administrative Procedure Act. These rules could cover practice before the Board and provide guidance to a court required to enforce the laws with which the Board is concerned. In these rules, the Board could also coordinate the application of the several different chapters in titles 54 and 55 of the Idaho Code covering these matters. This procedure would bring uniformity and clarity to this matter.

II.

Your second question addresses the situation where land survey monuments are not depicted on plans. You ask whether the engineer who prepared and sealed the plans or someone else acting in reliance upon the engineer's plans could be held liable for the resulting destruction of a land survey monument. The answer to this question is controlled by Idaho Code § 54-1234, which states:

54-1234. Monumentation—Penalty and liability for defacing. If any person shall wilfully deface, injure or remove any signal, monument, building or other object set as a permanent boundary survey marker by a registered, professional land surveyor, he shall forfeit a sum not exceeding five hundred dollars (\$500) for each offense, and shall be liable for damages sustained by the affected parties in consequence of such defacing, injury or removal, to be recovered in a civil action in any court of competent jurisdiction.

(Emphasis added.) It is our opinion that the language of the statute is clear and unambiguous and would be applied literally by a reviewing court. *See Frazier v. Nielsen & Co.*, 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

Thus, if a design engineer or any other person acting at his direction willfully defaces, injures or removes a land survey monument, he or she will be subject to the penalties provided in the statute: first, a civil penalty of \$500 may be assessed by the court; second, the party willfully defacing, injuring or removing the monument faces a statutory claim for damages caused by his or her acts; finally, if the person involved is licensed by the Board as a surveyor, disciplinary action can be initiated by the Board. *See Idaho Code § 55-1612.*

What is less clear, and in our opinion requires future statutory clarification, is where the engineer inadequately or negligently prepares and seals his plans without depicting existing land survey monuments. For the reasons set forth below, we conclude that such conduct does not amount to willful commission of an act defacing, injuring, or removing a land survey monument.

Our analysis begins with the "willful" requirement set forth in the statute. The word "willful" is defined differently depending on whether it is used in a civil or criminal context:

In civil actions, the word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But where used in a criminal context it generally means an act done with a bad purpose;

without justifiable excuse; stubbornly, obstinately, perversely. The word is employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S. Ct. 223, 225, 78 L. Ed. 381 (____).

Black's Law Dictionary (6th ed. 1991).

In Burgess v. New Hampshire Inc. Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), the Idaho Court of Appeals appeared to follow this distinction when construing an insurance contract. The court held that "willful" conduct in the civil context could be found if damages resulted from an intentional act from which damage was reasonably expected to result. Using this standard, an engineer might meet the "willful" conduct requirement of Idaho Code § 54-1234 by negligently preparing and sealing plans without depicting existing land survey monuments.

However, under Idaho Code § 54-1234, it is also required that the engineer or the engineer's agent actually deface, injure or remove the monument. Thus, if an engineer negligently fails to depict a land survey monument upon plans prepared, it is unlikely that he or she would be found to meet the requirements of the statute and be responsible for the land survey monument's destruction. In the situation you describe, the engineer has not actually injured, defaced, or removed the land survey monument.

In appropriate circumstances, the negligent failure to provide protection to a land survey monument where such failure later caused the destruction of the land survey monument might justify disciplinary proceedings. Once again, the Board should propose legislation or define through regulation a set of rules to establish minimal standards in this area. Such standards would eliminate current uncertainty and help avoid future controversy and litigation.

III.

Your third question asks whether it is possible that the requirements specified in Idaho Code § 54-1234 could be met by those who have a legal duty to review the plans an engineer has prepared depicting land survey monuments. It would be reasonable to assume, in appropriate cases, that project owners, contractors or other parties involved in the project who examine the plans and who would, with reasonable care, be aware of the land survey monument's existence (because of their knowledge and background) might meet the "willful" standard of Idaho Code § 54-1234. Once again, however, the statute places liability only on those who "wilfully deface, injure or remove" a monument. Absent an affirmative act defacing, injuring or removing the monument, project owners,

contractors and other parties would not face statutory liability for their failure to exercise reasonable care in reviewing an engineer's plans.

IV.

Your fourth question concerns liability for the accidental or unintended destruction of land survey monuments where the responsible party can be identified. As noted in the previous sections, Idaho Code § 54-1234 creates liability only for damages that result from the willful defacing, injury or removal of a land survey monument. Thus, there is no liability for the accidental or unintended destruction of a land survey monument pursuant to this section of the code. A landowner may, of course, have other remedies pursuant to the civil and criminal laws of trespass. See Idaho Code § 6-201, *et seq.* and Idaho Code § 18-7011.

V.

Your final question concerns the authority of the Board to institute legal action to cause land survey monuments to be replaced where accidentally or unintentionally damaged. As noted in section IV above, Idaho Code § 54-1234 provides no civil liability where accidental or unintended injury to or destruction of a monument has occurred. Moreover, even when civil liability exists for willful destruction of a monument, that remedy is available only for damages sustained by "affected parties."

It is unlikely that a court would find the Board to be an "affected" party who has sustained damages as required by the statute. Affected parties are those directly impacted by a person's actions. Further, the Board's statutory duties primarily relate to regulation and licensing of the practice of professional engineering and professional land surveying, not protecting land survey monuments.

A related issue is whether the Board could use its disciplinary powers to require one of its licensees to restore or repair land survey monuments damaged, injured, or destroyed by the licensee. The Board's powers defined by Idaho Code § 54-1220 do not specifically include the power to require restitution or repair of a monument. Nonetheless, the Board, in making its decision in a disciplinary proceeding, could take into account a licensee's voluntary cooperation in correcting damage to monuments.

AUTHORITIES CONSIDERED

1. Statutes:

Idaho Code § 6-201, *et seq.*

Idaho Code § 18-7011.

Idaho Code § 50-1301, *et seq.*

Idaho Code § 54-1220.

Idaho Code § 54-1234.

Idaho Code § 55-1602.

Idaho Code § 55-1603(a).

Idaho Code § 55-1603(c).

Idaho Code § 55-1603(f).

Idaho Code § 55-1604.

Idaho Code § 55-1606.

Idaho Code § 55-1612.

Idaho Code § 55-1613.

Idaho Code § 55-1701, *et seq.*

Idaho Code § 55-1902(3).

Idaho Code § 55-1904, *et seq.*

2. Cases:

Burgess v. New Hampshire Inc. Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985).

Frazier v. Nielsen & Co., 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

Hook v. Horner, 95 Idaho 657, 517 P.2d 554 (1973).

United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (____).

3. Other Authorities:

Black's Law Dictionary (6th ed. 1991).

John S. Hoag, Fundamentals of Land Measurement.

DATED this 30th day of October, 1992.

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