

IN THE SUPREME COURT FOR THE STATE OF ALASKA

RAY M. COLLINS and CAROL J.
COLLINS,

Appellants,

vs.

DAVID W. HALL and MARGARET R.
HALL Trustees, and their successors in trust,
of the D & M Hall Community property
trust, dated March 14, 2005, and also all
other persons or parties unknown claiming a
right, title, estate, lien, or interest in the real
estate described in the complaint in this
action,

Appellees.

Supreme Court No. S-16795
Superior Court No. 1JU-14-00771 CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, FIRST
JUDICIAL DISTRICT, THE HONORABLE PHILIP M. PALLEMBERG, PRESIDING

APPELLEES' BRIEF

Filed in the Supreme Court of the State of Alaska on February 13th, 2018.

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AUTHORITIES PRINCIPALLY RELIED ON

None.

I. Introduction: Issues Presented for Review

The Collinses' central argument is that the superior court "altered the boundaries of a subdivision plat" but that is a factually incorrect statement. The superior court adopted the property line consistent with the subdivision plat as drafted and recorded. The superior court rejected the Collinses' argument that an unrecorded error by the surveyor who drafted the subdivision plat should control the lot lines. As the superior explained: "there's been a lot of talk here about who is trying to move property lines...[I]t's not the Halls who are trying to move the property lines, it's the Collinses." [Exc. 154¹] The superior court found that no legal theory, including "boundary by acquiescence," applied to alter the lot line established by the written instruments, and therefore found in favor of the Halls.

The Collinses appeal the superior court's factual findings that the Halls' survey accurately located the lot line according to the recorded instruments. They also appeal the superior court's factual finding that the Collinses did not establish a boundary by acquiescence. And they appeal the superior court's factual findings that certain covenants were unenforceable due to abandonment. As none of these findings are clearly erroneous, this Court should affirm the superior court's holding in its entirety.

II. Statement of the Case: Factual and Procedural Background

The Halls and the Collinses own adjoining properties on Colt Island. The property

¹ The superior court's decision on the record was included in the Appellants' excerpt of record but is strangely formatted and therefore difficult to read. [Exc. 44-73] A version with standard formatting is included in the Appellees' excerpt of record and citations in this brief are to that version. [Exc. 142-169]

description in the Halls' deed is: "Lot Fifteen (15), Area One (1), Colt Island Recreational Development according to Plat 75-11, U.S. Survey 1755." [Exc. 24] The property description in the Collins' deed is: "Lot 14, Area 1, Colt Island Alaska Recreational Development according to Plat 75-11, U.S. Survey 1755." [Exc. 21-22]

U.S. Survey 1755 was completed in 1927 when the entire island was homesteaded. [Exc. 1] U.S. Survey 1755 traced the "meander lines" around Colt Island, meaning the line of mean high tide. [Exc. 110] The surveyor, whose name was Fred Dalhquist, created field notes describing his process as follows: He started the survey on a prominent point on the northwest corner of the island. [Exc. 109] He called this point "Meander Corner 1." [Exc. 109] He did not place a monument at Meander Corner 1, however, because it was an "unsafe place" for a monument (presumably meaning it might be destroyed by weather and tides). [Exc. 80] Instead he placed a monument called a "Witness Corner" up the beach, and marked it by carving the letters and numbers "WCMC1 S1755" (standing for "Witness Corner to Meander Corner 1 of Survey 1755") and an X. [Exc. 80] His field notes identify this monument as being 3,814.61 feet, at a bearing of N31°24'42"E, from a U.S. land monument on neighboring Admiralty Island called USLM 1285.² [Exc. 81] This was the only monument that Mr. Dahlquist created. [Exc. 106-113] The remainder of the survey is the distances and bearings of the meander lines beginning at Meander Corner 1 and

² The field notes state the distance and bearing between Meander Corner 1 and USLM 1285, and the distance and bearing between Meander Corner 1 and Witness Corner to Meander Corner 1, so this distance and bearing between Witness Corner to Meander Corner 1 and USLM 1285 is derived from those numbers by triangulation. [Exc. 14]

circumnavigating the island until they again reach Meander Corner 1. [Exc. 1]

Plat 75-11 was prepared in 1975 by surveyor John Bean to subdivide Colt Island into recreational cabin sites and larger commercial lots. [Exc. 2] Plat 75-11 used the same meander lines as US Survey 1755 and added lot lines to subdivide the inland area. [Exc. 2] Plat 75-11 is a “paper plat” which means that no monuments were in placed on the island in association with it. [Exc. 154, Tr. 210-11] It simply referenced the existing US Survey 1755, and then located the subdivided lots in relation to US Survey 1755. [Exc. 80, 154] Therefore, Plat 75-11 has the same “point of beginning” as US Survey 1755: Witness Corner to Meander Corner 1 created by Mr. Dahlquist in 1927. [Exc. 80, 154] To locate any lot created by Plat 75-11, a surveyor would find that monument and measure from it according to the bearings and distances established by US Survey 1755 for meander lines and Plat 75-11 for subdivision lines. In surveys and testimony, the “point of beginning” was the monument, and the “basis of bearing” was the distance and bearing between the monument and USLM 1285 on Admiralty Island. [Exc. 14, 43].

Plat 75-11 contains a serious discrepancy in its subdivision of Area 1. The meander line that defines the seaward side of Area 1 is 947.76 feet, but all the lots and easements placed along that line add up to 957.26 feet. [Exc. 84] So all the lots and easements created by Plat 75-11 cannot actually fit into the space available on the Island. [Exc. 84] This is the type of error that can happen with a “paper plat” because the surveyor has not actually gone into the field to locate and monument the lots.

Although Plat 75-11 was a “paper plat,” Mr. Bean and the developer, Mr. Lockwood,

did place some stakes and “control points” on Colt Island in 1970s. [Exc. 81, 156] But the existence and locations of those stakes and “control points” were not recorded on Plat 75-11. [Exc. 2, 81] Mr. Bean testified at trial that when he placed the stakes and “control points” in the 1970s, he used what he believed was Witness Corner to Meander Corner 1 to US Survey 1755. [Exc. 81, Tr. 141] It was a rock carved with a faint “X” without numbers or letters. [Exc. 81, 149] He measured the bearing between that faint “X” and USLM 1285 and found it to be consistent with the field notes to US Survey 1755, but he did not measure the distance. [Exc. 81, Tr. 209-210]

Mr. Bean testified that he intended to do a complete survey of all the lots created by Plat 75-11 and record it, but there was a dispute between the landowner and the developer and he didn’t get paid so he stopped work.³ [Tr. 162] In the 1980s or 1990s he returned and staked corners for a lot in Area 1 for property owners named Allwine. [Tr. 165] He used control points that he set in the 1970s to set those corners: he did not attempt to re-locate Witness Corner to Meander Corner 1. [Tr. 166]

Mr. Fisher, who was the original purchaser of the Halls’ lot, testified that when he purchased the property there was one boundary stake in place, but that he was never really sure where the property boundaries were. [Exc. 161] He testified that he used that stake to situate the cabin and outhouse that he built on the lot. [Exc. 161] He testified that the stake had rotted away by the time he sold the lot to the Halls in 1994. [Exc. 24, 161]

³ The dispute between the landowner and developer eventually made it to this Court in *Lockwood v. Black*, Not Reported in P.2d, 1994 WL 16457088 (Alaska 1994).

In 1999 Mr. Hall, who is not a surveyor, attempted to locate his lot lines by measuring from a stake on Lot 18, Area 1. [Exc. 158] Someone removed the stakes he set during that process, but to the best of his recollection at that time he found the boundary to be somewhere in between the surveys later done by Mr. Bean and R&M Engineering, described below.⁴ [Exc. 158, Tr. 549]

In 2004, Mr. Bean prepared a tidelands survey for a commercial lodge located on Tract D of Plat 75-11, which is adjacent to Area 1. [Exc. 114-115]⁵ At that time, Mr. Bean did attempt to re-locate Witness Corner to Meander Corner 1 and located a rock carved with the numbers and letters “WCMC1 S1755” and an “X”. [Tr. 152, 156] He testified that this is what he had been looking for in the 1970s. [Tr. 153] He used this rock as the point of beginning for the survey of Tract D, not the faint “X” that he used when setting “control points” in the 1970s. [Exc. 114-15, 152]

In 2009, a handful of property owners including the Collinses asked Mr. Bean to survey their lot lines. [Tr. 225-26] Mr. Bean did so by measuring from the corners that he had previously set on the Allwine’s lot. [Tr. 227] He did not look for Witness Corner to Meander Corner 1 again. [Tr. 228] He staked the corners of the Collinses’ lot but did not record this survey. [Tr. 228]

⁴ Mr. Hall made a hand-drawn survey of his efforts to locate his property boundary, which was an exhibit at trial. [Exc. 7] The Collinses’ brief erroneously describes this document as evidence of “reliance on the existing monuments showing the boundaries of Lot 15, Area 1.” But the “existing monument” from which Mr. Hall measured was a stake on the corner of Lot 18. [Exc. 158, Tr. 542] And the lot line that he located did not coincide with the lot line that the Collinses advocated at trial. [Exc. 158]

⁵ Exc. 115 is an enlargement of the upper left-hand corner of Exc. 114.

In 2012, the Halls hired Mark Johnson, of R&M Engineering, to survey their lot. [Exc. 14] Mr. Johnson sent out a crew to locate Witness Corner to Meander Corner 1. [Tr. 724] They located the rock with the engraved numbers and letters “WCMC1 S1755” and an “X” (the same rock that Mr. Bean used in his 2004 tidelands survey). [Exc. 724-25] They measured the distance and bearing between that rock and USLM 1285 on Admiralty Island and found it to be 3,813.49 feet away at a bearing of N31°24’42”E. [Exc. 14] This is only 1.12 feet off the distance stated in the field notes to US Survey 1755, and the same bearing. [Exc.14, 82] They used that rock as the point of beginning, and then followed the distances and bearings stated on Plat 75-11 to locate the corners of the Halls’ lot. [Exc. 2, 14] When they did so, they noted the stakes that Mr. Bean had placed in 2009 which were a significant distance from the corners they located. [Exc. 14] R&M recorded the survey. [Exc. 14]

In 2014, the Collinses asked Mr. Bean to record the survey of their lot that he did in 2009. [Exc. 43] He did so without returning to Colt Island. [Tr. 238-39] He had the coordinates of the corners he placed in 2009, and the coordinates of USLM 1285. [Tr. 238-241] Beginning with the coordinates of the corners he placed in 2009, he used the bearings and distances from Plat 75-11 to calculate the location of Witness Corner to Meander Corner 1 in relation to those corners. [Tr. 240-41] He then calculated the distance and bearing between the coordinates for USLM 1285 and the calculated coordinates for Witness Corner to Meander Corner 1. [Tr. 241-42] He calculated it to be the correct bearing from USLM 1285, but about twenty-two feet farther away than US Survey 1755 says it should be. [Exc.

42, 82]

The Collinses then sued the Halls for quiet title based on Mr. Bean's 2014 survey, and the Halls counterclaimed for quiet title based on Mr. Johnson's 2012 survey. [Exc. 15-38, 79] Mr. Bean's survey shows that the Halls' outhouse and shop encroach on the Collinses' property, but Mr. Johnson's survey shows no encroachment. [Exc. 14, 43] Mr. Bean's survey shows the edge of the Collins and Hall properties to be along the edge of the dirt road accessing the lots on the upland side (called "Totem Pole Trail"). [Exc. 43] Mr. Johnson's survey shows the edge of the lots to be somewhat distant from the actual location of Totem Pole Trail. [Exc. 14] Mr. Bean's survey shows the seaward boundary of the Collinses' lot as being about half-way up a steep bluff. [Exc. 43, 82-83, 149] Mr. Johnson's survey shows the seaward boundary of the Halls' lot as being on the beach. [Exc. 14, 82-83, 149]

Once the lawsuit was under way, it became clear that the discrepancy between the two surveys was caused by the different "point of beginning" used by each survey. [Exc. 80] Therefore, Mr. Collins asked Mr. Bean to come out to Colt Island and identify the rock that Mr. Bean believed was Witness Corner to Meander Corner 1 when he did his surveying work in the 1970s. [Tr. 243] Mr. Bean identified the rock with the faint "X." [Tr. 243-44] He then measured the distance and bearing stated by US Survey 1755 between Witness Corner to Meander Corner 1 and Meander Corner 1 and set a monument there. [Exc. 116-121] This monument is about twenty-two feet farther away from USLM 1285 than US Survey 1755 says Meander Corner 1 should be. [Exc. 81-82, Tr. 250]

Mr. Bean then recorded a new survey of the Collinses' lot based on that newly-placed monument.⁶ [Exc. 81, 130-131] His new survey did not alter the location of the corners of the Collinses' lot. However, the distances and bearings between the new monument and those corners were not consistent with Plat 75-11. [Exc. 84-85, 130-131] At trial, Mr. Bean was not able to satisfactorily explain these discrepancies. [Exc. 160]

After trial, the superior court held that Mr. Johnson's survey was more accurate than Mr. Bean's. [Exc. 154-55] The superior court held that the rock engraved with "WCMC1 S1755" was the monument created by Mr. Dahlquist in 1927, and that Mr. Bean made a mistake when he used the faint "X" in the 1970s. [Exc. 152-55] Therefore, the superior court held that Mr. Johnson's survey correctly identified the property boundary of "Lot 15, Area 1, Colt Island Recreational Development according to Plat 75-11, US Survey 1755" as described in the deeds. [Exc. 75-76]

The superior court also held that the Collinses had not proven that any other boundary had been established by acquiescence or agreement. [Exc. 162] The superior court stated that the elements of boundary by acquiescence are a reasonably marked boundary line that is mutually recognized and accepted for seven years or more and that those elements must be proven by clear and convincing evidence. [Exc. 156] The court reviewed the evidence carefully and concluded that it was insufficient to establish that a boundary by acquiescence had ever been created along the lot lines recorded in Mr. Bean's 2012 survey. The court's

⁶ This survey does not seem to be part of the Record on Appeal despite having been admitted as an exhibit at trial. [R. 998]

decision on the record on this issue is as follows:

There certainly is evidence that stakes and markers were placed on the property in the 1970s. There is plenty of evidence of that. There is evidence that lot owners saw those stakes, and they bought lots in reliance on those stakes.

And I think those stakes were placed by John Bean, although there is a little bit of uncertainty in my mind about that, as to who did it between Mr. Bean and Howard Lockwood. Mr. Lockwood testified that he did some measurements and put in some markers [to identify Totem Pole Trail]....

There is also some uncertainty about where those stakes were placed in a north-south direction [between lots]. None of those stakes are still there, and there aren't any of the old stakes remaining on the Collins-Hall boundary.

There was testimony by Mr. Hall that he measured down from the corner on the -- from the northeast corner of the Barry Rohm property [Lot 18] to try to mark that line in 1999. And I find it puzzling that there is a 10-foot discrepancy between the marker that Mr. Hall found in 1999, measuring down to the property line, and the John Bean markers. I don't have any explanation for that 10-foot discrepancy.

I will say that my sense of Mr. Hall is that he's a pretty careful and meticulous person, and that he would have used some care in measuring that distance down from the Rohm corner. And it's not clear to me why he came up with a different spot than John Bean did.

If the Rohm corner placed by Mr. Bean were correct, or correctly measured from the faint X rock, one would expect that the line found by Mr. Hall off of that corner in 1999 would be exactly the same as the line found by John Bean in 2012. But instead, Mr. Hall got a line that matched up with nobody's property line, Bean or R&M.

The problem for me in finding a boundary by acquiescence is that I don't know where that boundary should be. It's easy to say, "Well, everybody used the Bean lines in 1975, and people bought their lots knowing that the Bean lines were the lines." The problem is, which Bean lines are we talking about, and where do we put them? I can't find a boundary by acquiescence if I don't know where that boundary is.

And the reality is, as I see the evidence, that none of Mr. Bean's surveys are all that reliable. I would need to find by clear and convincing evidence that there is an identifiable line that was there from 1975 or '76 for a seven-year period, and I would have to fix the property line at that line. And I'm not able to find by clear and convincing evidence that the lines determined by Mr. Bean in 2012 are the lines that you would have seen if you went and looked at the stakes on the ground in 1976.

Every survey that Mr. Bean has done -- and I mean no disrespect to Mr. Bean -- but every survey that he's done has significant discrepancies. The paper plat he did in 1975 had a 10-foot discrepancy in the measurements of the lots, which would have to be accounted for somewhere in those lots. Somebody would have to lose 10 feet of their property, because you can't fit all the lots into the space available on the island because the numbers don't add up.

There is a 10-foot discrepancy between the markers that Mr. Hall found in 1999 and the markers that Mr. Bean found in 2012. The latest survey by Mr. Bean, in the second version of it that he issued to correct errors in the first, uses the wrong meander line from MC1 down to the start of the lots; and he really didn't give a clear explanation of that.... I think it's entirely possible that if one were to actually follow that line, one would get to an entirely different place.

And it may be that that line is just wrong. Every time Mr. Bean was confronted about one of the errors in his survey, he said, "Well, that's a drafting error." And I simply don't have any confidence that the lines Mr. Bean found in 2012 are at all the same lines that were staked in 1976.

There's another aspect of this that causes me to have a lack of confidence in those numbers.... Mr. Fisher testified that when he bought what became the Hall property in the 1970s, that ... his recollection was that there was one stake on the ground. And at some point, that stake rotted away. He really didn't know when.

Even if one grants that that stake may have been there for seven years, Mr. Fisher then went and built an outhouse. And he built that outhouse right smack on the property line that Mr. Bean found between Mr. Fisher's property and what is now the Collins property. And Mr. Fisher testified that he really didn't have a clear idea of where the property line was. If he had a clear idea of where the property line was, he surely wouldn't have built his outhouse right smack on that line....

Mr. Fisher didn't even know where the property line was, so how could he have mutually recognized and accepted with his neighbor a reasonably marked line if he couldn't even tell where it was to the extent that he built his outhouse right smack on that line, encroaching over it?

So that, to me, doesn't make any sense. If there was a line that everybody knew about, I think the people did generally feel like the Bean lines, whatever they were, should be the lines. But nobody really knew exactly where those lines were, and I don't know where they are now. So I can't find a boundary by acquiescence under that legal theory. [Exc. 156-162]

Collinses' complaint also alleged that the Halls' buildings do not meet the setback requirements established by the protective covenants on the lots, and that the Halls' outhouse does not meet the requirements for sewage disposal in those covenants. [Exc. 19] But the superior court held that those covenants were abandoned and unenforceable, because they are widely violated on the island, because the outhouse had been in the same location and using the same sewage disposal system since the 1980s without objection, and because the covenants called for them to be enforced by a Colt Island Homeowners' Association that was never established. [Exc. 86-87, 91]

Therefore, the superior court entered judgment in favor on the Halls and against the Collinses. [Exc. 75-76] The Collinses appeal.

III. Standard of Review

All of the issues on appeal are questions of fact, which this court reviews for "clear error."⁷ "A decision is clearly erroneous when a review of the entire record leaves us with

⁷ *Reeves v. Godspeed Properties LLC*, ___ P.3d ___, 2018 WL 561386 at *3 (Alaska 2018).

a definite and firm conviction that a mistake has been made.”⁸

The Collinses do not dispute the superior court’s legal rulings that the property descriptions in the deeds and the recorded instruments that the deeds reference control the location of the lots. [Exc. 87] Nor do the Collinses dispute the superior court’s legal ruling that a boundary by acquiescence must be established by clear and convincing evidence that “adjoining landowners (1) whose property is separated by some reasonably marked boundary line (2) mutually recognize and accept that boundary line (3) for seven years or more.”⁹ [Exc. 88, 156]

All of the trial court’s holdings with which the Collinses take issue are questions of fact. Which rock is the correct “point of beginning” for Plat 75-11 is a question of fact.¹⁰ The accuracy of the parties’ conflicting surveys is also a question of fact.¹¹ The trial court’s findings that Mr. Bean’s surveying on Colt Island was unreliable is a question of fact.¹² Whether the elements of boundary by acquiescence were established by clear and convincing evidence is a question of fact.¹³ And whether certain protective covenants are unenforceable due to abandonment is also a question of fact.¹⁴

⁸ *Id.* (internal quotation omitted).

⁹ *See Lee v. Konrad*, 337 P.3d 510, 516, 520 (Alaska 2014).

¹⁰ *See Fink v. Municipality of Anchorage*, 379 P.3d 183, 191 (Alaska 2016).

¹¹ *See Lee*, 337 P.3d at 517 (“the credibility of witness, including the weight given the opinions of surveyors, the location or existence of physical markers, and the timing of events, are questions of fact.”)

¹² *See id.*

¹³ *See id.*

¹⁴ *See B.B.P. Corp. v. Carroll*, 760 P.2d 519, 524 (Alaska 1988) (“a covenant will be deemed abandoned when the evidence reveals substantial and general noncompliance”).

IV. Argument: The Superior Court Did Not Clearly Err in Holding that the Halls' Surveyor Used the Correct Point of Beginning.

Contrary to the Collinses' assertions, the superior court did not "alter the boundaries" of Plat 75-11, "re-plat" Colt Island, or establish a "new point of beginning" for Plat 75-11. The superior court's holding, and the Halls' survey, are consistent with Plat 75-11 as drafted and recorded. [Exc. 87-88] The Collinses actually take issue with the superior court's holding that Mr. Bean's survey based on an unrecorded error in the 1970s and containing other serious discrepancies does not control the boundary between Lots 14 and 15. [Exc. 88]

Mr. Bean himself testified that the point of beginning of Plat 75-11 is intended to be the Witness Corner to Meander Corner 1 established by Mr. Dahlquist when he created US Survey 1755. [Tr. 130-132] The evidence at trial was overwhelming that the rock engraved with the letters "WCMC1 S1755" was the monument created by Mr. Dahlquist in 1927. [Exc. 148] Even Mr. Bean used it in his tidelands survey of nearby Tract D. [Exc. 114-15] The superior court did not clearly err in its factual finding about which rock was the monument engraved by Mr. Dahlquist and therefore the point of beginning for Plat 75-11.

At trial, the court questioned Mr. Bean about the accuracy of the "control points" that Mr. Bean placed in the 1970s based on the rock marked with the faint "X" and he responded thus:

Q [by the court]. If, in fact, the faint X on the rock was not Dahlquist's WCMC1, would that mean that those control points were in the wrong place at that time?

A [by Mr. Bean]. Yes. Yes. [Tr. 195]

So it was not clear error to find that Mr. Johnson's survey for the Halls based on the engraved

monument used the correct point of beginning for Plat 75-11 and US Survey 1755, and Mr. Bean's survey for the Collinses based on the faint "X" did not.

Furthermore, the Halls' survey conforms exactly to Plat 75-11 to locate the property line, and the Collinses' survey does not. Mr. Bean's amended survey, prepared after returning to Colt Island to identify the faint "X" that he used in the 1970s, contains serious discrepancies. [Exc. 130-131, 160] The superior court found that Mr. Bean was not able to satisfactorily explain those discrepancies at trial. [Exc. 160] So the superior court held that the Halls' survey corresponded most closely to the recorded documents, and was more reliable, and therefore granted the Halls quiet title based on it. [Exc. 87-88, 91]

The Collinses' brief does not state any reason for this Court to reverse that holding as clearly erroneous. The Collinses' brief correctly states that the work of the original surveyor controls future surveys. But Mr. Dahlquist, who prepared US Survey 1755 in 1927 and established the monument at Witness Corner to Meander Corner 1, is the original surveyor. It is not Mr. Bean, as argued by the Collinses. In fact, Mr. Bean consistently referred to Mr. Dahlquist as the "original surveyor" in his trial testimony. [Tr. 122, 124, 128, 141, 181] Mr. Johnson's survey honored that principle: Mr. Dahlquist's Witness Corner to Meander Corner 1 monument turned out to be 1.12 feet farther from USLM 1285 than Mr. Dahlquist's field notes recorded. [Exc. 82, 148-49] But Mr. Johnson used the monument that Mr. Dahlquist established; he did not use a different point 1.12 feet closer to USLM 1285.

The Collinses' brief repeatedly refers to "follow[ing] in the footsteps of the original

surveyor” but fails to recognize that the original surveyor’s footsteps must be recorded for a future surveyor to follow in them. As Mr. Bean testified, a recorded survey always takes precedence over unrecorded surveying work. [Tr. 104-105] Mr. Bean did not record any of the surveying that he did in the 1970s based on the rock with the faint “X”. [Tr. 228] In fact, the only recorded survey Mr. Bean prepared on Colt Island, prior to the surveys involved in this dispute, was the tidelands survey that used the rock engraved with “WCMC1 S1755” as the point of beginning. [Exc. 114-15] As the trial court noted: “I think the only explanation that makes sense for why Mr. Bean did that is that, at least on some level, he recognized that the WCMC rock is the right rock.” [Exc. 153]

The Collinses are also correct that a recorded and monumented mistake can be controlling on future surveyors. That was the situation in the “Four Corners” example given in the Collinses’ brief. But the Collinses’ brief ignores the fact that Plat 75-11 is a “paper plat” that did not establish any monuments. [Exc. 2, 80, 154] Because Mr. Bean’s mistake was not recorded, it cannot be controlling on future surveyors. Future surveyors would have no way to know that Mr. Bean had used the wrong rock in the 1970s (or that he had done any surveying at all). They simply *could* not repeat his error.¹⁵

¹⁵ In fact, surveyor Randy Davis testified for the Halls as an expert witness and described his own efforts to survey on Colt Island in 2008. He described finding “a smattering of rebar, pins, form pins, 1-by-1 posts, 2-by-2 posts, nothing having a surveyor cap on it. ... none of the markers, corners, wood, form pins, rebar were hitting anywhere near close to, in this general vicinity, of where I had computed the lot corners.... It was apparent then that there was some sort of mistake out there.” [Tr. 849-50] He testified that he then stopped surveying and went back to his office to do further research to try to understand the source of the problem but was not able to do so from the documents of record. [Tr. 850-51]

Finally, the Collinses' brief incorrectly argues that the superior court's holding placed property lines "without regard to actual improvements." But, in fact, the superior court found it relevant that Mr. Bean's survey found encroachment by the Halls' buildings and Mr. Johnson's survey did not. [Exc. 161-62] The superior court found that this weighed against finding a boundary by acquiescence to the lot lines in Mr. Bean's survey. [Exc. 161-162] The superior court also considered the fact that Mr. Bean's survey showed the lot lines abutting the actual location of Totem Pole Trail while Mr. Johnsons' survey showed the lot lines some distance away. [Exc. 164-65] The superior court did not find that this weighed in favor of the Collinses' position, however, stating:

[Totem Pole Trail] might have been built in the wrong place in the 1970s when Marion Hobbs went through and improved it or when the Worrells went through and logged it. And I think there are all kinds of potential problems there. [Exc. 165]

So, although the court noted that there was likely a prescriptive easement established on the actual location of Totem Pole Trail, the fact that Mr. Bean's corners were located on the edge of it did not make it more likely that Mr. Bean's survey was accurate. [Exc. 165] There was no other concrete evidence introduced at trial regarding the location of improvements relative to Mr. Johnson's lot lines and Mr. Bean's lot lines.

The superior court did note that Mr. Johnson's survey located the seaward boundary of the lots on the beach and Mr. Bean's survey located them halfway up a steep bluff. [Exc. 149] The superior court held that this weighed in favor of Mr. Johnson's survey being more accurate because Mr. Dahlquist's field notes described the meander line as running along the beach. [Exc. 149] So the superior court did consider physical features on the island when

reaching its decision.

The superior court's holding that Mr. Johnson used the correct "point of beginning" was well-founded in the evidence presented at trial, and this court should not reverse it as clearly erroneous.

V. Argument: The Superior Court Did Not Clearly Err in Holding That the Elements of Boundary By Acquiescence Were Not Met.

Having found that the Halls' survey correctly located the lot lines according to Plat 75-11 and US Survey 1755, the court then considered whether any legal doctrine applied to alter them. [Exc. 154-55] The court held that the evidence was insufficient to establish a boundary by acquiescence in the location of the property boundaries that Mr. Bean surveyed in 2012. [Exc. 162] That holding was not clear error, and this Court should affirm it.

The Collinses do not dispute the superior court's legal rulings with regards to boundary by acquiescence, specifically that it must be supported by clear and convincing evidence that the property of adjoining landowners "(1)...is separated by some reasonably marked boundary line; (2) [that they] mutually recognize and accept that boundary line; (3) for seven years or more." [Exc. 155] The Collinses appeal only the court's factual conclusion that those elements were not met.

As can be seen from the extensive quotation in the background section above, the superior court considered the trial evidence carefully and thoroughly before ruling that the elements of boundary by acquiescence had not been met. The Collinses' brief does not state any reason for this court to overturn that holding as clearly erroneous.

The Collinses cite *Diehl v. Zanger*, a Michigan case from 1878, in support of their

argument, but the facts of that case are entirely distinguishable.¹⁶ The properties in that case had been separated by a fence for twenty years before the property was re-surveyed and the fence found to be several feet away from the property line.¹⁷ The court noted the undisputed evidence at trial that “lots thirty-nine and forty... had for twenty years and upwards been identified and defined in their position and extent upon the ground by buildings, fences and harmonious occupancy...[that] were visible and apparent to everybody.”¹⁸ The court held that the trial court erred in instructing the jury to find the property line according to the re-survey.¹⁹ The court explained that the evidence, if believed by the jury, was sufficient “to find that the [lot line] had become fixed and established at the place marked by the fence.”²⁰ But there was no fence between the Halls’ and Collinses’ properties, or any such boundary demarcation “visible and apparent to everybody.” So the cases are not comparable.

Judge Cooley’s concurrence in *Diehl v. Zanger* first discussed the importance of following in the footsteps of the original surveyor and locating the “original monuments.”²¹ Of course, that is the principle that the Halls’ survey, and the superior court, honored by locating and surveying from the original monument established in 1927. Judge Cooley concluded: “The long and practical acquiescence of the parties concerned [to the location of the fence]...should be regarded...as to be conclusive even if originally located

¹⁶ *Diehl v. Zanger*, 39 Mich. 601 (1878).

¹⁷ *Id.* at 602-603.

¹⁸ *Id.*

¹⁹ *Id.* at 603.

²⁰ *Id.*

²¹ *Id.* at 605 (Cooley, J., concurring).

erroneously.”²²

The superior court below held that it was no longer possible to ascertain where Mr. Bean (or Mr. Lockwood) may have placed the stake between the Collinses’ and Halls’ lot in the 1970s, nor to determine that the owners at that time acquiesced in a boundary at that location. [Exc. 156-162] So this case is entirely distinguishable from *Deihl v. Zanger* and this Court should affirm the superior court’s holding as not clearly erroneous.

VI. Argument: The Superior Court Did Not Clearly Err in Holding That the Set-Back and Septic Covenants Had Been Abandoned.

The Collinses argued below that the Halls’ shop and outhouse fail to comply with a twenty-foot setback requirement contained in the subdivision covenants for Colt Island, but the superior court held that those covenants had been abandoned.²³ That holding was well-supported by the record and this Court should affirm it as not clearly erroneous. There was testimony at trial that various buildings on Colt Island are in violation of the twenty-foot setback and that several properties have or have had outhouses without complaint from other property owners. [Tr. 349-50, 363, 402, 564, 559-62, 602-603, 688, 701-703] Furthermore, there was testimony at trial that the Halls’ outhouse had been in place since the 1980s without objection. [Tr. 422, 426, 481-82, 564, 580, 599-600] Finally, enforcement of these two covenants was entrusted to a homeowners’ association that was never established. [Exc. 5, Tr. 438, 702]

²² *Id.* at 606 (Cooley, J., concurring).

²³ The superior court did not address this issue in its decision on the record, but signed Findings of Fact and Conclusions of Law addressing it. [Exc. 86-87, 91, 170-171]

The covenant violations at issue in this case are entirely different from the covenant violations by Mr. Shumway in *Shumway v. Betty Black Living Trust*, on which the Collinses rely.²⁴ Mr. Shumway's violations caused significant actual damages to other property owners on Colt Island.²⁵ Mr. Shumway did not appeal the damages award against him, and the case came before this Court only on the question of execution of the judgment.²⁶ So the *Shumway* case does not dictate a different result in this case. This Court should affirm the superior court's holding that it would be inequitable to enforce the setback or sewage covenants against the Halls under these circumstances.

Also, the superior court's holding in favor of the Halls implicitly resolved the Collinses' trespass allegations. The Collinses alleged that the Halls trespassed on their property by removing the Collinses' personal property from the disputed area.²⁷ [Exc. 18-19, Tr. 493] The superior court resolved the trespass claims by ruling that the disputed area is part of the Halls' property.

²⁴ *Shumway v. Betty Black Living Trust*, 321 P.3d 372 (Alaska 2014).

²⁵ *See id.* at 374 (“[The Shumways] widened common-use trails, felled trees outside their property, damaged the island’s communal spring, removed gravel from Black’s property and state-owned tidelands, buried garbage and other debris on the beach, and damaged trails by their recreational use of all-terrain vehicles.”)

²⁶ *Id.* at 375.

²⁷ At trial, Mr. Collins also recounted an anecdote of finding Mr. Hall looking under Mr. Collins' cabin for building materials. [Tr. 489-492] At the time the Collinses' co-owned the property with the Bartons, who were close friends of the Halls. [Tr. 534-35] Mr. Hall clarified the incident explaining that he and Mr. Barton had identical shop keys and a long-standing mutual agreement to borrow building tools and materials from one another. [Tr. 565] The record is clear that the Collinses were not seeking damages for that incident. [Tr. 489-492]

VII. Argument: The Collinses Did Not Argue at Trial that the Halls' Survey was Technically Inadequate and So Cannot Do So On Appeal.

The Collinses argue for the first time on appeal that the Halls' survey was a "replat" that required review and approval by the Alaska Department of Natural Resources. But the Collinses did not make this argument below, so cannot make it for the first time on appeal.²⁸ In any case, as described above, the Halls' survey is entirely consistent with Plat 75-11 and therefore an appropriately-recorded "record of survey" not a "replat."²⁹

VIII. Argument: Chaos Already Existed on Colt Island, the Superior Court's Decision Did Not Create It.

This is the fourth time that this Court has been called upon to hear a dispute involving tiny Colt Island.³⁰ The Collinses asked Mr. Bean to survey their lot in 2009 due to property boundary disputes with Mr. Shumway. [Tr. 226, 323] There was also testimony regarding a property boundary dispute between two landowners to the south of the Collinses' property, one of whom testified for the Halls and the other of whom testified for the Collinses. [Tr. 399, 699-701] Various witnesses testified to different understandings of the location of their seaward lot lines, even though they are all along the same meander line. [Tr. 38, 339, 379, 539-540]

One of the Halls' surveyor expert witnesses testified that he went out to Colt Island

²⁸ See *Hurst v. Victoria Park Subdivision Addition No. 1 Homeowners' Ass'n*, 59 P.3d 275, 279 (Alaska 2002).

²⁹ See AS 34.65.030.

³⁰ See *Shumway v. Betty Black Living Trust*, 321 P.3d 372 (Alaska 2014); *W.A.W. Inc. v. Black*, Not Reported in P.2d, 1994 WL 16457089 (Alaska 1994); *Lockwood v. Black*, Not Reported in P.2d, 1994 WL 16457088 (Alaska 1994).

in 2008 to survey a nearby property. He testified that he found:

a smattering of rebar, pins, form pins, 1-by-1 posts, 2-by-2 posts, nothing having a surveyor cap on it...none of the markers, corners, wood, form pins, rebar were hitting anywhere near close to, in this general vicinity, of where I had computed the lot corners....I told my clients... "Something is going awry here. [Tr. 850-51]

The superior court found that none of Mr. Bean's surveying on Colt Island was reliable, and the court was not at all convinced that the corners Mr. Bean set in 2012 would line up with the stakes he set in the 1970s. [Exc. 159-60] Mr. Bean's re-survey of the Collinses' property, supposed to correct errors in the original survey, contained new and inexplicable errors. [Exc. 160] And Mr. Bean's 2004 tidelands survey used the rock engraved with "WCMC1 S1755" as the point of beginning, not the faint "X" rock that he later used for the Collinses' survey. [Exc. 114-115]

The Collinses would have this Court believe that property boundaries were all settled on Colt Island, and neighbor relations copacetic, until the Halls' survey suddenly threw everything into disarray. But that is just not supported by the evidence. Colt Island has been plagued by lawsuits and property disputes for decades.³¹

The superior court's holding only addresses one property line. [Exc. 146-147] It is true that the court determined which rock is the correct point of beginning for Plat 75-11 and

³¹ One witness called by the Collinses testified that this trial was her second time testifying before the superior court regarding Colt Island. At the conclusion of her direct examination, when asked if there was anything else she'd like to tell the court, she said: "Just that I am really sick of coming to court over Colt Island when it's meant to be a place to go relax, enjoy your friends and your family, and have a good time.... That's how I feel at this point about Colt Island." [Tr. 329]

US Survey 1755, and future surveyors will likely follow that ruling. But each property owner will still have to sort out their own lot lines. Some property owners may be able to establish property boundaries by acquiescence, or adverse possession, in which case the location of Witness Corner to Meander Corner 1 is irrelevant to them. For other property owners, like the owners of the commercial tract that was the subject of Mr. Bean's 2004 tidelands survey, the superior court's ruling actually confirms that their tract was correctly surveyed. And, as the superior court noted, there is likely a prescriptive easement over the actual location of Totem Pole Trail. But other problems, such as the drafting error in Plat 75-11 that places 957 feet of lots along a 947-foot meander line, remains to be resolved.³²

So the picture that the Collinses paint of settled property lines suddenly shifted by an officious court is inaccurate. The superior court's decision resolved one problem out of a host of problems that already existed on Colt Island.

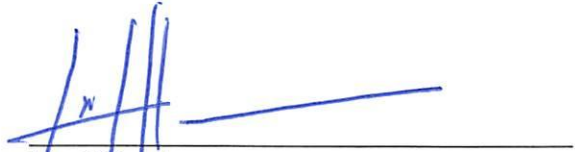
IX. Conclusion

This Court should affirm the superior court's holdings in their entirety. The Collinses do not appeal the superior court's legal rulings, and the superior court's factual findings are not clearly erroneous.

³² As the superior court noted: "[Plat 75-11] had a 10-foot discrepancy in the measurements of the lots, which would have to be accounted for somewhere in those lots. Somebody would have to lose 10 feet of their property because you can't fit all the lots into the space available on the island because the numbers don't add up." [Exc. 159-60]

DATED this 13th day of February, 2018.

FAULKNER BANFIELD, P.C.



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AK Bar No. 0811093
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

RAY M. COLLINS and CAROL J.
COLLINS,

Appellants,

vs.

DAVID W. HALL and MARGARET R.
HALL Trustees, and their successors in trust,
of the D & M Hall Community property
trust, dated March 14, 2005, and also all
other persons or parties unknown claiming a
right, title, estate, lien, or interest in the real
estate described in the complaint in this
action,

Appellees.

Supreme Court No. S-16795
Superior Court No. 1JU-14-00771 CI

CERTIFICATE OF TYPEFACE AND SERVICE

Pursuant to Appellate Rule 513.5(c)(1)(B) and (c)(2), I certify that the typeface used in the text of Appellees' Brief is 13 Point Times New Roman.

Pursuant to Appellate Rule 514(b), I certify that on February 13th, 2018, I caused a copy of the Appellees' Brief and Appellees' Excerpt of Record to be sent via first class mail, postage pre-paid, to:

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Juneau, AK 99801



Lael Harrison

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APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, FIRST
JUDICIAL DISTRICT, THE HONORABLE PHILIP M. PALLEMBERG, PRESIDING

APPELLEES' EXCERPT OF RECORD

Filed in the Supreme Court of the State of Alaska on February 13th, 2018.

By: 

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(907) 586-2210

Marilyn May, Clerk
Appellate Courts

By: _____

Deputy Clerk

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ORIGINAL

RECEIVED
OFFICE OF SURVEY GENERAL
DENVER, ALASKA

APR 27 1927

ANSWERED

FIELD NOTES

OF THE SURVEY OF THE

BOUNDARIES AND HEADER LINES

OF

THE HOMESTEAD CLAIM OF ALBERT FORSYTH

U.S. SURVEY NO. 1757

EMBRACING ALL OF COIT ISLAND STRAITS

PASSAGE IN THE TERRITORY OF ALASKA

IN

LATITUDE 58°15'28"N. LONGITUDE 139°43'12"W.

Of the _____ Meridian,

In the State of Territory of Alaska.

EXECUTED BY

Kres Dahlquist, U.S. Cadastral Engineer

In the capacity of U.S. Surveyor, under Special Instructions dated Feb. 7, 1927, 191

Public Survey Office

issued by the United States Surveyor General to govern surveys included in Group

No. _____, which were approved by the Commissioner of the General Land

Office, Feb. 19, 1927, and Assignment Instructions dated Apr. 19, 1927, 191

Survey commenced April 22, 1927, 191

Survey completed April 23, 1927, 191

DEFENDANT
1JU-14-771C1
Exhibit J2B
Admitted

INDEX DIAGRAM.

Township _____, Range _____

1	2	3	4	5	6
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

SCIENTIFIC DATA.

Owing to continued cloudy and inclement weather conditions it was not possible to obtain an observation for azimuth during the execution of this survey. I therefore deflect angles from the meridian obtained by J. Frank Warner, U.S. Cadastral Engineer, in making U.S. Survey No. 1285, and which was taken at a point, in latitude 58°15'N., and longitude 134°44'W., which bears S. 42°18'15"W., 57.44 chs., dist., from the true point for Cor. No. 1, M.C., this survey. In using this azimuth, proper allowance has been made for convergency of meridians, owing to difference of seating of the two positions.

The scientific data of the observation is given below:

Mean time of observation, 4h. 45m. P.M., April 14, 1920.

1st. Obs.	Alt. 17°04'	turn to left to mark	23°51'
2nd. "	16°12'	" " " "	25°20'
3rd. "	15°35'	" " " "	26°55'
4th. "	15°15'	" " " "	" "
5th. "	10°12'	" " " "	35°10'

Solution by the formula:

$$\cos \phi ZS \text{ equals } \frac{\sin \delta \times \sin(\delta - \text{codecl.})}{\sin \text{coalt.} \times \sin \text{colat.}}$$

where S equals codecl. + colat. + coalt.

Solution of First Observation.

colat.	31°45'00"	a.c. log sin	0.278578
coalt.	72°59'00"	a.c. log sin	0.019443
codecl.	80°23'35"		
	2) 185°07'35"		
	92°33'47"	log sin	9.999761
	80°23'35"		
	12°10'12"	log sin	9.323847
		2) 19.021538	
		-log Cos ϕA	9.810969

$\phi A = 49^{\circ}41'30''$

- 1. 49°23'00" azimuth from the North.
- 2. 80°57'00" course to sun.
- 3. 23°51'00" angle between sun and mark.
- 4. S. 56°46'00" bearing to mark by 1st. observation.
- 5. S. 56°44'00" " " " 2nd. "
- 6. S. 56°45'00" " " " 3rd. "
- 7. S. 56°46'00" " " " 5th. "
- 8. S. 56°45'00" course by mean of four observations.

Chains.

Survey commenced April 22, 1927, and executed with Liets transit no. 9502, the horizontal plates of which read by double opposite verniers to single minutes of arc, which is also the least count on the vernier of the vertical circle.

The transit has been approved by the Assistant Supervisor of Surveys for Alaska, April 15, 1925.

All adjustments of the transit examined and verified before commencing the survey, and maintained in adjustment throughout progress of field work.

Measurements made with a five chain steel tape, first chain graduated to single links; remaining four chains graduated every ten links. Tape tested by comparison with a 100 ft. steel standard and found correct.

Slope angles determined by transit readings, and all measurements reduced to horizontal distances.

All lines of the survey deflected from the true meridian determined as hereinbefore shown, and carried by fore and backsights. The latitude and longitude obtained by computation from data obtained from the field notes of U.S. Survey No. 1285.

I begin at the true point for Cor. No. 1, K.C., on line of mean high tide of Stephens Passage, which point is situated on the prominent point forming the northwest corner of Colt Island; in latitude $58^{\circ}15'28''N.$, and longitude $134^{\circ}43'12''W.$, from which

U.S.L.M. No. 1285, hereinafter described, bears $S. 31^{\circ}13' E.$, 57.87 chs. dist.

True point for Cor. No. 1, K.C., Sur. 1285, hereinafter described, bears $S. 42^{\circ}18'15'' W.$, 57.44 chs. dist.

As the above true point for meander corner falls at an unsafe place for corner, I establish a witness corner at a point which bears $S. 36^{\circ}22' E.$, 0.21 chs. dist., from the true corner point, as follows:

On the sharply sloping face of a bedrock ledge, showing

Field Notes of Survey No. 1755

2 ft. x 3 1/2 ft. above ground and facing northwest, I mark with cross (+) and with letters: WC NO. 1 81755, for witness corner to Cor. No. 1 and N.C. of this survey, from which

A spruce, 9 ins. dia. bears S. 73° 29' E., 1.55 chs. dist.,

marked WC 81755 NO. 1 BT.

A spruce, 6 ins. dia. bears S. 13° 20' S., 0.67 chs. dist.,

marked WC 81755 NO. 1 BT.

Thence from the true meander corner point.

With meanders of Colt Island.

Along line of mean high tide, over stony, sandy, and rocky beach.

- 1. N. 31° 41' E. 4.12 chs.
- 2. S. 63° 36' E. 4.06 "
- 3. N. 61° 06' E. 7.12 "
- 4. N. 39° 07' E. 4.20 "
- 5. N. 17° 03' E. 5.06 "
- 6. N. 49° 32' E. 7.58 "
- 7. N. 5° 04' E. 3.00 " At end, rock bears N. 27° W., 4.30 chs. dist.
- 8. S. 63° 34' E. 2.34 "
- 9. S. 5° 41' E. 18.86 "
- 10. S. 53° 30' E. 9.70 "
- 11. S. 27° 09' E. 3.34 "
- 12. S. 2° 07' W. 11.37 "
- 13. S. 23° 30' W. 4.66 "
- 14. S. 31° 37' W. 7.97 "
- 15. S. 25° 08' W. 8.65 "
- 16. S. 69° 40' W. 2.81 "
- 17. N. 71° 27' W. 6.92 " At end, sand spit, bare at low water, extends to N. end of Hras Island.
- 18. N. 29° 27' W. 10.16 "
- 19. N. 11° 29' W. 4.12 "
- 20. N. 32° 34' W. 5.56 "
- 21. N. 24° 25' W. 14.36 "

22. N. 13° 32' W. 5.92 " Intersect true point for corner No. 1, N.C., and the place of beginning, containing 115.296 acres.

Land: gently rolling upland; occasional rocky bluffs from 10 to 20 ft. high, along beach.

Field Notes of Survey No. 1755

CHAINS.

Soil: sandy loam, black muck, and leaf mold; 2nd. rats.

Timber: heavy spruce and hemlock.

Undergrowth: berry bushes and buck brush.

TIE TO U.S.L.M. No. 1285.

Owing to the location monument being situated on the opposite side of the tide-water channel, it is impracticable to make the tie by measurement on a direct line. I therefore make the tie from true point for Cor. No. 1, H.C., to the location monument, as follows; by triangulation:

From the true point for Cor. No. 1, H.C., a flag set at the location monument, bears S. 31° 13' E. To obtain a base line, I measure a traverse line as follows; from Cor. No. 1, H.C.

S. 13° 32' E. 5.92 chs.

S. 24° 25' E. 14.36 "

S. 32° 34' E. 5.56 "

S. 11° 29' E. 4.12 "

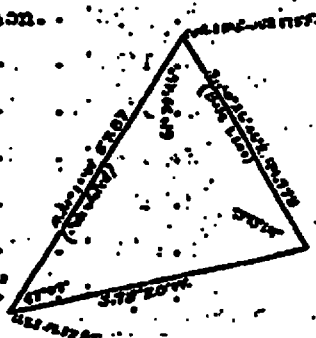
S. 29° 27' E. 10.16 "

S. 71° 27' E. 6.92 " to a point from which the flag

set at the location monument, bears S. 78° 20' W.

Computing the above traverse, gives for the base line S. 30° 26' 46" E., 44.775 chs. dist., from Cor. No. 1, H.C. The angle subtended at the location monument is 47° 07'. All angles checked by deflection and repetition.

log 44.775 = 1.651258
 log sin 71° 13' 14" = 9.976242
 1.627430
 log sin 47° 07' = 9.864950
 log 57.87 = 1.762450



Therefore the course and distance from true point for Cor. No. 1, H.C., to U.S.L.M. No. 1285, is S. 31° 13' W.,

57.87 chs. dist. The monument is a granite boulder in place showing 14x12x6 ft. above beach; and as reported.

TIE TO COR. NO. 1 SUR. 1285.

From U.S.L.M. No. 1285, the course and distance, by direct measurement, to true point for Cor. No. 1, H.C. of Sur. No. 1285 is N. 51° 02' W., 11.15 chs. dist.

Therefore I make tie from point for Cor. No. 1, H.C., of Sur.

Field Notes of Survey No. 1755,
No. 1755 to point for Cor. No. 1, U.C., of Survey No. 1285

by traverse, as follows; from Cor. No. 1, U.C. Sur. 1755.

S. 31° 13' W. 57.87 chs. to U.S.L.M. No. 1285.

N. 51° 02' W. 11.15 " to Cor. No. 1, U.C. Sur. No. 1285.

Computing the above traverse, gives for the course and distance to Cor. No. 1, U.C. Sur. 1285, as S. 42° 12' 15" W., 57.44 chs. Fitness corner to Cor. 1, U.C., Sur. 1285 bears East, 0.43 chs. dist., from the true meander corner point, and is an iron post, 1 in. dia., showing 15 ins. above ground, firmly set and marked as described in the official records.

Improvements.

The improvements are tied to the end of the third meander course, and consist of:

A log cabin, 14x24 ft., long side bears about E. and W., the NE. corner of which bears East, 5.19 chs. dist.

A log cabin, 10x24 ft., long side bears NE. and SW., the N. corner of which bears S. 15° 30' E., 3.75 chs. dist.

A log cabin, 10x12 ft., long side bears NE. and SW., the N. corner of which bears S. 7° 00' E., 4.33 chs. dist.

A pole shed, 8x16 ft., long side bears about E. and W., the NE. corner of which bears S. 1° 00' W., 3.89 chs. dist.

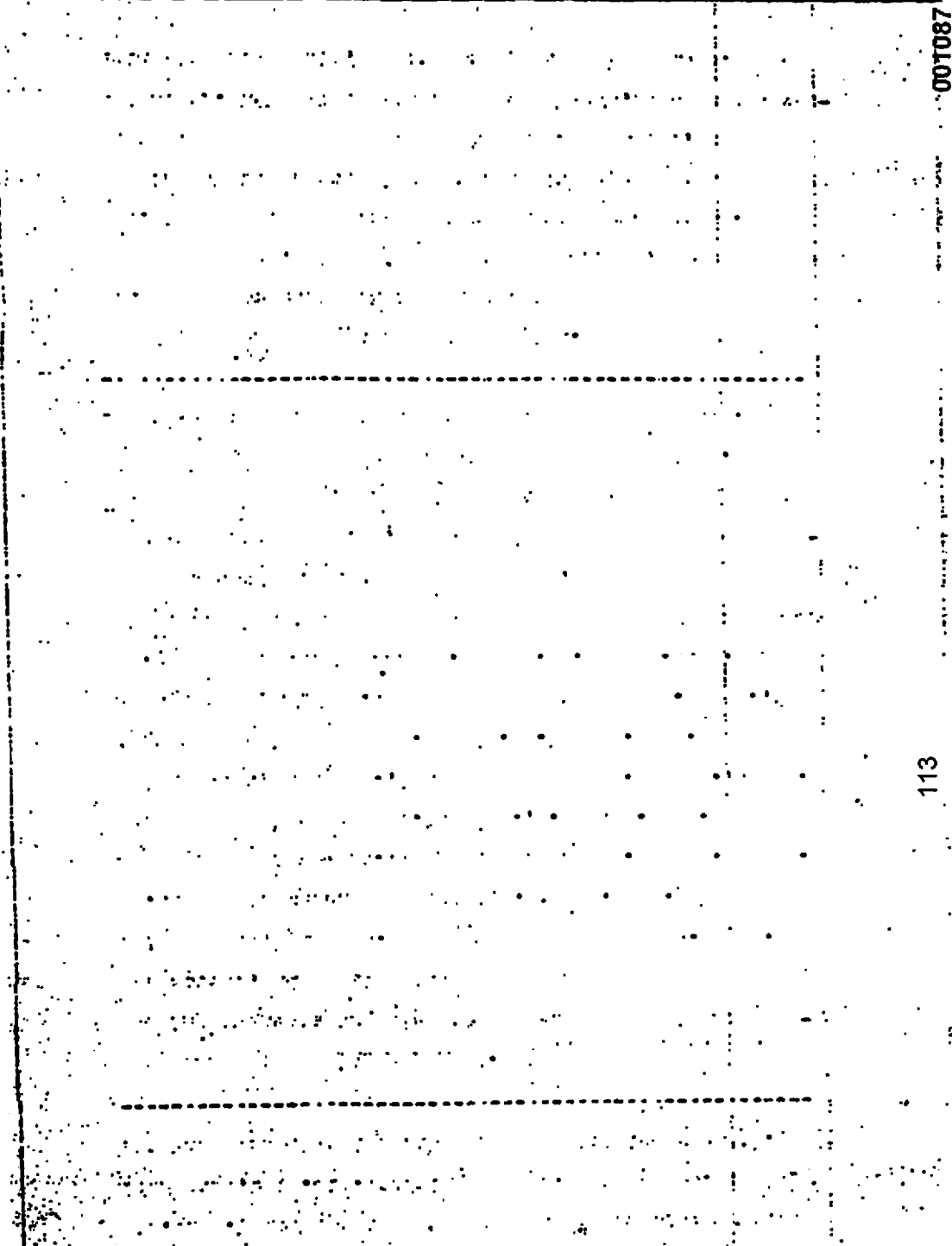
There are about three acres cultivated land, in irregular areas around and near the buildings, which are situated in a natural clearing, built up by wave action, the indentation of the shore line in front of the buildings, having at some time in the past, extended further inland.

There ^{are} is about five chains of pole and stake fence.

General Description.

The land embraced within this survey contains the whole of Colt Island, situated in Stephens Passage, an arm of the Pacific Ocean, and lying just north of Horse Island.

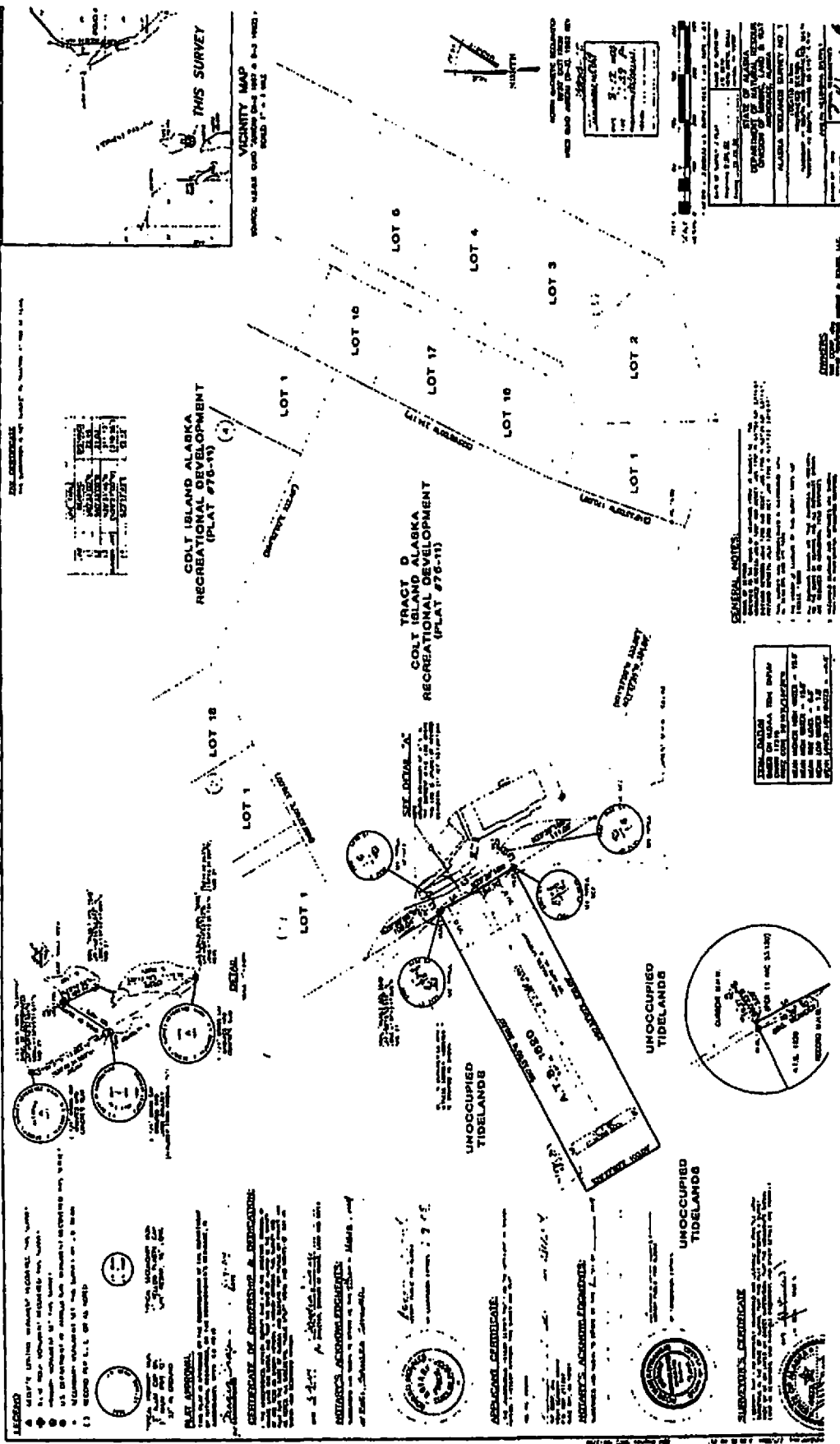
The island is practically ^{all} covered with spruce and hemlock timber, and a dense undergrowth of berry bushes, buck brush and alder. The soil consists of sandy loam, black muck, overlaid with leaf mold, and in some places with moss. There



John F. ...
U.S. Geological Survey

There are no streams, roads, or trails on the land. All travel is
and from the place is by water. The land is gently rolling
and well adapted to the raising of vegetables and berries.

Field Notes of Survey No. 1751



THE ALASKA SURVEYORS' ASSOCIATION, INC. 1975

ALASKA	1975
ALASKA	1975
ALASKA	1975
ALASKA	1975
ALASKA	1975

COLT ISLAND ALASKA
RECREATIONAL DEVELOPMENT
(PLAT #76-11)

TRACY B ALASKA
RECREATIONAL DEVELOPMENT
(PLAT #76-11)

GENERAL NOTES:

ALASKA	1975
ALASKA	1975
ALASKA	1975
ALASKA	1975
ALASKA	1975

LEGEND

- 1. 400' x 400' SECTION
- 2. 1/4 SECTION
- 3. 1/2 SECTION
- 4. 1/4 SECTION
- 5. 1/4 SECTION





Land Survey Monument Record Rev. Feb 2002



- 1) Land Corner Restoration
- Land Corner Establishment
- Other:

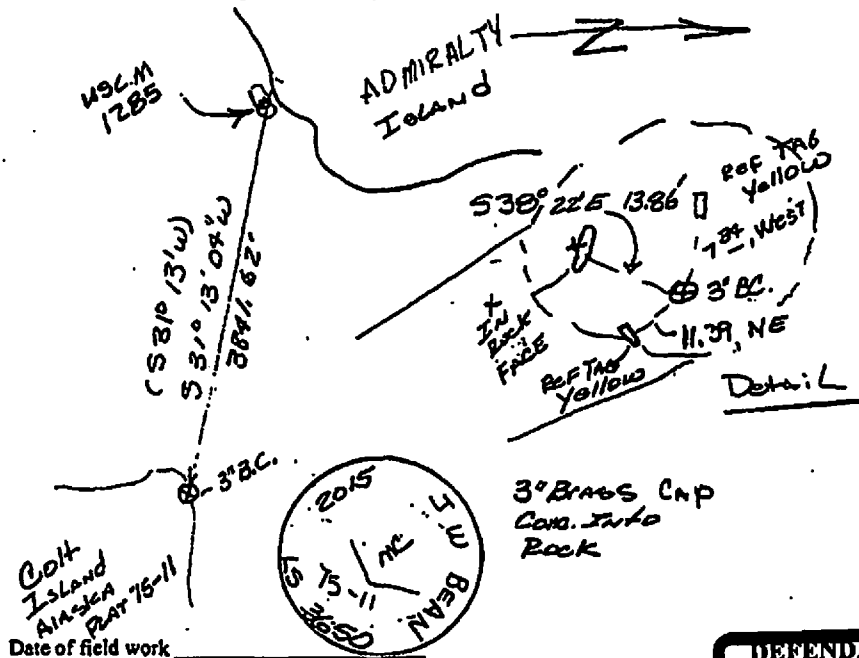
2) Description of corner evidence found or a concise statement of the method used to re-establish the corner:

U.S.L.M. MONUMENT 1285 FOR BEARING
TO ESTABLISH MONUMENT FOR PLAT No. 75-11

3) Description of monument and accessories established to perpetuate the location of the monument.

U.S.L.M. MONUMENT 1285
X on Rock FOUND ON ROCK FACE
SEE ATTACHMENT Photos and 75-11

4) A sketch showing the relative location of monument and reference points or a sketch showing the monuments used and the measurements made to determine the position of the monument being established. (Use additional sheets if necessary)



DEFENDANT
 1JU-14-771C1
Exhibit J12L
 Admitted

LAND SURVEY MONUMENT RECORD

1. LAND CORNER RESTORATION
- LAND CORNER ESTABLISHMENT (Complete Item No. 5)
- OTHER Explain _____
2. DESCRIPTION OF CORNER EVIDENCE FOUND OR A CONCISE STATEMENT OF THE METHOD USED TO REESTABLISH THE CORNER.
see attached
3. DESCRIPTION OF MONUMENT AND ACCESSORIES ESTABLISHED TO PERPETUATE THE LOCATION OF THE MONUMENT.
See Attached
4. A SKETCH SHOWING THE RELATIVE LOCATION OF MONUMENT AND REFERENCE POINTS OR A SKETCH SHOWING THE MONUMENTS USED AND THE MEASUREMENTS MADE TO DETERMINE THE POSITION OF THE MONUMENT BEING ESTABLISHED. (USE ADDITIONAL SHEETS IF NECESSARY).
SEE ATTACHED

*Return to
JW BEAN
1070 Arctic Circle
Juneau, ALASKA
99801*

DATE OF FIELD WORK *8-17-15*

6. **SURVEYORS CERTIFICATE**

I John BEAN REGISTRATION NO. 3650
DO HEREBY CERTIFY THAT I WAS IN RESPONSIBLE
CHARGE OF THE SURVEYING WORK DESCRIBED IN THIS
RECORD AND THAT TO THE BEST OF MY KNOWLEDGE
THE INFORMATION PRESENTED HEREIN IS TRUE AND
CORRECT.
DATE 9-29-15

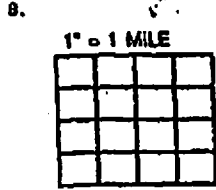


8. **CORNER DESCRIPTION**
CORNER M.C. Cott Island Alaska SUBDIVISION
SECTION _____ TOWNSHIP _____ RANGE _____, Copper River MERIDIAN, ALASKA
RECORDERS NO. _____, REC. DISTRICT: Juneau
DATE FILED: _____, IF UNSURVEYED SECTION, INCLUDE
PROTRACTED SECTION NUMBER

7. **RECORDING DISTRICT INFORMATION**



(DO NOT FILL IN)



• - LOCATION OF MONUMENT

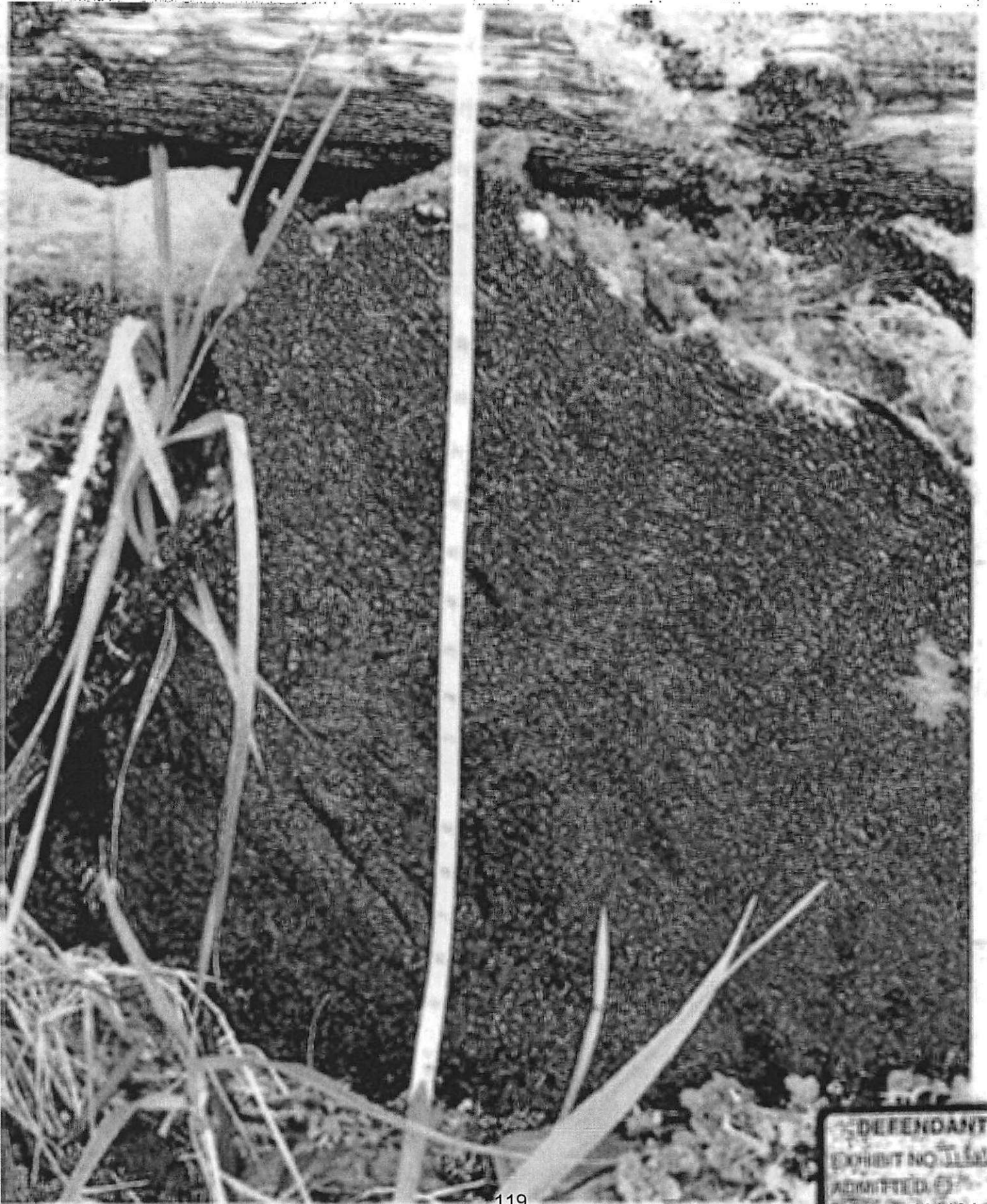
INDEX REF. NO. _____





PL 000240

DEFENDANT
DU-14-771C1
Exhibit 001103
Admitted 12



DEFENDANT
EXHIBIT NO. 111-2
ADMITTED
001104
CASE NUMBER

56° NE
PLEASE
PROTECT
NEARBY
SURVEY
MARKER

1/29/89

DEFENDANT
EXHIBIT NO. 103M-3
ADMITTED
103M-3
(CASE NUMBER)

270°W
PLEASE
PROTECT
NEARBY
SURVEY
MARKER
7³⁴

DEFENDANT
EXHIBIT NO. 11
ADMITTED
1988
001106



rmconsult.com

R&M CONSULTANTS, INC.

9101 Vanguard Drive
Anchorage, Alaska 99507

phone: 907.522.1707
fax: 907.522.3403

December 17, 2015

R&M No. (2343.01-.02)

Baxter Bruce & Sullivan
P.O. Box 32819
Juneau, AK 99803
Attn: Daniel G. Bruce

Faulkner Banfield, P.C.
8420 Airport Boulevard, Ste 101
Juneau, AK 99801-6924
Attn: Lael Harrison

RE: Collins v. Hall 1JU-14-00771 CI
Boundary Conflict Assessment

Dear Mr. Bruce/ Ms. Harrison:

The following is my report and conclusions regarding the boundary conflict in the above referenced Collins v. Hall case. I have reviewed the materials that you have provided to me along with other publically available on-line information. No field survey was performed as a part of this review.

Introduction

The subject of this report is a boundary conflict between two recreational lots on Colt Island as monumented by two separate surveys. The parcels in question are Lots 14 and 15 of the Colt Island Recreational Development¹, a subdivision of U. S. Survey No. 1755. A plat for Lot 15 was prepared by R&M Engineering, Inc.² in 2012 for owner D & M Hall Community Property Trust (Hall Plat). A plat for Lot 14 was prepared by J.W. Bean, Inc.³ in 2014 for owner Ray & Carol Collins (Collins Plat).

The two surveys differ in their location of the common boundary between Lots 14 & 15 by approximately 15-feet. The conflicting interpretation of the boundary location suggests that certain improvements on Lot 15 may encroach onto Lot 14.

Location

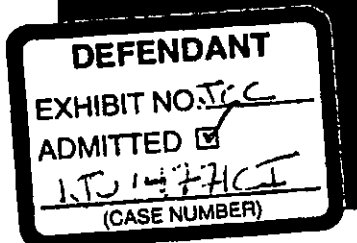
Colt Island is defined by U.S. Survey No. 1755 located within Section 35 of Township 41 South, Range 65 East, Copper River Meridian⁴. Colt Island lies between Admiralty Island and Douglas Island along Stephens Passage and is approximately 10.5 air miles southwest of Juneau.

¹ Colt Island Recreational Development, U.S.S. 1755 filed as Plat 75-11 on July 16, 1975, Juneau Recording District. Platted by J. W. Bean, PLS for H. H. Lockwood & Associates.

² Record of Survey of Lot 15, Area 1, Colt Island Recreational Development, U.S. Survey 1755, filed as Plat 2012-32 on 12/7/12, Juneau Recording District by R&M Engineering, Inc., 6205 Glacier Highway, Juneau, Alaska 99801 – Surveyor: Mark A. Johnson, L.S.

³ Record of Survey Lot 14, Area 1, Colt Island Alaska Recreational Development, U.S. Survey No. 1755, filed as plat 2014-46 on October 8, 2014, Juneau Recording District by J.W. Bean, Inc., 1070 Arctic Circle, Juneau, Alaska 99801

⁴ See USGS Quadrangle Juneau B-3, AK 1996



Survey Chronology

1. U.S. Survey No. 1285: This survey was performed in 1922 to define the homestead claim of W. D. Baney on Admiralty Island. U.S. Location Monument (USLM) No. 1285, established for this survey, would provide the basis of geographic location (latitude and longitude) and basis of bearings for the subsequent U.S. Survey No. 1755 on Colt Island.
2. U.S. Survey No. 1755: This survey was performed in 1927⁵ in order to define the boundaries and meanders of the homestead claim of Albert Forsythe. The survey consisted of a 115 acre island property with cabin and shed improvements. What is unique about a small island survey of this type is that the General Land Office (GLO) surveyors only established a single monument on the island. This monument along with a tie to USLM No. 1285 on Admiralty Island provided a geographic location and orientation to true north for the Colt Island survey. Often, U.S. Surveys would have established multiple monuments that could be used to preserve the survey location should some of the monuments be lost to human activity or other natural events. In the case of U.S. Survey No. 1755, the preservation and identification of the original survey control monuments is critical to ensure an accurate boundary retracement at a later date.

The single monument established for U.S.S. 1755 was a Witness Corner Meander Corner (WCMC) and is not located on the boundary of the survey. The purpose of a WCMC is to "evidence" the true corner with a monument that is established upon secure ground as the Meander Corner itself would be liable to destruction. From Meander Corner No. 1, a series of 22 lines were run clockwise from MC-1 by bearing and distance to define the meanders of Colt Island. Meander lines are run not as boundaries of the tract but for the purpose of defining the sinuosities of the mean high tide line and as a means of ascertaining the quantity of land.⁶

The field notes for U.S.S. 1755 make the following statement regarding the MC and WCMC: "*As the above true point for meander corner falls at an unsafe place for corner, I establish a witness corner at a point which bears S.38°22'E., 0.21 chs. dist., from the true corner point, as follows: On the sharply sloping face of a bedrock ledge, showing 2 ft. x 3 ½ ft. above ground and facing northwest, I mark with cross (+) and with letters: WC MC1 S1755, for witness corner to Cor. No. 1 and M.C. of this survey,...*"

The field notes then describe the survey of the meanders: "*Thence from the true meander corner point. With meanders of Colt Island. Along line of mean high tide, over stony, sandy, and rocky beach.*"

3. Plat 75-11 Colt Island Recreational Development (U.S.S. No. 1755): A subdivision of this nature is referred to as a "paper plat". There is no indication on the plat that a survey was performed on the ground or that the corners of the lots were monumented. This provides for a relatively inexpensive way to subdivide land and move directly into parcel sales but it merely transfers the cost and potential for conflicts to future owners. In order to limit the adverse effects caused by a "paper plat", Alaska statutes provide the authority for local

⁵ Colt Island was surveyed between April 22 and 23, 1927. The plat of U.S. Survey No. 1755 was approved on October 17, 1928.

⁶ Surveys executed by the Department of the Interior are performed according to the most recent manual of instructions published prior to the survey. Definitions and references relating to U.S.S. 1755 are paraphrased from the Advance Sheets of Chapters I to VI, inclusive, of a revision of the Manual of Instructions for the Survey of the Public Lands of the United States, dated 1919.

government to control the process by implementing a platting authority.⁷

At the time the Colt Island plat was prepared, there was no local or state government authority setting specific standards for platting, monumentation or access. The City and Borough of Juneau was unified in 1970, prior to the Colt Island platting, however, the local government boundaries almost appear to have been drawn to specifically exclude the Mansfield Peninsula of Admiralty Island as well as Colt Island and Horse Island directly to the south. (See Figure 1)

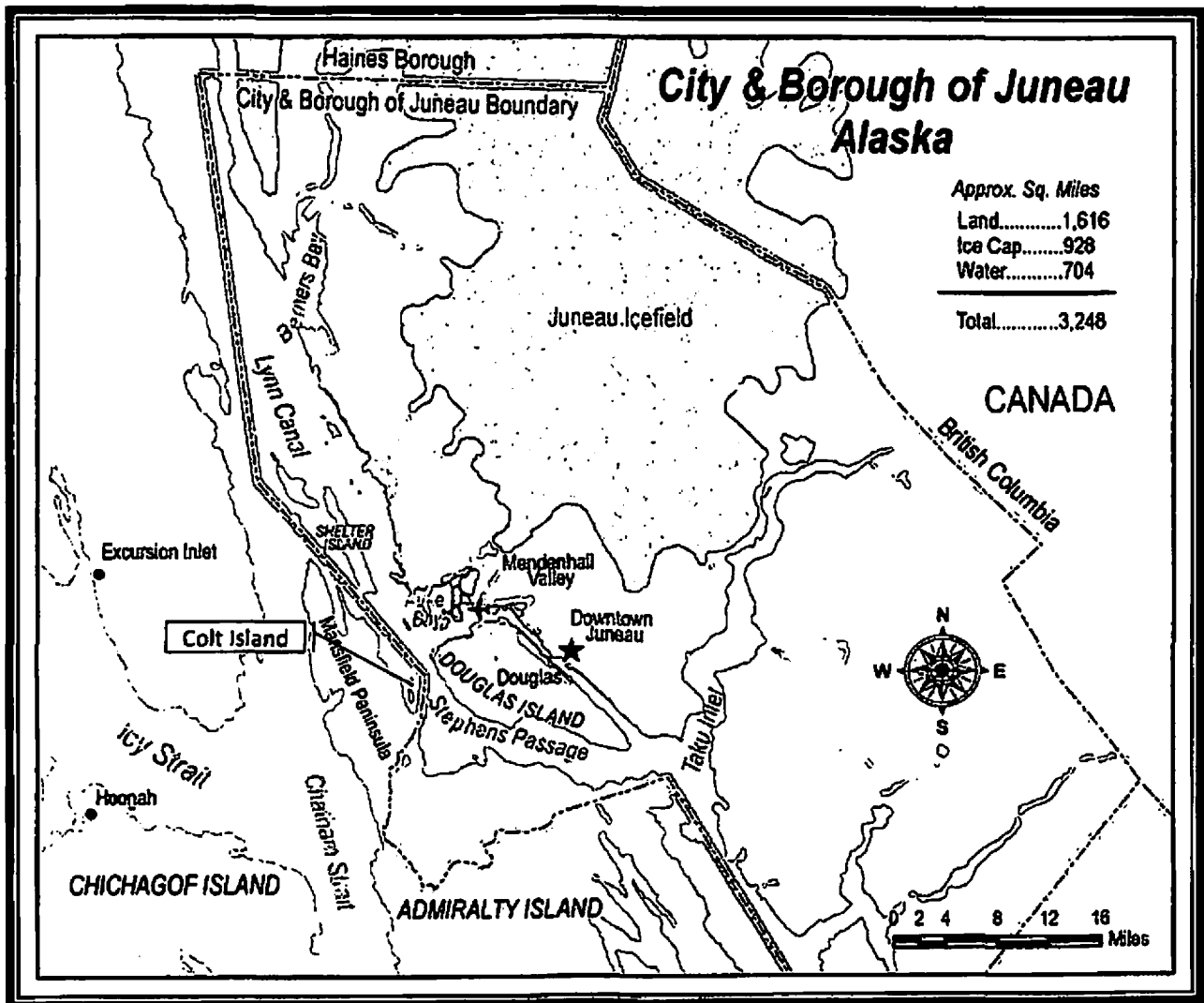


Figure 1 - City & Borough of Juneau Boundaries

⁷ See A.S. 29.40.010 Planning, Platting, and Land Use Regulation and A.S. 29.40.070 Platting Regulation.



To address the platting issues arising where no local government platting authority existed, in 1998, the Department of Natural Resources (DNR) was established as the platting authority for the Unorganized Borough⁸. Regulations implementing DNR's new authority were not issued until late 2001⁹. While further subdivisions of Colt Island property would be subject to DNR platting jurisdiction after that point, the initial subdivision of the Colt Island lots without monumentation was not prohibited by law. We often find older subdivisions prepared prior to the establishment of a platting authority that have been surveyed, platted and monumented. Although not legally required at the time, monumentation of these subdivisions may be the result of the surveyor's minimum standards or the desire of the subdivision developer.

As no field survey was performed as a part of the Plat 75-11, the exterior boundary of the tract being subdivided was adopted from the original bearings and dimensions as published in U.S. Survey No. 1755. The Collins & Hall properties are Lots 14 and 15 respectively within "Area 1" of Plat 75-11. The westerly boundaries of the lots adjoin the second leg of the U.S.S. 1755 meanders from MC-1 running in a counterclockwise direction.

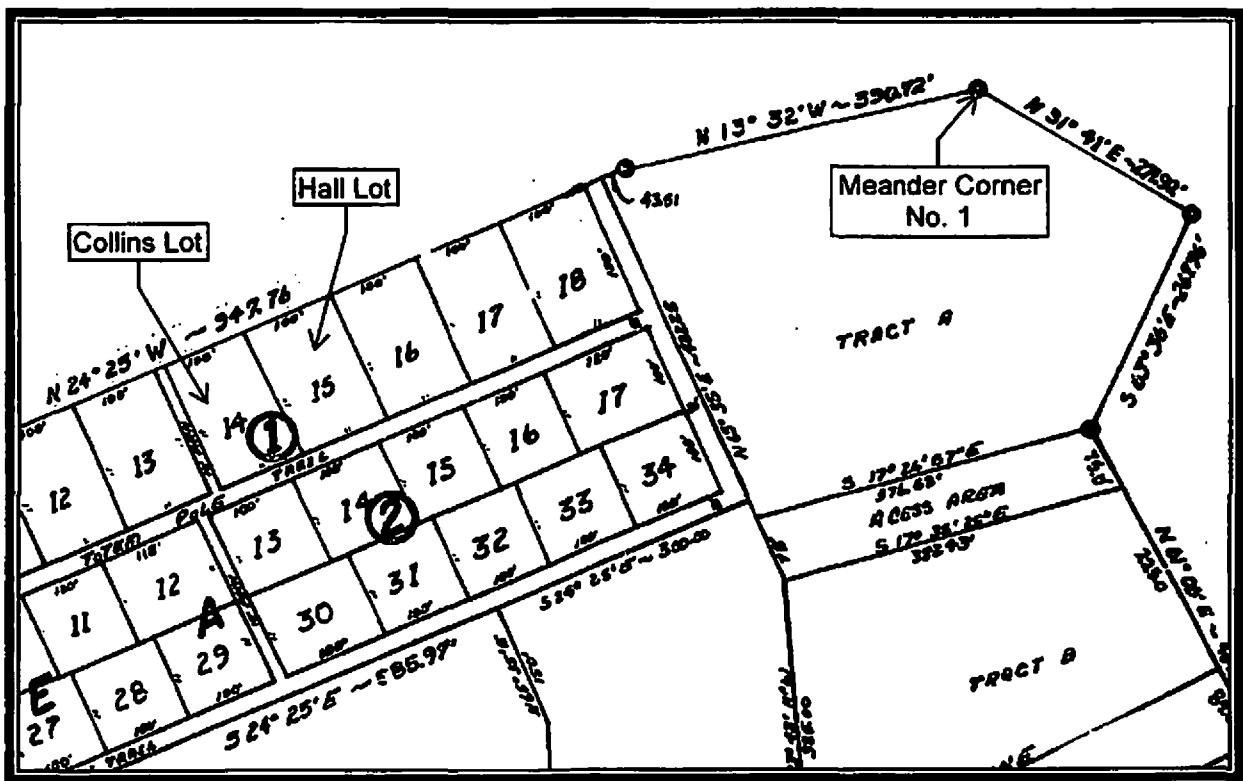


Figure 2 - Plat 75-11 Excerpt

⁸ A.S. 40.15 Article 4 Platting in Areas Outside Certain Municipalities, effective August 18, 1998

⁹ 11 AAC 53, Article 5. Platting Authority In the Unorganized Borough, effective October 2001.



Many of the dimensions on the digital copy of Plat 75-11 that can be downloaded from the Recorder's Office website are illegible as a result of either a poor quality original or poor quality scan. Regardless, I was able to mathematically reproduce and validate the plat dimensions within most of Areas 1 & 2 as a check of whether the boundary conflict might be a result of an error in the original plat.

4. **Plat 2004-10:** Alaska Tidelands Survey No. 1680.¹⁰ This plat was prepared by J.W. Bean under DNR survey instructions. The purpose of the plat was to define a State tidelands lease area adjoining Tract D of the Colt Island Subdivision (Plat 75-11). This plat's relevance is related to the fact that its Basis of Bearing is the same one used for the surveys in conflict. It will be discussed later in this report.
5. **2008 Davis Survey:** Included in the materials transmitted by Gabrielle Keizer (Baxter Bruce & Sullivan) on November 19, 2015 was an undated review of the "Hall" and "Collins" plats performed by Randal V. Davis, PLS for the Halls. Davis performed no field survey as a part of this review, however, his review attachments included data, calculations and photos from a survey he had been hired to perform for an unnamed Colt Island lot owner on August 6, 2008. I contacted Mr. Davis on November 11, 2015 to see if he had additional information relating to existing monumentation of the Colt Island lots. He stated that he had started a survey and upon finding conflicts between existing lot corners and the record dimensions for Plat 75-11, he determined that the resolution was beyond the scope of a single lot survey. He said that as he was unable to resolve the conflicts, he set no lot corners and filed no plats.
6. **Plat 2012-32:** The "Hall" plat was previously referenced in footnote 2. The plat locates Lot 15 using the record dimensions and basis of bearing reflected on Plat 75-11, Colt Island Subdivision. Highlights in Figure 3 graphically indicate that four existing secondary monuments were found, (3650-S J.W. Bean) and that they represent lot lines for Lot 15 that are estimated to be 17-feet to the north of and 18-feet to the east of the "Hall" plat survey. The highlights also indicate that if the found Bean monuments are correct, that the Hall's outhouse and shop building extend approximately 1 to 2 feet respectively into the Collins' Lot 14.

¹⁰ Filed as Plat 2004-10 on March 12, 2004, Juneau Recording District



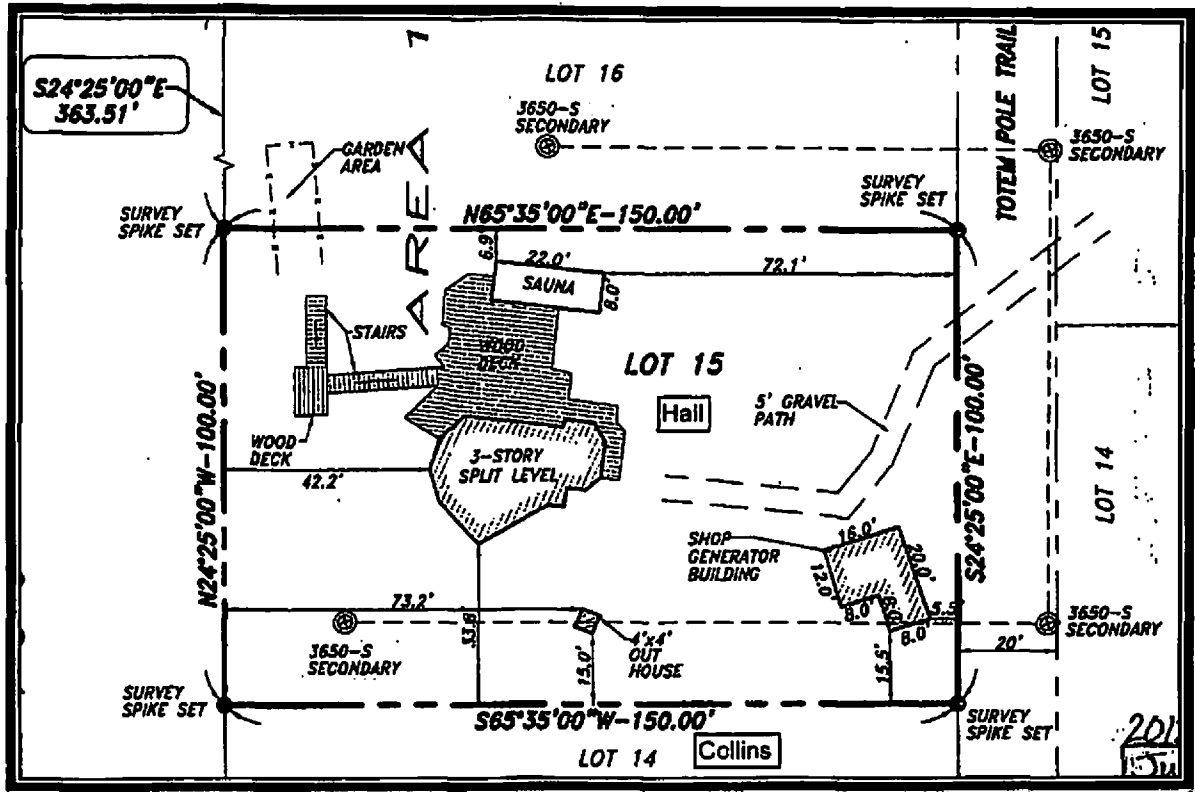


Figure 3 - Plat 2012-32 Excerpt

7. **Plat 2014-46:** The "Collins" plat was previously referenced in footnote 3. On the face of the plat, it also appears to locate Lot 14 using the record dimensions and basis of bearing reflected on Plat 75-11, Colt Island Subdivision. The plat graphically indicates that existing secondary monuments to the north, south and east of Lots 14 and 15 were recovered. The plat provides a topographic survey of improvements and contour elevations within Lot 14. Two structures noted as "shed" and apparently representing the Hall's outhouse and shop are shown as encroaching onto the Collins' lot by 1.1 and 1.7 feet respectively. No ties or graphic representations are made to the monuments set by R&M Engineering, Inc. as a part of the "Hall" plat in 2012.

An inspection of the contour lines indicates that southwest corner is located about a third of the way up the bluff near the 25-foot elevation. The mid-point of the west boundary is about half of the way up the bluff near the 28-foot elevation and the northwest corner is in the vicinity of the top of the bluff near the 30-foot elevation. This is important because according to the Colt Island subdivision (Plat 75-11), the west boundary of the lot was designed to coincide with a record meander line for U.S. Survey No. 1755. The record meander line as stated in the preceding discussion for the plat for U.S.S. 1755 was to be "Along line of mean high tide, over stony, sandy, and rocky beach." Assuming that the bluff has not significantly eroded since the original 1927 survey, this suggests that the "Collins" plat depicts a location for Lot 14 that is further to the

east than was intended. This discrepancy was also noted in the Randal Davis review.

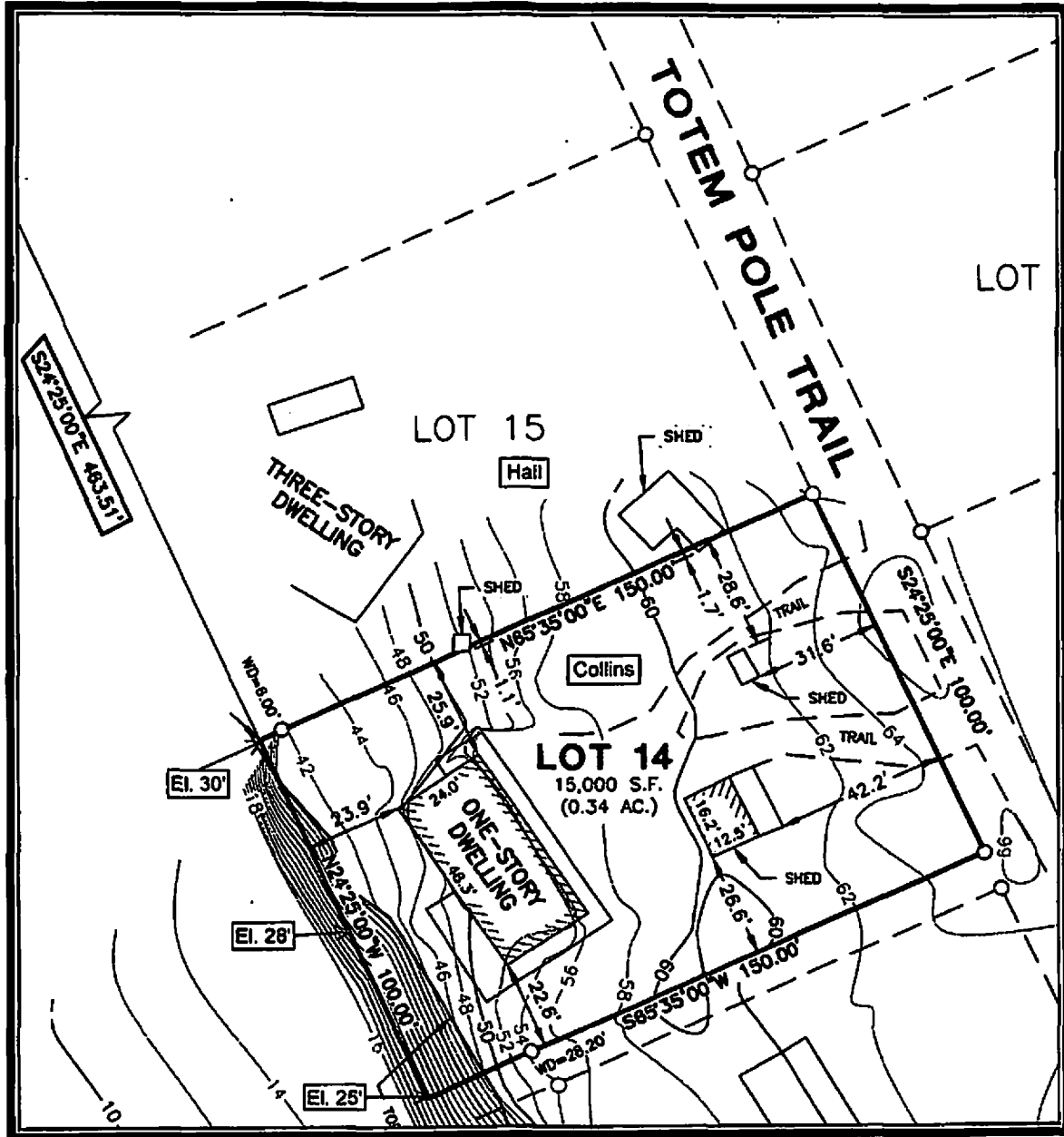


Figure 4 - Plat 2014-46 Excerpt

8. Land Survey Monument Record 2015-005094¹¹: Establishment of MC-1, U.S.S. 1755. A land survey monument record¹² is not a plat but documents the establishment or restoration of an important monument. The purpose of this monument record was to establish a 3-inch BC (Brass Cap) concreted into rock for the position of MC-1 of U.S. Survey No. 1755. The document identifies the corner position as being an MC (Meander Corner) for the "Colt Island Alaska" subdivision and includes photographs of the monument and accessories that were set. The sketch included in the monument records indicates that MC-1 was established at the record bearing and distance according to U.S.S. No. 1755 from an "X on rock found on rock face". The "X on rock" was implied to be but not identified as the record WCMC-1 for U.S.S. No. 1755. A photo of the "rock face" attached to the document intended to show the "X" is of poor quality and no markings can be discerned.

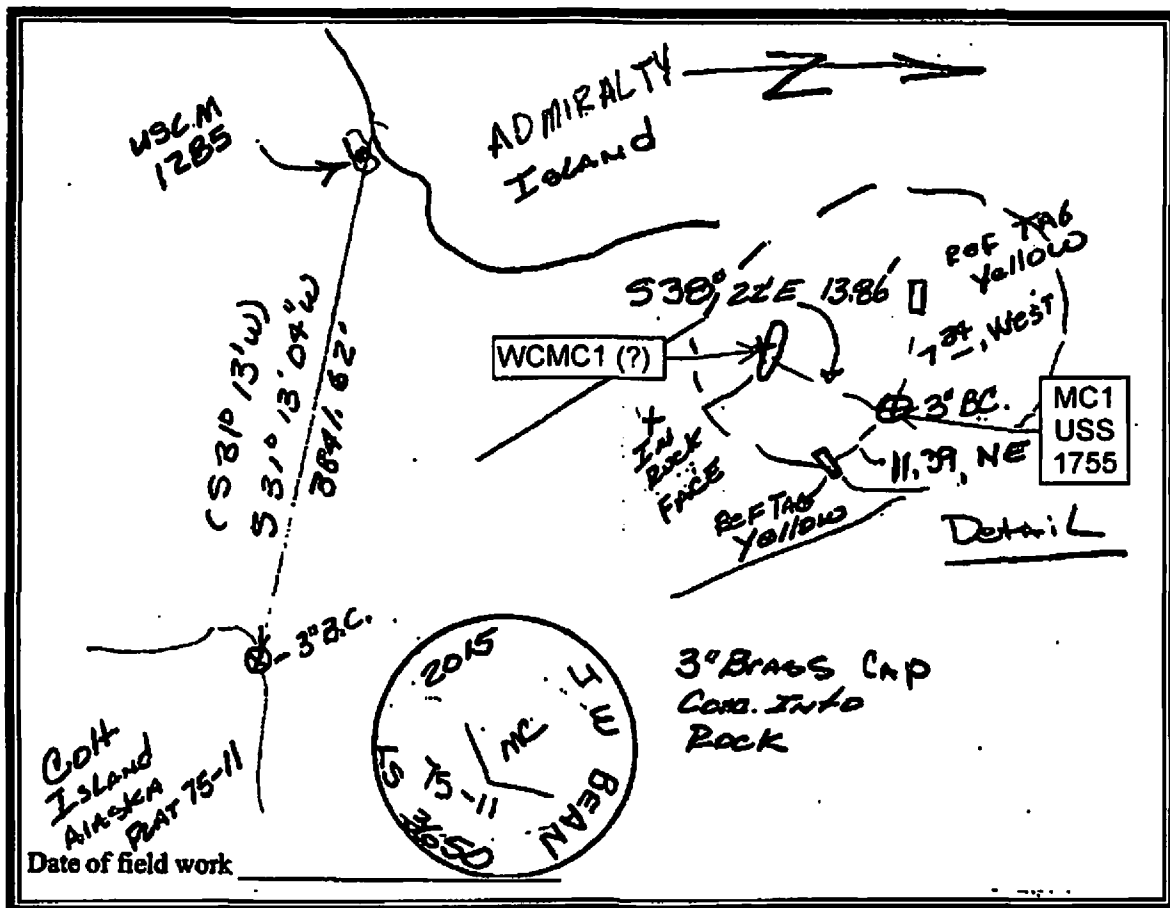


Figure 5 - Monument Record Sketch

¹¹ This monument record was recorded as document 2015-005094-0 on September 30, 2015, Juneau Recording District by J.W. Bean based on field work performed on 8/17/15.

¹² A.S. 34.65.040 Records of monument.



9. Plat 2015-37¹³: This Record of Survey is an amendment to the "Collins" plat. (2014-46). The size, shape and location of Lot 14 along with the topography and location of improvements in the vicinity of Lot 14 appears to be unchanged from the original "Collins" plat. What has changed are the Basis of Bearing and basis of location references to MC-1 of U.S.S. 1755.

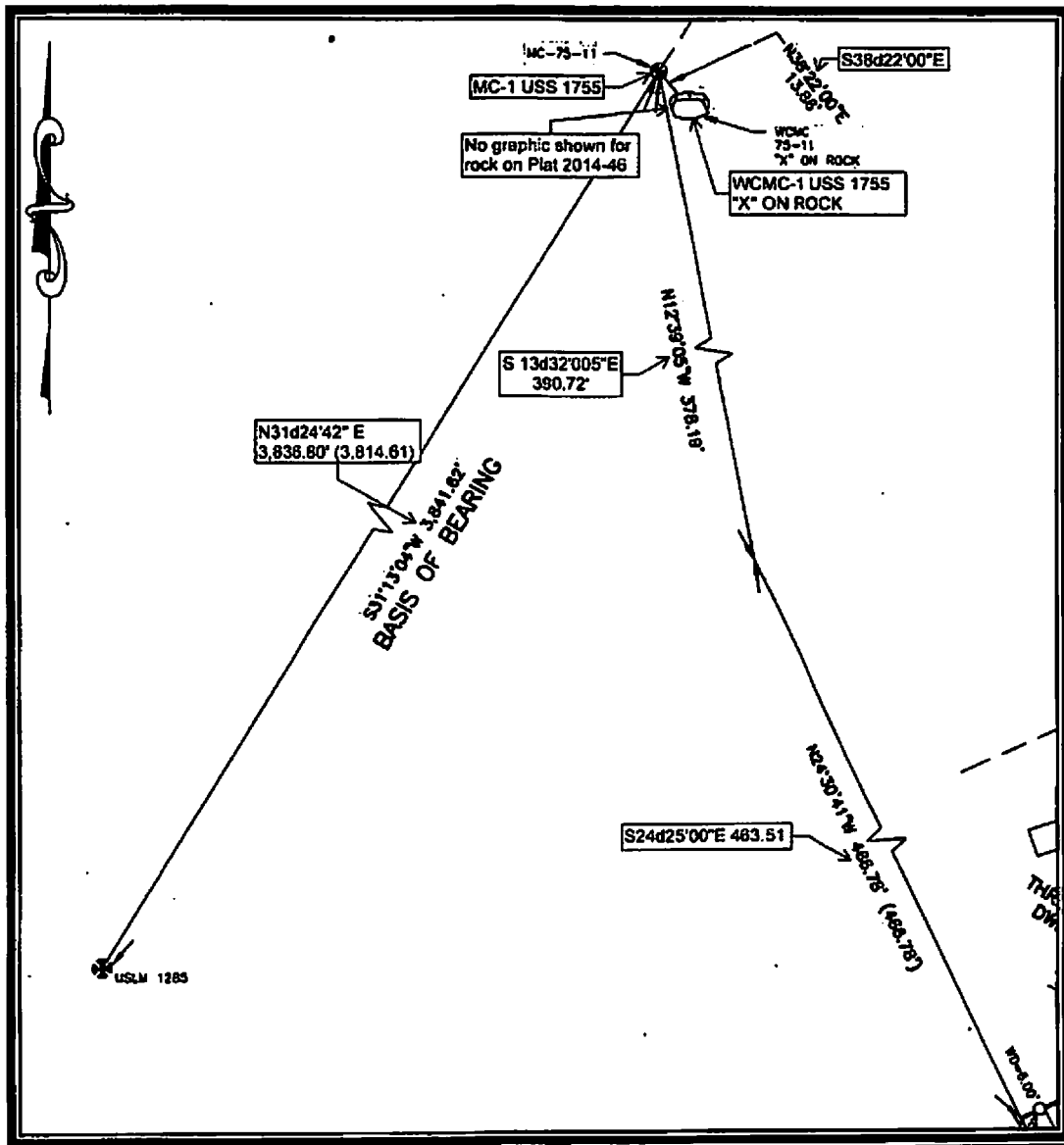


Figure 6 - Plat 2015-37 Excerpt

¹³ Plat 2015-37 filed on September 30, 2015, Juneau Recording District by J.W. Bean, PLS.



Figure 6 represents the modifications made to the "Collins" plat (2014-46) by the amended plat 2015-37. The red boxes note the text as shown on the original plat and the highlighted items indicate the amended revisions.

- a. MC-1 and WCMC-1 are no longer referenced to the original U.S.S. 1755. They are referenced to the subsequent Colt Island subdivision plat 75-11. It is presumed that they are intended to represent the same points.
- b. The record tie between WCMC-1 and MC-1 for U.S.S. No. 1755 is S38°22'E, 13.86 feet. The tie is shown correctly on the initial "Collins" plat (2014-46) but the bearing is labeled incorrectly on the amended plat as N38°22'E. This may be a labeling error as the WCMC symbol is shown in the correct quadrant with respect to MC on the amended plat. It is interesting that the sketch for the preceding Monument Record, although crude, also suggests that the WCMC is to the northeast of the MC while being labeled with the correct S38°22'E bearing.
- c. The Basis of Bearing for Plat 2015-37, is now shown as the approximate record bearing of S31°13'04"W (Record for U.S.S. 1755 is S31°13'W) between MC-1 and USLM 1285. Both the initial "Collins" plat and the "Hall" plat show a computed Basis of Bearing between WCMC-1 and USLM 1285 because those were the only two physically existing monuments.
- d. The distance on the Basis of Bearing shown on the initial "Collins" plat compared to the amended "Collins" plat differs by 4.82 feet because the initial plat used a computed basis of bearing between WCMC-1 and USLM 1285 while the amended plat used a basis of bearing between MC-1 and USLM 1285. The amended "Collins" plat does not provide the record distance along the basis of bearing.
- e. The two ties commencing from MC-1 to the northwest corner of Lot 14 (common with the southwest corner of Lot 15) as shown on the original "Collins" plat (2014-46) were S13°32'00"E, 390.72 feet; then S24°25'00"E, 463.51 feet. They have been revised on the amended "Collins" plat (2015-37) to N12°39'05"W, 378.19 feet; then N24°30'41"W, 466.78 feet.

Survey Analysis

1. Definitions :

- a. "(2) 'monument' means a fixed physical object marking a point on the surface of the earth used to commence or control a survey or to establish a lot corner;"¹⁴
- b. "(3) 'plat' means a map or delineated representation of a tract or parcel of land showing the subdivision of land into lots, blocks, streets, or other divisions;"
- c. "(5) 'subdivision' (A) means the division of a tract or parcel of land into two or more lots by the landowner or by the creation of public access, excluding common carrier and public utility access;"

¹⁴ See A.S. 40.15 Subdivisions and Dedications, Sec. 40.15.900 Definitions for the meaning of "monument", "plat" and "subdivision".

- d. **Legally Sufficient Description**: "A valid deed must designate the land intended to be conveyed with reasonable certainty....a description is sufficient if it contains information permitting identification of the property to the exclusion of all others."¹⁵
- e. **Point of Beginning (POB)**: For a survey or description of a parcel of land to be reproducible, the parcel location must begin at a readily identifiable, known point. The Point of Beginning (POB) should be a point on the boundary of the parcel being described and preferably consist of an existing natural or manmade monument.
- f. **Point of Commencement (POC)**: In the absence of an existing monument located on the boundary of the parcel being described, the description may start at an existing natural or manmade monument referred to as the "Point of Commencement". The description or survey will then proceed by courses of directions and distances to the "Point of Beginning".
- g. **Basis of Bearing (BOB)**: The orientation of angular relationships of lines in a description or on a map. For a survey or description of a parcel of land to be reproducible, the direction of lines must be related to a known basis such as magnetic north, true north or a line between two fixed monuments. Generally, the "basis of bearing" will be clearly stated on the plat or description that created the parcel or can be derived from associated data.

2. **Basis of Location for Lots 14 & 15, Area 1, Colt Island Subdivision**

The 1928 plat of U.S.S. No. 1755 indicates that a single monument was established to control the location of the survey. To ensure permanency, the surveyor selected the face of a bedrock ledge, a natural monument for the location of the Witness Corner to Meander Corner No. 1 (WCMC-1). To ensure that the monument would be identifiable among a beach full of similar rock faces, the surveyor chiseled out a "cross" and the letters "WC MC1 S1755".

There is no evidence on the face of the Colt Island subdivision plat that any field survey was performed or the lots monumented. The exterior boundaries of the subdivision are based on the record meanders of U.S.S. No. 1755. Although MC-1 and the monumented WCMC-1 for U.S.S. No. 1755 are not labeled on the subdivision plat, it is clear that WCMC-1 would be the sole basis of control on Colt Island from which the subdivision lots could be located.

The title for Lot 14 vests in Ray and Carol Collins through a quitclaim deed issued by the Internal Revenue Service in 1990¹⁶. The title for Lot 15 vests in David W. and Margaret R. Hall, Trustees of the D & M Hall Community Property Trust through a warranty deed issued in 2005¹⁷. The property description in each deed is similar in that they refer to either Lot 14 or 15, Area 1, Colt Island Recreational Development, according to Plat 75-11, U.S. Survey No.1755, Juneau Recording District, First Judicial District. A description by lot and block alone is insufficient to locate the property without reference to the plat that initially created the lot. The reference to

¹⁵ *Shilts v. Young*, 567 P.2d 769, Alaska – July 22, 1977

¹⁶ Quitclaim Deed recorded in Book 331, Page 671, June 1, 1990, Juneau Recording District.

¹⁷ Statutory Warranty Deed recorded as document 2005-001967-0, March 14, 2005, Juneau Recording District.



the plat essentially makes it a part of the deed.¹⁸

The "Hall" plat (2012-32) used the record tie according to U.S.S. No. 1755 from WCMC-1 to establish a computed position for MC-1. From MC-1, the "Point of Commencement", the surveyor locates the northwest corner of Lot 15, the "Point of Beginning" by running the record courses along the exterior subdivision boundary. The plat identifies WCMC-1 as an "X in stone". With only one physical monument (WCMC-1) controlling the subdivision, there is really no alternative initial procedure. Upon monumenting the corners of Lot 15, the "Hall" plat identifies existing lot corners that conflict with those being set.

The initial "Collins" plat appears to use an identical process to locate Lot 14. The plat identifies WCMC-1 as an "X on rock". The position of MC-1 (POC) is computed based on the record tie according to U.S.S. No. 1755 and the record courses along the exterior subdivision boundary are run to the northwest corner of Lot 14, the "Point of Beginning". The "Hall" plat monuments are not identified, however, the monuments for Lot 14 as well as those for several adjoining lots are noted in the legend as "Secondary monument recovered this survey, rebar & cap, JW Bean". This implies that the monuments had been set by Bean at a previous time and not as a part of the 2014 "Collins" plat. The question at this point is if both surveys used the same basis of location, basis of bearings and the record courses according to the Colt Island subdivision plat, how could the boundaries significantly disagree?

The next two items, the amended "Collins" plat (2015-37) and the Monument Record are reviewed together. Generally, if the establishment of a monument is documented in a Record of Survey, it is not necessary to also file a Monument Record. However, both are recorded on the same date and the Monument record provides information that is not evident on the amended plat such as the reference accessories to the monumented MC-1 and the photograph of WCMC-1. There is no explanation on the plat regarding why courses from the newly monumented MC-1 (POC) to the northwest corner of Lot 14 (POB) now vary so significantly from the record subdivision courses as noted on the "Hall" plat and the initial "Collins" plat.

There are several reasons why the "Hall" and "Collins" plats could be in conflict. They include errors in measurement, errors in computation, a misidentification of the "Point of Commencement" or an error in the "Basis of Bearings" that will be discussed in the following section. Evaluation of errors in measurement and computation would require an independent survey and so are beyond the scope of this assignment. There also would be insufficient data to evaluate a misidentification of the "POC" or WCMC-1 without the review report submitted by Randal Davis, PLS. Davis provides two photographs from his incomplete 2008 survey.

In figure 7, Davis fills the chisel markings on the bedrock with yellow lumber crayon to make the WCMC-1 markings readily visible. Because the Recorder's office scan of Bean's WCMC-1 photo for Land Survey Monument Record 2015-005094 was of such poor quality, it is impossible to determine at this point whether it was the same "X in rock" that is shown in the Davis photos.

¹⁸ *Estate of Smith v. Spinelli*, 216 P.3d 524, Alaska – September 18, 2009 – "Footnote 12: 'See 26A C.J.S. Deeds § 226 (2001)(A map, plat, plan, or survey, by virtue of apt reference thereto in a deed, may be treated as part of, and may be construed with, the deed in determining the property conveyed.)'"



Figure 7 - WCMC-1 from Davis Report

3. Basis of Bearings:

To ensure that a survey is reproducible and meet the cited Shilts v. Young requirement that the property be identifiable to the exclusion of all others, the survey must not only commence from a known point, but orientation of directions or "Basis of Bearing" (BOB) must also be known. Generally, a single known point, which is all we have on Colt Island would be insufficient to establish a BOB. A single point might be reasonable if the basis of bearings is referenced to magnetic bearings, astronomical observations or Global Positioning System satellites, but at the time of the original 1927 survey of U.S.S. 1755, these were not options. Establishing true north by solar observations was the common method to orient the directions of a U.S. Survey at the time, however, the field notes for U.S.S. 1755 state: "Owing to continued cloudy and inclement weather conditions it was not possible to obtain an observation for azimuth during the execution of this survey. I therefore deflect angles from the meridian obtained by J. Frank Warner, U.S. Cadastral Engineer, in making U.S. Survey No. 1285..." U.S. Survey No. 1285 was surveyed in 1920 and included the establishment of a U.S. Land Monument (USLM) on the easterly boundary along the shore of Admiralty Island. The USLM 1285 and the position for MC-1 of U.S. Survey No. 1755 are intervisible and to establish a geographic position for MC-1, it would be necessary to measure the distance between the USLM and MC-1. Having no electronic means at the time to measure the distance directly, the U.S.S. 1755 surveyor computed the distance and bearing between the two positions by triangulation.

Figure 8 is a graphic from the Davis report that compares the basis of bearing for each plat reviewed as a part of this report. Note that while the amended "Collins" plat uses the record basis of bearing between MC-1 and USLM 1285, the computed BOB between WCMC-1 and USLM 1285 would be the same for both versions of the "Collins" plats. The basis of bearing tie is between the existing monumented points for U.S.L.M 1285 and WCMC-1 U.S.S. 1755.

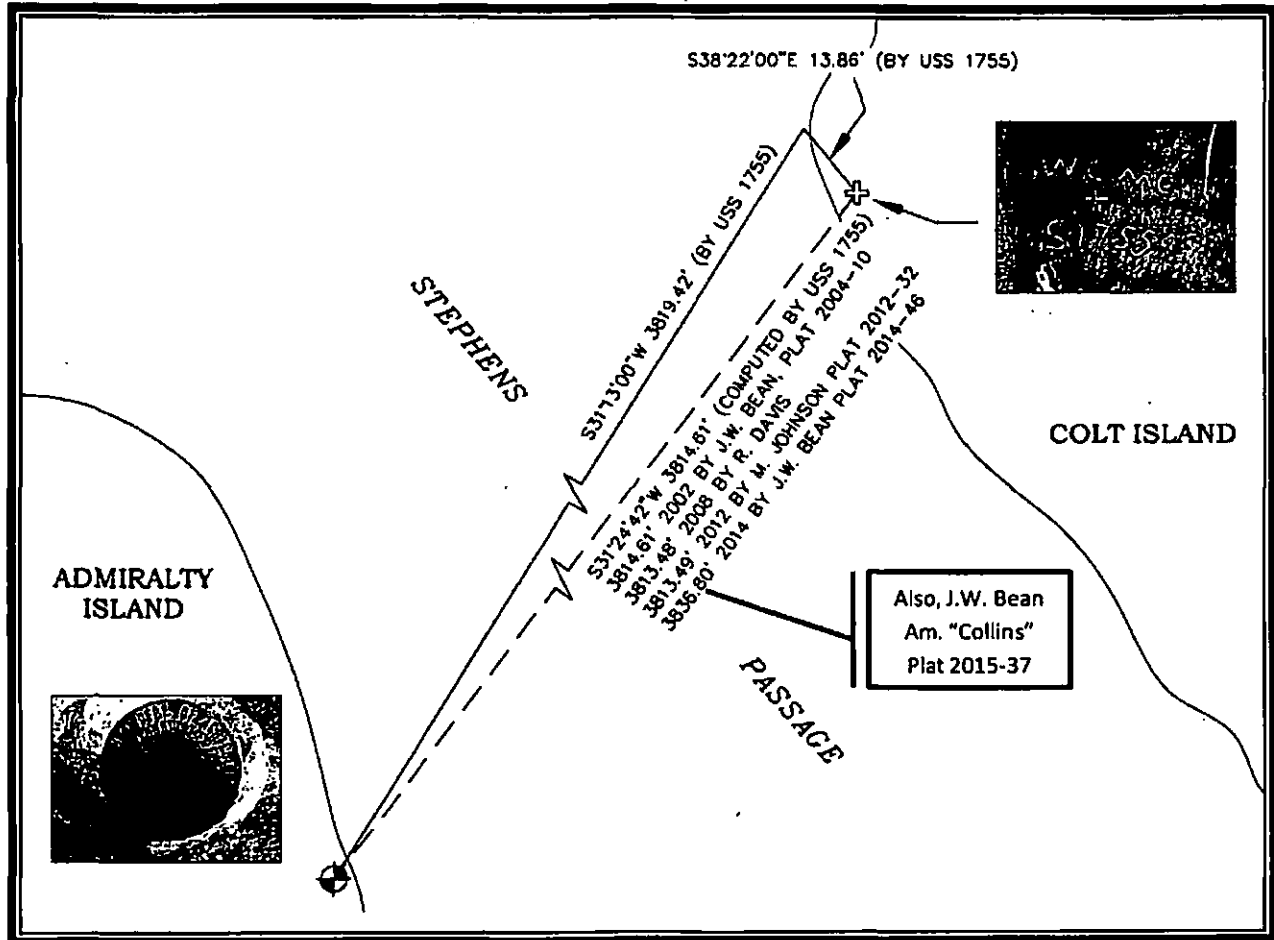


Figure 8 - Graphic from Davis Report w/ Annotations

The basis of bearing for U.S.S. 1755 is S 31°13' W, a distance of 3,819.42 feet between MC-1 and USLM 1285. However, as MC-1 was not monumented as a part of U.S.S. 1755, the following surveys use a computed BOB between WCMC-1 and USLM 1285 of S 31°24'42\" W and distance of 3,814.61 feet based on the U.S. Survey record data.

The next survey to use this basis of bearing is Bean's ATS No. 1620 (Plat 2004-10). Plat note 5 states that "Recorded bearings and distances are shown enclosed in parenthesis. Measured bearings and/or distances are shown without parenthesis." Interestingly, plat note 1 then shows the bearing of S 31°24'42\" W and distance of 3,814.61 as being both the record and measured bearing and distance. It is expected that the measured and record bearing be the same because the intent was to orient the survey to the record basis of bearing. What is

unusual is that the measured distance between USLM 1285 and WCMC-1 is shown as being exactly the same as the record distance or 3,814.61 feet. While it is not impossible for the 2004 survey to have measured the same distance to the nearest one hundredth of a foot as the triangulated 1927 distance, it is improbable. A more likely explanation is that the distance between USLM 1285 and WCMC-1 was not measured at all for the Plat 2004-10 survey. If the primary purpose for the line between USLM 1285 and WCMC-1 is to provide a basis of bearings, it is not absolutely required that the distance between the two be measured, but it is a good practice.

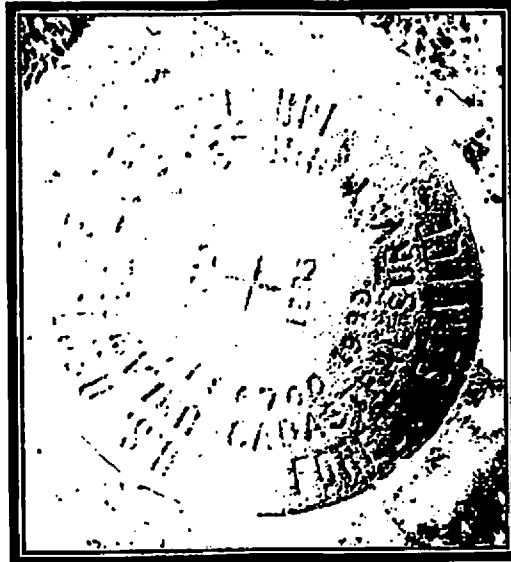


Figure 9 - Photograph of USLM 1285

The reason for measuring between the basis of bearing monuments is to ensure that you are set up on and sighting the correct points. Figure 9 is a photograph taken by Davis of USLM 1285 as a part of his 2008 survey. The markings on the brass cap leave little doubt that this is the USLM 1285¹⁹ that is graphically represented on the plat for ATS No. 1260 (Plat 2004-10) and the "Hall" plat (2012-32). Both the "Collins" plat (2014-46) and the amended Plat 2015-37 identify this monument as "U.S.L.M 3" Brass Monument".

According to the 2008 Davis survey data, he measured a distance of 3,813.48 feet between USLM 1285 and WCMC-1. The "Hall" plat (2012-32) measured a distance of 3,813.49 feet between the two same points. Measuring a 3,800 foot distance across the water with two separate sets of surveying equipment, different crews and different conditions and having them agree within one hundredth of a foot is notable but within the realm of possibility given the precision of modern electronic surveying equipment. This compares with the record U.S.S. 1785 distance of between USLM 1285 and WCMC of 3,814.61 feet. This is a difference of 1.12 feet from the "Hall" plat distance. The measured "Davis" and "Hall" distances compare remarkably well with the

¹⁹ USLM 1285 was reset in Plat 89-38RS filed on November 9, 1989 in the Juneau Recording district by Greg Scheff & Associates for the Forest Service. The plat indicates that the original chiseled "X" in a granite boulder along with an original bearing tree were recovered. The brass cap was set in the center of the original chiseled "X".

record (computed) distance given that the record U.S.S. 1785 tie was not made with the benefit of direct electronic measurement but by triangulation with far less precise equipment. As noted in Figure 8, the "Collins" plat and the amended "Collins" plat both reflect a measured distance of 3,836.80 feet between USLM 1285 and WCMC-1. This is a difference of 22.19 feet compared to the record (computed) U.S.S. 1785 distance and a difference of 23.31 feet compared to the "Hall" plat distance. Working within the framework of the evidence we have available including the Bean and Davis photos of WCMC-1 and the disparity of the "Collins" plat measurement between USLM 1285 and WCMC-1 when compared to the measurements of the "Hall" and Davis surveys as well as the record U.S.S. 1755 distance, it is reasonable to suspect that the Bean surveys may not have found the true WCMC-1. Figure 3 graphically indicates that the "Collins" plat established lot lines for Lot 15 that are to the north and east of the "Hall" plat. If the "Collins" plat or prior Bean surveys that were used as a basis for the "Collins" plat commenced at a point that was to the north and east of the actual WCMC-1, the discrepancy in the lot line location would make sense. The Davis photo conclusively identifies the recovered rock face as WCMC-1. The consistency between the Davis, "Hall" plat and record U.S.S. 1755 distances between USLM 1285 and WCMC-1 indicate with high confidence that they are all using the same WCMC-1. In addition, the relationship between the contour lines and the west boundary of Lot 14 as shown in Figure 4 appear to confirm that the "Collins" plat has located Lot 14 to the east of its record location.

With regard to the discrepancy between the "Hall" and "Collins" plats and based solely on the "Point of Commencement", "Point of Beginning" and "Basis of Bearing" surveying principles, the "Hall" plat (2012-32) most accurately represents the record location of the boundaries for Lot 15, Area 1 according to the Colt Island subdivision (Plat 75-11).

Boundary Analysis

The preceding section is intended to identify the survey that most correctly located the record lot boundaries. There are many legal doctrines regarding unwritten transfer of title that could result in boundaries that are contrary to those identified in the record subdivision plat or conveyance document. These include adverse possession, acquiescence, unwritten agreement, practical location, and estoppel.

Alaska is a relatively young state with regard to boundary law and there are few Alaska cases to draw upon for guidance. As a result, we often draw upon learned treatises relating to boundary law principles and rely upon case law from other states.

1. Original Lines and Monuments: *"Once a lot, street, or block line within a subdivision is established by the original surveyor and the land is sold in accordance with original plat, the lines originally marked and surveyed are unalterable except by resubdivision."*²⁰ *"No subsequent surveyor has the authority to 'correct' any errors that are found. To do so would wreak havoc on possession, structures, and other improvements within the subdivisions. Neighborhoods that have enjoyed a long history of peace will be thrown into total disorder."*²¹ *"No rule that has been adopted to accomplish that end is more firmly established than that courses and distances are controlled by marked and fixed monuments."*²²

As previously stated, the Colt Island subdivision (Plat 75-11) was a "paper plat". No survey was performed as a

²⁰ Section 12.10, Principle 9 - Brown's Boundary Control and Legal Principles, 7th Edition, Robillard & Wilson - 2014

²¹ Ibid. p. 395

²² Ibid. p. 396 - Quoted from Morris v. Jody, 216 Ky. 593 (1926)



part of the subdivision design and no lots were staked. Under the original lines and monuments principles, had the Colt Island subdivision lots:

- a. been monumented by the original surveyor prior to the recordation of the Colt Island subdivision plat;
- b. been monumented subsequent to plat recordation as a condition of a plat note requiring monumentation by a specific date, if relied upon and accepted by the landowners;
- c. been monumented by the original surveyor soon²³ after recordation of the plat;

the position of the monuments, even if in conflict with the positions according to the subdivision plat would control the location of the lot boundaries.

An original surveyor is one who sets out monuments for the very first time for a common grantor. A subsequent surveyor is obligated to "follow in the footsteps" of the original surveyor and accept the original monuments as conclusive evidence of the lines as originally run. "The monuments set by the original surveyor to show the lines as marked and surveyed express the intent of the subdivider and become the paramount control for resurvey within a recorded subdivision."²⁴

"The Hall property and Collins property boundaries,...were surveyed and monumented by J. W. Bean, Registered Land Surveyor No. 3650 ("Bean") on or about July, 2009."²⁵ Although J. W. Bean was the original surveyor of the Colt Island subdivision, he was no longer the "original" surveyor in the context of controlling original monuments. The monuments he set in 2009 came almost 34 years after the filing of the Colt Island subdivision plat, 19 years after title for Lot 14 vested into the Collins and 15 years after title for Lot 15 vested into the Halls. None of the above stated criteria for controlling original subdivision monuments could be met. Under the original subdivision monumentation rules, the 2009 monuments set by Bean carry no more weight than the monuments set in 2012 for the "Hall" plat (2012-32).

2. Un-called for Monuments: "Monuments set after a deed was written do not control a boundary, although they may be used as evidence for possible prescriptive points."²⁶ Neither of the deeds vesting title in the Halls or the Collins called for a survey to be performed or monuments to be set as a part of the conveyance. Alaska law provides guidance in interpreting deed descriptions. Norken Corp. v. McGahan states the following: "We have long held that the touchstone of deed interpretation is the intent of the parties...The proper first step in deed construction is to look to the four corners of the document to see if it unambiguously presents the parties' intent, without resort to the 'rules of construction'...If the words of the deed taken as a whole are capable of but one reasonable interpretation, a court need go no further."²⁷

There is no ambiguity or conflict in the Collins or Hall deed descriptions as neither makes a conflicting call for a survey or monuments to control the boundaries of the parcels conveyed. The only definition of the properties conveyed by the deeds is based on the reference to the recorded Colt Island subdivision plat. Monuments set subsequent to the conveyance and not called for in the deed description may not control the location of the

²³ Ibid. p. 364 "If the evidence shows the monuments were placed in the ground soon after the original survey, by the same individual who conducted the original survey, infrequently the courts have been known to accept these as original monuments."

²⁴ Ibid. p. 395

²⁵ Paragraph 10 – Complaint dated July 29th, 2014, Collins v. Hall, Case No. 1JU-14-771 CI

²⁶ Ibid. 21, p. 361.

²⁷ Norken Corp. v. McGahan, 823 P.2d 622, Alaska, November 15, 1991.



parcel boundaries.

3. **Boundary by Acquiescence:** There is an argument that the monuments set by Bean in 2009 should control the locations of Lots 14 and 15 even if they are in conflict with the record dimensions according to the Colt Island subdivision plat (Plat 75-11). This argument may be based on one of the several methods of unwritten transfer of title. I start with a consideration of boundary by acquiescence because of a recent case of first impression considered by the Alaska Supreme Court in Lee v. Konrad.²⁸

The case relates to a boundary line dispute according to two conflicting surveys, one performed in 1992 (Lee) and one performed in 2008 (Konrad). "Lee 'ask[s] [this] court to recognize the law of practical location, by whatever name (practical location, boundary by agreement, by acquiescence, or by estoppel),..."²⁹

"Boundary by acquiescence is an equitable gap-filling doctrine that may be available where estoppel and adverse possession are unavailable. While the exact requirements of the doctrine vary from state to state, Justice Thomas Cooley of the Michigan Supreme Court aptly summarized the doctrine as follows: 'The long practical acquiescence of the parties concerned, in supposed boundary lines, should be regarded as such an agreement upon them as to be conclusive even if originally located erroneously.'"³⁰

"We agree with the New Hampshire Supreme Court that 'boundary by acquiescence is grounded upon principals of public policy that preclude a party from setting up or insisting upon a boundary line in opposition to one which has been steadily adhered to.'"³¹

"Accordingly, we hold that a boundary line is established by acquiescence where adjoining landowners (1) whose property is separated by some reasonably marked boundary line (2) mutually recognize and accept that boundary line (3) for seven years or more."³²

"For consistency, we adopt the seven-year statutory prescriptive period for adverse possession under color and claim of title, AS 09.45.052(a), as the time period required to establish a boundary by acquiescence. But we note that boundary by acquiescence and adverse possession are fundamentally distinct legal doctrines. Boundary by acquiescence arises from some of the same policy considerations as adverse possession, but rather than creating a means whereby a party can acquire title to land without the other owner's consent, it allows parties to establish the location of a boundary by consent, but without written agreement."³³

Lee v. Konrad established the doctrine of boundary by acquiescence in Alaska and ruled that the boundary between Lee and Konrad had been established under this doctrine.

There are two reasons why this doctrine cannot apply to the Collins v. Hall case. The 2009 monumentation of the lots by Bean may have represented a "reasonably marked boundary line", however, there is clearly no mutual recognition or acceptance of the line by the parties and even if there were, from July 2009, the date of

²⁸ Lee v. Konrad, 337 P.3d 510, Alaska, August 29, 2014

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

Bean's monumentation to today, only 6 years and 5 months have passed.

4. **Boundary by Adverse Possession:** In Alaska, an unwritten transfer of title can be accomplished through the doctrine of adverse possession. The requirements include "The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies with the boundaries of adjacent real property owned by the adverse claimant,..."³⁴

The "adverse" requirement provides that the use be non-permissive and the claimant act as if they are the owner of the land. The "notorious" requirement holds that the adverse use be reasonably visible to the record owner.

In the context of Collins v. Hall there is the possibility of Collins asserting the boundary location as established by the monuments set by Bean in 2009 or an assertion by the Halls of that portion of Lot 14 according to Bean's monuments that may be occupied by their outhouse and shop building. In the prior section on boundary by acquiescence, I noted that it would not be applicable to this case in part because the Bean monuments had not been in place for the minimum of 7 years as required by the Alaska Supreme Court. In an adverse possession assertion by the Collins to the boundary based on Bean's monuments and without color of title to Lot 15, they would have to meet the requirement of uninterrupted possession for at least 10 years. If a case for adverse possession against Hall's interest cannot be made by Collins, there is no reason to consider an adverse possession assertion by Hall against the Collins property.

Without additional facts upon which to base a claim of adverse possession, it appears that a boundary by adverse possession between the Hall and Collins property cannot be established due to a failure to meet the prescriptive time periods required by the adverse possession statute.

5. **Boundary by Estoppel:** Boundary by estoppel is designed to prevent fraud and injustice and to protect innocent landowners who reasonably rely on the representations of their neighbors regarding boundary lines. In Alaska the general elements required for the application of the doctrine of equitable estoppel³⁵ are:
 - a. The assertion of a position by conduct or word;
 - b. Reasonable reliance thereon by another party; and
 - c. Resulting prejudice.

For this doctrine to have any applicability to the Hall/Collins boundary dispute the Halls would have to have initially asserted to Collins that the Bean monuments represented the true boundary between Lot 15 & Lot 14, Collins would have relied upon that assertion to their detriment, and now Hall reverses their assertion causing an adverse impact to Collins. None of these elements appear to be in place in this dispute and so cannot be considered applicable.

I am unaware of a boundary law doctrine that would support an assertion that the 2009 Bean monuments controlled the location of the boundaries between Lots 14 & 15, Area 1, Colt Island subdivision.

³⁴ A.S. 09.45.052 Adverse Possession

³⁵ Jamison v. Consolidated Utilities, Inc., 576 P.2d 97, Alaska, March 3, 1978



The best evidence to support the location of the Lot 14/15 boundaries are the monumented WCMC-1 of U.S. Survey No. 1755, the basis of bearing between WCMC-1 and USMS 1285 according to U.S.S. 1755 and the record bearings and distances from WCMC-1 to the lots according to the Colt Island Subdivision plat (Plat 75-11). These elements are best represented in the "Hall" plat (2012-32).

As stated in our proposal letter dated November 24, 2015, my opinion was based on the materials provided to me and publically available supplemental information. The lack of an independent survey to confirm the accuracy of the preceding surveys along with the limitations of the provided and publically available information could result in a revised conclusion should additional facts be revealed.

Should you have any further questions regarding this report, please feel free to contact me at any time.

Sincerely,

R&M CONSULTANTS, INC.



John F. Bennett, PLS, SR/WA
Senior Land Surveyor

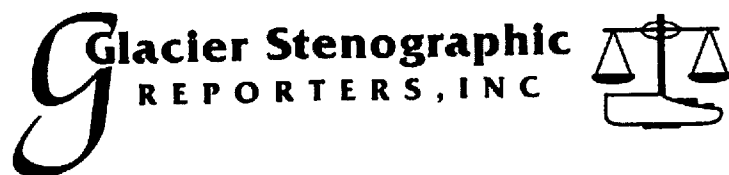
JFB:jfb

Attachment: Resume, John F. Bennett, PLS, SR/WA

In The Matter Of:
Collins v. Hall, et al.
Case No. 1JU-14-771 CI

Decision on Record
December 14, 2016

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RAY M. COLLINS and)
CAROL J. COLLINS,)
)
Plaintiffs,)
)
v.)
)
DAVID W. HALL and)
MARGARET R. HALL,)
Trustees, and their)
successors in trust,)
the D & M HALL COMMUNITY)
PROPERTY TRUST, dated)
March 14, 2005, and also)
all other persons or)
parties unknown claiming)
a right, title, estate,)
lien, or interest in the)
real estate described in)
the complaint in this)
action,)
)
Defendants.)

Case No. 1JU-14-771 CI

TRANSCRIPT OF DECISION ON RECORD
BEFORE THE HONORABLE PHILIP M. PALLEMBERG
Superior Court Judge

Juneau, Alaska
December 14, 2016
3:58 p.m.

1 APPEARANCES:

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P R O C E E D I N G S

[CourtSmart CD]

3:58:42 PM

THE CLERK: Juneau Superior Court is now in session with the Honorable Philip M. Pallenberg presiding.

THE COURT: Good afternoon. I'm sorry. I've made all of you wait around an unforgivably long time, and I'm really sorry about that. Today has been a bad day, and too many things that -- too many people needed to talk to me for too long. So I'm sorry about that. I hate to make people wait that long.

I had thought about setting this over to another day, but that would have meant making you wait even longer and come back a second time, and I thought it was better to finish what I needed to do and come back in here and talk to you all.

So I've given the matter a lot of thought. I've spent a lot of time going through the exhibits and considering the evidence. And I guess I want to start with sort of this introduction.

I think it's obvious that there are significant surveying discrepancies on Colt Island, discrepancies between the surveyors and between the

Decision on Record

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1 various surveys. And I think it's obvious that
2 those things have caused significant problems for
3 every property owner on the island. I think that
4 the recording of the R&M survey, which itself shows
5 two different sets of property lines, I would
6 anticipate could cause problems even for property
7 owners whose property isn't shown on that survey and
8 create a cloud on their title, because it shows two
9 separate sets of property lines.

10 You know, I don't know how the -- I'm not
11 a title insurance person, and I don't know how title
12 companies deal with that kind of thing and banks and
13 potential buyers and all those kind of things; but I
14 think it's obvious that there are lots of -- just
15 the fact that you're all here today is further
16 evidence that there are lots of people interested in
17 the outcome, interested in trying to find a solution
18 to these problems. And I think it's clear that
19 ultimately an island-wide solution is what is
20 needed.

21 Unfortunately, as I said last week, I
22 don't think this case will necessarily provide that
23 island-wide solution. All I can do in a case is
24 adjudicate the rights of the people who are parties
25 to that case. I'm here to enter a decision in the

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1 case of Collins vs. Hall, and whatever order I enter
2 will fix the property line between the Collinses and
3 the Halls. It will not necessarily fix other
4 people's problems or settle where other people's
5 property lines are.

6 If I were the king, I could impose a
7 comprehensive solution. I could issue an edict that
8 would fix all the property lines on Colt Island in a
9 way that would create the greatest good for the
10 greatest number and try to make the properties as
11 marketable as I could, eliminate any clouds on the
12 title, and try to resolve everything.

13 Somebody once said it's good to be king.
14 I'm not. My obligation as a judge is just to decide
15 the case that's in front of me in a way that is
16 based on the law and the facts of this case and the
17 evidence presented to me. That might be a different
18 result than what the king would impose for the
19 benefit of everybody on the island. I think
20 ultimately that's maybe one of the shortcomings of
21 the litigation process as a potential solution to
22 problems.

23 Turning, I guess, to the specific issues,
24 the first question that I have to decide, probably
25 most important one, is just to try to determine

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1 which survey is correct. And that begins with
2 determining which rock on the northwest corner of
3 the island is Fred Dahlquist's rock, the original
4 rock marked in the 1927 survey.

5 In many ways, I think that's the easiest
6 decision in this case. I think the evidence is
7 clear -- it's certainly sufficiently clear to
8 persuade me; and, again, I don't think it's a close
9 question -- that the rock with the vertical writing
10 on it that says "WCMC1," the rock that R&M used as
11 its beginning point, is Fred Dahlquist's rock.

12 I think that that's the only conclusion I
13 can come to from the evidence. There's been some
14 suggestion that somebody carved writing on that rock
15 more recently than 1927, and I don't find that to be
16 at all a plausible theory. I don't find that
17 remotely plausible. Without question, the writing
18 on that rock is strikingly visible now, now that
19 somebody has put paint or chalk in it; but the idea
20 that that -- somebody went out there with a chisel
21 in the late '90s and chiseled lettering in that rock
22 I just don't find remotely plausible.

23 The location of that rock is strikingly
24 consistent with the description -- well, the
25 description of the rock is entirely consistent with

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1 Fred Dahlquist's description in his survey notes.
2 The distance from that rock to Admiralty Island, to
3 the marker on Admiralty Island, is strikingly close
4 to what was determined by Fred Dahlquist.

5 Using that rock results in a meander line
6 on the beach, which is what Fred Dahlquist
7 described. If you use what I'll call John Bean's
8 rock, the rock with the faint X on it, you wind up
9 with a meander line halfway up the bluff. There is
10 no way that isostatic rebound accounts for that.
11 That island might have come up a little bit, but it
12 didn't form a new bluff jutting up out of the ground
13 since 1927. And Fred Dahlquist laid out a line down
14 the beach from that marker, and you just don't get
15 that if you use the rock with the faint X.

16 Now, you know, it would be interesting to
17 go find all of Fred Dahlquist's witness corners that
18 he laid out in the 1920s and see if they used
19 vertical writing or horizontal writing. I don't
20 have any idea. But, you know, that doesn't cause me
21 to doubt Fred Dahlquist's -- it doesn't cause me to
22 doubt -- the fact that the writing is vertical
23 doesn't cause me to doubt that it's Fred Dahlquist's
24 rock.

25 why would somebody faking the rock in the

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1 1990s do vertical writing any more than why would
2 Fred Dahlquist write it vertically? Somebody wrote
3 it vertically, and it seems to me that somebody who
4 was trying to fake the rock would have carved it in
5 the way -- would have carved it horizontally. So
6 that, to me, doesn't shed any light on it one way or
7 the other, that it's vertical writing.

8 The fact that multiple people wandered
9 around the island looking for it and didn't see it
10 doesn't cause me to assume or to conclude that it's
11 a recent fabrication. I think we all who've
12 wandered around Southeast Alaska know that things
13 get covered with moss. They get covered with dirt.
14 And 70 years after the fact, in the 1990s, I think
15 to me it's entirely plausible that people could walk
16 past that rock a thousand times and never see the
17 inscription on it. And by dumb luck, somebody found
18 it. I don't find that remotely implausible or
19 unlikely.

20 I think anybody who has ever looked for
21 petroglyphs on a beach, where they are told there
22 are petroglyphs and not found them, can understand
23 how somebody could search for that rock and not find
24 it. And I think everything about that rock, all of
25 the evidence I've heard about it, points to that

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1 being Fred Dahlquist's rock.

2 There certainly are some things about the
3 testimony that are difficult to account for,
4 particularly Howard Lockwood's testimony, that he
5 found a rock with writing on it in the 1970s that he
6 described as horizontal writing. Perhaps he's
7 remembering that incorrectly, or perhaps he found
8 the right rock and is -- well, perhaps he found the
9 right rock but is misremembering whether the writing
10 was vertical or horizontal. Perhaps he's
11 remembering it incorrectly altogether. Perhaps he
12 found the right rock but didn't show it to John
13 Bean. That is unclear to me.

14 I will say -- and I mean no disrespect to
15 Mr. Lockwood -- that there are several things about
16 Mr. Lockwood's testimony that he's clearly
17 remembering incorrectly. A lot of time has passed.

18 For example, he testified that the
19 western boundary of the lots of Area 1 is at the top
20 of the bluff. That's clearly not right. And I tend
21 to think that what he's actually remembering is the
22 reference line that John Bean ran down the top of
23 the bluff, which he thought was the property line.

24 In fact, it wasn't. I think that was
25 very clear from Mr. Bean's testimony and everything

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1 else about it. There is certainly no survey that
2 found that the property line is at the top of the
3 bluff. So obviously Mr. Lockwood's testimony about
4 that is incorrect, as is his testimony that he saw
5 horizontal writing, because there is no rock anyone
6 has ever found that has horizontal writing.

7 Anyway, for all of those reasons, I think
8 it is by far the most likely view of the evidence
9 that the WCMC1 rock, the R&M rock, if you will, is
10 Dahlquist's rock. Given that, it's clear to me that
11 Mr. Bean used the wrong rock in his survey work in
12 the '70s, and he's continued to do so in his
13 subsequent survey work in the subdivision.

14 It's curious to me that Mr. Bean used the
15 WCMC rock in his ATS survey but not in his survey of
16 the subdivision. Mr. Bean didn't give a clear
17 explanation to me of why he used a different
18 beginning point on the ATS survey. That survey
19 showed -- I'm sorry. I'm forgetting the letter of
20 the tract down there where the lodge is. I think
21 it's Tract D, if I'm remembering right.

22 But he drew in those boundaries on that
23 survey, and he drew in the boundaries of the
24 southernmost lots in the subdivision that butted up
25 against it on that survey. And all of those tracts

1 would have been in an entirely different place if
2 he'd used one rock versus the other rock. And it's
3 curious to me, and there is no good way to reconcile
4 the inclusion of those boundaries on that survey
5 with his use of WCMC1, as opposed to his other
6 surveys on which he used the faint X rock.

7 I think the only explanation that makes
8 sense for why Mr. Bean did that is that, at least on
9 some level, he recognized that the WCMC rock is the
10 right rock, but he couldn't figure out how to fix
11 that problem for the subdivision. And thus, when he
12 surveys the subdivision, he kind of felt compelled
13 to keep using the wrong rock, since he's been using
14 it for 40 years.

15 In any event, based on that conclusion, I
16 conclude that the R&M survey accurately lays out the
17 boundaries of the Halls' lot as it was platted in
18 Plat 75-11.

19 The collinses suggest that even if R&M
20 used the right rock, that I should adopt the Bean
21 lines because doing otherwise would cause havoc on
22 Colt Island. It very well might cause havoc on Colt
23 Island, and I'm going to talk some more about that;
24 but I don't think I have the authority to simply fix
25 new property lines different from what is fixed in

1 the written instruments merely because it would help
2 folks to not have problems.

3 There has to be some legal theory under
4 which I can do that. I can't simply say, "You know
5 what? A different property line would be better."
6 I have to have a legal theory to do that. There are
7 some legal theories I'll talk about in a moment, but
8 I can't do it just because it would work out better
9 for everybody.

10 And I want to make clear that I guess I
11 think, you know, there's been a lot talk here about
12 who is trying to move property lines. Property
13 lines, as a starting point, are where they are fixed
14 in written instruments. Fred Dahlquist did a survey
15 in 1927, and he established a reference point. John
16 Bean did a paper plat in 1975, in which he laid out
17 some paper -- on paper, property lines keyed off of
18 that reference mark.

19 The reference mark that he adopted is
20 WCMC1. And, as I said, my conclusion is that WCMC1
21 is a rock on the beach that says WCMC1 on it. That
22 means that the property lines fixed by those written
23 instruments are the property lines that flow from
24 WCMC1. And I guess I think, really, in my view,
25 it's not the Halls who are trying to move the

1 property lines; it's the Collinses.

2 Now, sometimes courts can move property
3 lines, and there are legal theories under which a
4 court can adopt property lines different from those
5 that are surveyed. And we talked a fair amount at
6 trial about one of those theories, the theory of
7 boundary by acquiescence.

8 Under this theory, a boundary line is
9 established by acquiescence where adjoining
10 landowners -- and there are three elements that I'm
11 going to lay out -- 1, whose property is separated
12 by some reasonably marked boundary line; 2, mutually
13 recognize and accept that boundary line; 3, for
14 seven years or more. That's language that comes
15 directly out of the Alaska Supreme Court case Lee
16 vs. Conrad.

17 The Supreme Court, in Lee vs. Conrad, did
18 not specifically address the burden of proof of
19 boundary by acquiescence, but there is substantial
20 case law from other states and the trial court in
21 Lee vs. Conrad that requires clear and convincing
22 evidence to find boundary by acquiescence.

23 And I think that, from a legal
24 standpoint, the rationale for adopting a clear and
25 convincing evidence standard is that boundary by

1 acquiescence is similar to the doctrine of adverse
2 possession, although it's not exactly a species of
3 adverse possession. The Supreme Court adopted that
4 seven-year requirement from the adverse possession
5 requirements. And I think if the Supreme Court were
6 called upon to decide that, I think it would adopt a
7 clear and convincing evidence standard, just as it
8 adopted the seven-year requirement by essentially
9 taking that requirement from the adverse possession
10 standards. That's the law in most every state
11 that's dealt with it. That's the general rule.

12 So in order to find a boundary by
13 acquiescence here, I would have to find that the
14 property owners here, for some seven-year period,
15 mutually recognized and accepted a boundary line, a
16 reasonably marked boundary line.

17 There certainly is evidence that stakes
18 and markers were placed on the property in the
19 1970s. There is plenty of evidence of that. There
20 is evidence that lot owners saw those stakes, and
21 they bought lots in reliance on those stakes.

22 And I think those stakes were placed by
23 John Bean, although there is a little bit of
24 uncertainty in my mind about that, as to who did it
25 between Mr. Bean and Howard Lockwood. Mr. Lockwood

1 testified that he did some measurements and put in
2 some markers. He testified that he measured
3 160 feet up from the stakes at the top of the bluff
4 to mark the center line of Totem Pole Trail, which
5 was then used by the worrells to blast out the
6 trail.

7 I would note that if, in fact, that's
8 what Mr. Lockwood did, it would have put Totem Pole
9 Trail in the wrong place, because it would be
10 160 feet up from the top of the bluff and not from
11 the meander line on the beach. That would have put
12 Totem Pole Trail in a place where neither R&M nor
13 John Bean would have put it, and it would be too far
14 to the east.

15 I tend to think that Mr. Lockwood is not
16 remembering that right, and that, in fact, Totem
17 Pole Trail is where John Bean would have surveyed
18 it. And that's not -- I don't know that to a
19 hundred percent certainty.

20 There is also some uncertainty about
21 where those stakes were placed in a north-south
22 direction. None of those stakes are still there,
23 and there aren't any of the old stakes remaining on
24 the Collins-Hall boundary.

25 There was testimony by Mr. Hall that he

1 measured down from the corner on the -- from the
2 northeast corner of the Barry Rohm property to try
3 to mark that line in 1999. And I find it puzzling
4 that there is a 10-foot discrepancy between the
5 marker that Mr. Hall found in 1999, measuring down
6 to the property line, and the John Bean markers. I
7 don't have any explanation for that 10-foot
8 discrepancy.

9 I will say that my sense of Mr. Hall is
10 that he's a pretty careful and meticulous person,
11 and that he would have used some care in measuring
12 that distance down from the Rohm corner. And it's
13 not clear to me why he came up with a different spot
14 than John Bean did.

15 If the Rohm corner placed by Mr. Bean
16 were correct, or correctly measured from the faint X
17 rock, one would expect that the line found by
18 Mr. Hall off of that corner in 1999 would be exactly
19 the same as the line found by John Bean in 2012.
20 But instead, Mr. Hall got a line that matched up
21 with nobody's property line, Bean or R&M.

22 The problem for me in finding a boundary
23 by acquiescence is that I don't know where that
24 boundary should be. It's easy to say, "Well,
25 everybody used the Bean lines in 1975, and people

1 bought their lots knowing that the Bean lines were
2 the lines." The problem is, which Bean lines are we
3 talking about, and where do we put them? I can't
4 find a boundary by acquiescence if I don't know
5 where that boundary is.

6 And the reality is, as I see the
7 evidence, that none of Mr. Bean's surveys are all
8 that reliable. I would need to find by clear and
9 convincing evidence that there is an identifiable
10 line that was there from 1975 or '76 for a
11 seven-year period, and I would have to fix the
12 property line at that line. And I'm not able to
13 find by clear and convincing evidence that the lines
14 determined by Mr. Bean in 2012 are the lines that
15 you would have seen if you went and looked at the
16 stakes on the ground in 1976.

17 Every survey that Mr. Bean has done --
18 and I mean no disrespect to Mr. Bean -- but every
19 survey that he's done has significant discrepancies.
20 The paper plat he did in 1975 had a 10-foot
21 discrepancy in the measurements of the lots, which
22 would have to be accounted for somewhere in those
23 lots. Somebody would have to lose 10 feet of their
24 property, because you can't fit all the lots into
25 the space available on the island because the

1 numbers don't add up.

2 There is a 10-foot discrepancy between
3 the markers that Mr. Hall found in 1999 and the
4 markers that Mr. Bean found in 2012. The latest
5 survey by Mr. Bean, in the second version of it that
6 he issued to correct errors in the first, uses the
7 wrong meander line from MC1 down to the start of the
8 lots; and he really didn't give a clear explanation
9 of that. It's certainly possible that's simply his
10 reference line, although I don't think that's
11 correct surveying practice to put that reference
12 line on the survey; but I don't know that. And I
13 think it's entirely possible that if one were to
14 actually follow that line, one would get to an
15 entirely different place.

16 And it may be that that line is just
17 wrong. Every time Mr. Bean was confronted about one
18 of the errors in his survey, he said, "well, that's
19 a drafting error." And I simply don't have any
20 confidence that the lines Mr. Bean found in 2012 are
21 at all the same lines that were staked in 1976.

22 There's another aspect of this that
23 causes me to have a lack of confidence in those
24 numbers. Mr. Collins testified that when -- I'm
25 sorry. Mr. Fisher testified that when he bought

1 what became the Hall property in the 1970s, that
2 there was -- his recollection was that there was one
3 stake on the ground. And at some point, that stake
4 rotted away. He really didn't know when.

5 Even if one grants that that stake may
6 have been there for seven years, Mr. Fisher then
7 went and built an outhouse. And he built that
8 outhouse right smack on the property line that
9 Mr. Bean found between Mr. Fisher's property and
10 what is now the Collins property. And Mr. Fisher
11 testified that he really didn't have a clear idea of
12 where the property line was. If he had a clear idea
13 of where the property line was, he surely wouldn't
14 have built his outhouse right smack on that line.

15 In order for there to be a boundary by
16 acquiescence, as I said, there has to be -- and I
17 want to use the right wording -- an agreement
18 settling a boundary -- I'm sorry. I've lost my
19 wording here about that. There has to be property
20 separated by a reasonably marked boundary line that
21 is mutually recognized and accepted by the adjoining
22 property lines.

23 Mr. Fisher didn't even know where the
24 property line was, so how could he have mutually
25 recognized and accepted with his neighbor a

1 reasonably marked line if he couldn't even tell
2 where it was to the extent that he built his
3 outhouse right smack on that line, encroaching over
4 it?

5 So that, to me, doesn't make any sense.
6 If there was a line that everybody knew about, I
7 think the people did generally feel like the Bean
8 lines, whatever they were, should be the lines. But
9 nobody really knew exactly where those lines were,
10 and I don't know where they are now. So I can't
11 find a boundary by acquiescence under that legal
12 theory.

13 There's another theory that I located in
14 the case law. It's not in any Alaska case, but
15 there's case law from other states that talks about
16 a theory of boundary by agreement. It a case called
17 Anderson vs. Fautin, a Utah case, that actually has
18 a really helpful discussion of that theory and
19 contrasting it with boundary by acquiescence. That
20 case is 379 P.3rd 1186. It's a 2016 Utah case.

21 And that case set out four elements to
22 find a boundary by agreement: One, that there is an
23 agreement between adjoining landowners; second,
24 settling a boundary that is uncertain or in dispute;
25 third, a showing that injury would occur if the

1 boundary were not upheld; and, fourth, where the
2 doctrine is being invoked against successors in
3 interest, that there's demarcation of a boundary
4 line such that a reasonable party would be placed on
5 notice that the given line was being treated as the
6 boundary line between the properties.

7 In Anderson, there was a fence line that
8 had been there for years and years. Nobody knew
9 exactly where the property line was, but everybody
10 kind of agreed to live by the fence line. And it
11 put a purchaser on notice that that was a line.

12 There was no fence line on this land when
13 the Halls bought their property. Here, if the
14 doctrine were invoked, it would be invoked against a
15 successor in interest. Both parties here are
16 successors in interest. And there's clearly no
17 demarcated boundary line that would have put anybody
18 on notice. There's sort of an imaginary paper
19 boundary line that people -- that the court is being
20 asked to recognize, but there is no on-the-ground
21 line. And so I don't find that the doctrine of
22 boundary by agreement could be adopted as well.

23 I have pondered without success some
24 other legal theory on which to adopt Mr. Bean's
25 current property lines, and I'm simply not able to

1 come up with one.

2 I think the legally correct line, based
3 on the surveys, is the R&M survey. I think adopting
4 that line creates a lot of potential problems.

5 Among those, adopting that line takes away 13 or
6 18 feet on the north side of the Collins property,
7 but what happens on the south side of the Collins
8 property? Does that mean that the Collins lot
9 slides down 18 feet from where they thought it was?

10 well, Dale Lockwood might have something
11 to say about that, because he's owned his property
12 since the 1970s. He testified that he knew where
13 his lines were. They were staked with wooden lines,
14 and I think he replaced them with some successor
15 lines; and he has a pretty clear idea where his line
16 is. I don't suppose he's going to give away 18 feet
17 of his property without a fight.

18 And so it is possible that fixing that
19 line at the R&M line means that the Collinses don't
20 own a 100-foot-wide lot; they might own an
21 82-foot-wide lot. Mr. Lockwood is not a party to
22 this case, and I can't adjudicate his rights.

23 And I think there is some potential for
24 similar problems arising all over the island. Totem
25 Pole Trail -- where in the world is Totem Pole Trail

1 now? Certainly we know where Totem Pole Trail is in
2 a physical sense, because people walk up and down it
3 and drive their four-wheelers on it; and it is where
4 it is.

5 But it may not be physically located on
6 the easement, as that easement would be fixed off of
7 WCMC1, because it might have been built in the wrong
8 place in the 1970s when Marion Hobbs went through
9 and improved it or when the Worrells went through
10 and logged it. And I think there are all kinds of
11 potential problems there.

12 Likely there is a prescriptive easement
13 if the trail was physically built over lots in
14 Area 2, which it might have been. Likely 40 years
15 of use has created a prescriptive easement over
16 those lots, which means that those lots -- those
17 property owners might lose some property because
18 there is now a trail over the end of their lots.

19 I think that other property owners might
20 well be able to make a claim for boundary by
21 acquiescence. If somebody built a fence down their
22 property in 1977 and it's still there, I think
23 they'd have a pretty good claim that that's the
24 boundary line even if it's not on the surveyed
25 boundary line.

1 I think there's a host of problems, and
2 I'm probably creating more of them today. I don't
3 mean to be cruel in saying this, but I think those
4 problems stem from some problems with the surveys;
5 and I can't fix that. It's a court of law, and I am
6 obliged to follow the law. And I think that that
7 leads me to the place that R&M has surveyed the
8 Halls' property correctly, and I will enter a decree
9 quieting their title according to the survey found
10 by R&M.

11 Ms. Harrison, I guess I'd ask you to
12 prepare some findings of fact and conclusions of law
13 and a decree consistent with that ruling.

14 MS. HARRISON: Yes.

15 THE COURT: Are there questions about the
16 ruling, Mr. Geldhof?

17 MR. GELDHOF: I would ask the court to be very
18 mindful of the bearings from Admiralty Island and
19 squaring the bearings of all three of the surveys
20 that are relevant -- Dahlquist's, John Bean's 2015
21 survey, the bearing point -- to the MC. I think the
22 MCs are more important than the witness corners.
23 But --

24 THE COURT: I didn't --

25 MR. GELDHOF: -- matching the bearings up

1 is --

2 THE COURT: Right. I didn't find anything
3 about the bearings that pointed me to John Bean's
4 rock or to John Bean's corner. That -- I didn't
5 find that there was anything about those bearings
6 that caused me to think that he had the right rock.

7 He testified that he measured the right
8 bearing, and he measured that bearing in the 1970s.
9 He didn't measure the distance, but he measured the
10 bearing. But I don't know what the bearing is
11 between the two rocks. No one ever measured that.
12 And if it's right that John Bean's rock with the X
13 on it is on the right bearing, that might simply
14 mean that one rock is right behind the other on that
15 line. I don't know, because no one measured that
16 bearing. So --

17 MR. GELDHOF: Well, Your Honor, it's not the
18 distance; it's the bearings from the MC1 that Bean
19 utilized or testified to in 2015, comparing that to
20 Dahlquist's 1927 bearing from his MC1 and the
21 bearing used in the R&M, which is an assumed MC1
22 because they didn't establish an MC1. They shot off
23 from the witness corner. But --

24 THE COURT: I think that's something that can
25 be calculated by triangulating, and I think R&M did

Decision on Record

26

1 that.

2 Ms. Harrison, any questions about the
3 ruling?

4 MS. HARRISON: No questions. Thank you.

5 THE COURT: All right.

6 MS. HARRISON: Well, actually, I should ask --
7 unless the two of you have any questions.

8 MR. HALL: No questions.

9 MS. HARRISON: No, no questions.

10 THE COURT: We'll go off record.

11 THE CLERK: All rise. Court is in recess
12 subject to call.

13 4:32:38 PM

14 END OF REQUESTED PORTION

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C E R T I F I C A T E

SUPERIOR COURT)
STATE OF ALASKA) ss.

I, LYNDA BARKER, Registered Diplomate Reporter and certified for transcription services by the United States Courts and the Alaska State Courts, hereby certify:

That the foregoing pages contain a full, true and correct transcript of proceedings in the above-referenced matter, transcribed by me to the best of my knowledge and ability, or at my direction, from the electronic sound recording.

DATED at Juneau, Alaska, this 28th day of December, 2016.

SIGNED AND CERTIFIED TO BY:



LYNDA BARKER, RDR
Notary Public for Alaska
My commission expires:
5/6/2020

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RAY M. COLLINS and CAROL J.
COLLINS,

Plaintiffs,

vs.

DAVID W. HALL and MARGARET R.
HALL Trustees, and their successors in trust,
of the D & M Hall Community property
trust, dated March 14, 2005, and also all
other persons or parties unknown claiming a
right, title, estate, lien, or interest in the real
estate described in the complaint in this
action,

Defendants.

CASE NO. 1JU-14-00771 CI

**NOTICE OF SUBMISSION OF PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW,
FINAL JUDGMENT,
AND DEED OF THE CLERK OF COURT**

The defendants submit the enclosed proposed Findings of Fact and Conclusions of Law, Final Judgment and form of Clerks' Deed, pursuant to Alaska Rule of Civil Procedure 78.

Paragraphs 24 through 29 of the Findings of Fact, and paragraph 10 of the Conclusions of Law were not part of the decision on the record. However, they were implicit in the court's decision on the record and they were added to the proposed Findings of Fact and Conclusions of Law to ensure the record is complete.

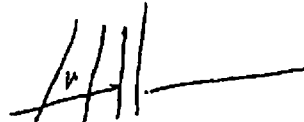
Notice of Submission
Collins v. Hall

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Faulkner Barfield, P.C.
8420 Airport Boulevard, Suite 101
Juneau, Alaska 99801-6924

DATED this 21st day of December, 2016

FAULKNER BANFIELD, P.C.

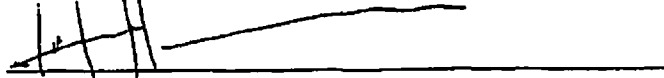


Lael Harrison
AK Bar No. 0811093
Attorney for Defendants
David W. Hall and Margaret R. Hall,
Trustees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of December, 2016, the undersigned caused a copy of the foregoing, with enclosures, to be sent by mail to:

Joe Geldhof
Law Office of Joseph W. Geldhof
2 Marine Way, Suite 207
Juneau, Alaska 99801


Lael Harrison

24667

Notice of Submission
Collins v. Hall

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