

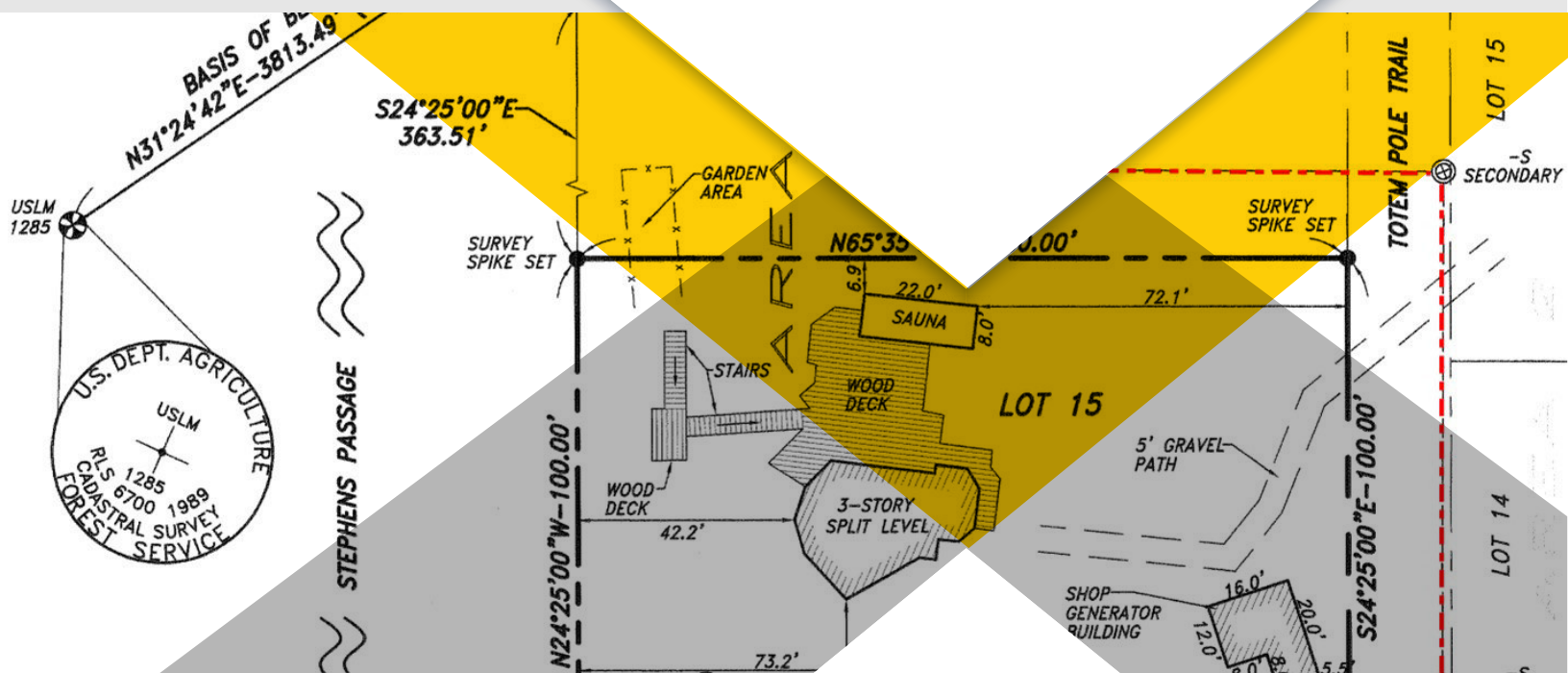
# NO BOUNDARIES

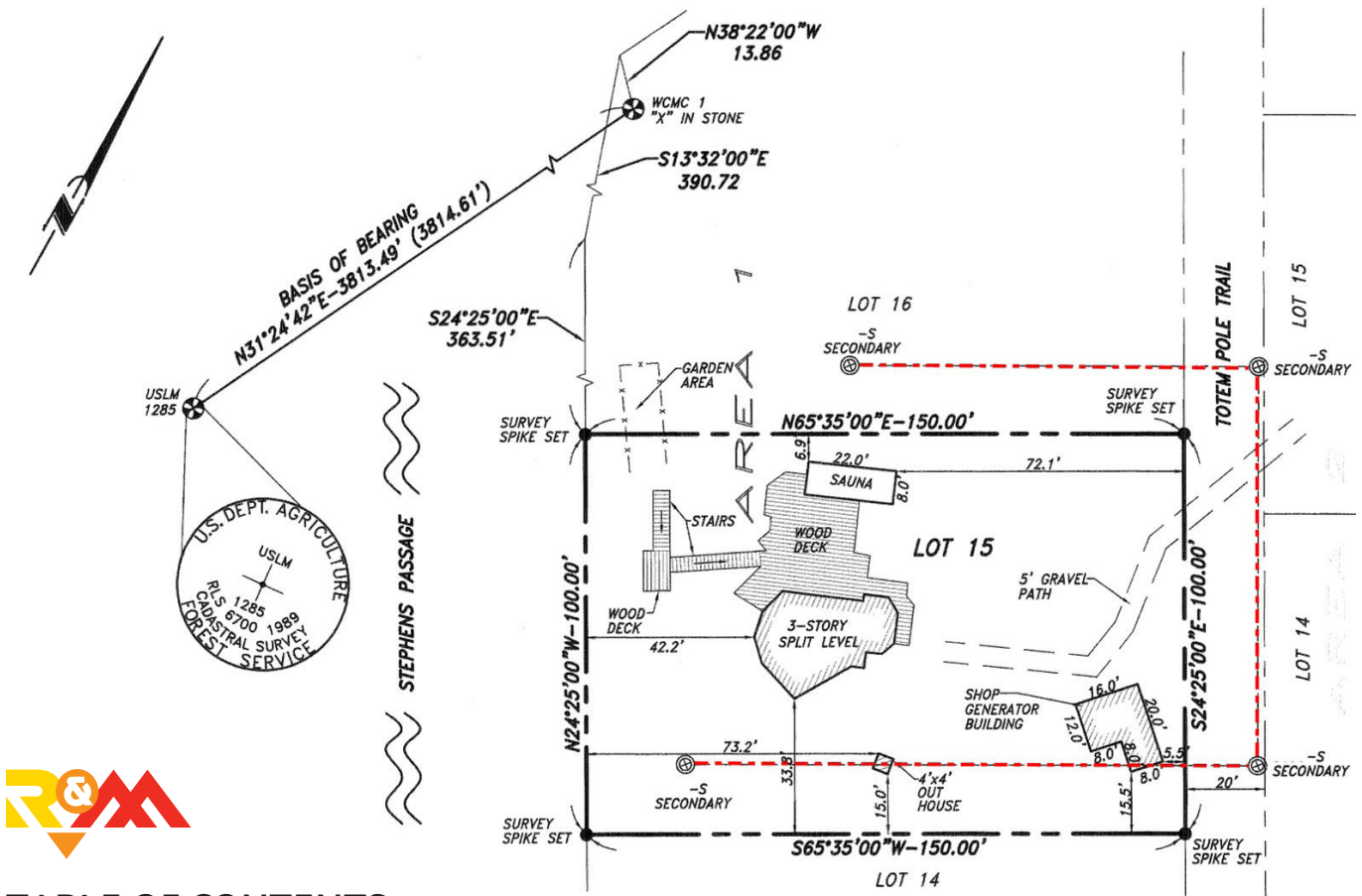
## A BRIEF DISCUSSION OF ALASKA BOUNDARY LAW

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# No Boundaries

## INTRODUCTION

Land surveying has long been considered both an art and a science. It is an art involving elements of history, law, evidence and their interpretation; and a science due to the mathematical and scientific methods employed. This discussion will focus on the legal guidelines available to the Alaskan surveyor, or the lack thereof, to re-establish boundaries.

A land surveyor's education typically includes course work in boundary law. The foundation for this coursework may be based upon a learned treatise such as Brown's Boundary Control & Legal Principles<sup>1</sup> or Clark on Surveying and Boundaries.<sup>2</sup> These treatises provide guidelines and principles regarding boundaries based on case law throughout the federal and state court systems. An interpretation of law that has never arisen before in any reported case is considered a "*case of first impression*". If the first impression is related to a specific state, decisions from other states or the federal courts may be examined as a guideline. Treatises<sup>3</sup> such as Brown's and Clark's may be cited in support of the adoption of a boundary law principle in such a case of first impression.<sup>4</sup>

Brown's Principle 6 is titled "*Who May Create Boundaries*" and states, "*The original surveyor creates boundaries. It is the retracing surveyor who ascertains or identifies boundaries from the original evidence.*" The principle continues, "*A parcel of raw land has no boundaries. But once the surveyor runs and then identifies these lines, the boundaries are created and can never be altered by any subsequent surveyor.*" This principle emphasizes the requirement to "*...follow in the footsteps of the original surveyor*". The question that follows is whether there

exist principles and practices in Alaska to ensure that you are meeting this objective.

Alaska, being the 49th state to enter the union in 1959 has a relatively limited inventory of case law and Supreme Court decisions related to boundaries are virtually non-existent. Generally, Alaska case law can include decisions regarding boundaries by adverse possession, estoppel and acquiescence, riparian boundaries, easements, dedication, rights-of-way, deed interpretation and title issues. However, when it gets right down to surveying methodology, evaluation of evidence and application of boundary principles in the retracement of existing property lines, Alaska case law has little guidance to offer the surveyor.

For example, using the *search by word option* on the Alaska Case Law Service website<sup>5</sup>, the search terms *right of way* AND highway AND *title* delivered 94 cases. A search for *real property* AND *adverse possession* provided 61 cases. Then a search for *boundaries* AND monument AND surveyor returned only five cases.<sup>6</sup> Unfortunately, the focus of most of these cases was more on adverse possession, platting and deed ambiguity as opposed to interpretation of boundary evidence.

A more appropriate measure would be to review the latest Alaska Reporter<sup>7</sup> index for the subject *Boundaries*. Prior to the 2019 Collins v. Hall decision, the index identified 11 cases. Lee v. Konrad, a case to be further discussed in this paper was cited more than any other case for a total of seven references. Hawkins v. Alaska Freight Lines, Inc., 410 P.2d 992 (Alaska 1966), a case that discusses meanders and water boundaries was referenced five times. Five of the cases came out of the

1 Brown's Boundary Control and Legal Principles, 7th Edition 2014, Walter G. Robillard & Donald A. Wilson

2 Clark on Surveying and Boundaries, 8th Edition 2015, Walter G. Robillard

3 Alaska Court Rules – Rules of Evidence – Rule 803. Hearsay Exceptions – "*The following are not excluded by the hearsay rule,... (18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.*"

4 A review of the Thomson Reuters WESTLAW Alaska Case Law Service website found only one reference to Brown and two references to Clark in Alaska Supreme Court opinions as of January 21, 2020.

5 <https://govt.westlaw.com/akcases/Index> Westlaw - Alaska Case Law Service

6 Collins v. Hall – 2019, Fink v. Municipality of Anchorage – 2016, Lee v. Konrad – 2014, Shilts v. Young – 1977, Nelson v. Green Const. Co. – 1973.

7 Alaska Reporter, West/Thomson Reuters, Opinions and decisions issued by the state courts of Alaska.

pre-statehood federal district court or the 9th Circuit Court of Appeals. Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002) provided a key definition: *“A ‘boundary’ is a separation that marks the limits of property.”* Prior to the 2019 Collins v. Hall decision, only one case, the 2014 Lee v. Konrad appeal, touched on *“evidence of disputed boundaries”* and the *“location or existence of physical markers”*.

While our case law relating to boundaries is sparse, others have occasionally stepped in to offer resources and guidance for surveyors in the form of seminars or short courses. Many of these programs have addressed access, rights-of-way and easements. Short courses that focused on boundary law and evaluation of evidence have been presented at the annual Alaska Surveying & Mapping Conference or by private continuing education providers such as the National Business Institute (NBI). NBI presented a pair of one day seminars titled Boundary Law in Alaska in 1991 and 1994. The format for these programs included instruction from one professional land surveyor licensed in Alaska and two attorneys practicing in Alaska

## THE SURVEYOR AS AN EXPERT WITNESS

Surveyors are often referred to as *“expert measurers”*. Although a significant part of our education is related to boundary law, we are not lawyers and should not provide legal advice to a client. This guidance can be found in a variety of boundary law treatises:

*Principle 1. What a boundary is, is a question of law, Where a boundary is, is a question of fact. Principle 2. The creating and retracing boundary surveyor should not give legal opinions, either in writing or orally to clients.*<sup>8</sup>

In a discussion of the surveyor’s role as an expert witness, an attorney I worked with stated that normally, expert witnesses do not give opinions as to what the law is. It is the judge’s job to decide what the law is, and lawyers can submit arguments about the law. He noted that there is a little ambiguity about this principle concerning mixed issues of law and fact, and sometimes judges are flexible in allowing testimony that probably is not proper, because they can disregard the improper testimony in reaching their decision.

The idea behind these principles is that surveyors are not licensed to practice law just as the lawyers are not licensed to practice land surveying. However, this apparent restriction on the surveyor is hazy with respect to the preparation of expert reports and the retracement of boundaries. In fact, the surveyor may be said to be practicing law every time they apply their experience and judgment with regard to the location of a boundary. We make those decisions based upon our understanding of the relevant case and statute law. Where we have little case law to draw upon, we apply the general rules as stated in a variety of recognized boundary law textbooks. Every retracement survey will include some ambiguity and few will contain the exact same set of facts as the examples used in the boundary law references or the few decided cases we have in Alaska. It clearly is not practical to obtain an attorney’s opinion with regard to every retracement survey performed by the surveyor.

The preceding statements suggest that a retracement surveyor’s expert report should contain nothing more than the identification of recovered evidence (monuments, fences, roads...) and their relative positions and dimensions. I do not believe that many surveyors would agree with that limitation. If the client and the court are to understand the basis for the surveyor’s decisions regarding the location of retraced boundaries, they also need to understand the legal principles and case law that the surveyor relied upon. Alaska Statutes governing our profession include the knowledge of law as it relates to land surveying as an integral element of land surveying.

*AS 8.48.341 Definitions (14) “practice of land surveying” includes “...any service or work the adequate performance of which involves the application of special knowledge of ...the relevant requirements of law for adequate evidence of the act of measuring and locating land...”*

The Lee v. Konrad case that will be discussed in this paper represented the first time the Alaska Supreme Court referenced the writings of Justice Thomas Cooley who presided over the Supreme Court of Michigan between 1864 and 1885. The case discussed his paper titled The Judicial Functions of Surveyors which included the subject of boundary by acquiescence. Cooley’s

<sup>8</sup> Brown’s Boundary Control and Legal Principles, 7th Edition 2014, Walter G. Robillard & Donald A. Wilson

paper has also been incorporated into the Alaska Society of Professional Land Surveyor's Standards of Practice Manual, Fourth Edition<sup>9</sup> from its original printing in 1994 to the latest 2013 update. The Cooley paper closes with a paragraph titled "*Quasi-Judicial Capacity of Surveyors*":

*Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions.*

More recently, the 2019 Collins v. Hall case further references Justice Cooley and his discussion regarding original surveys as related to the 1878 Michigan case Diehl v. Zanger.

A very practical statement regarding this principle was made by Ira M. Tillotson, PE, RLS<sup>10</sup> in the papers of the ACSM<sup>11</sup> 1968 Fall Convention.

*When determining property lines the surveyor places his stakes and presents a plat showing where he believes that the property lines should be, his belief being founded upon what he thinks the court will uphold in the event of litigation involving his survey. He is constantly interpreting what the statutes say and what the courts have determined to be right and wrong, but such interpretation is correct only to the extent to which the courts will*

*uphold it. He is in the unfortunate position of being the middleman who must determine for a client what he thinks the court will accept.*

Alaska Court Rule 702, Testimony by Experts defines what an expert witness is:

*(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.*

## SUMMARY

While a surveyor may rely upon the law in making boundary determinations and knowledge of the law falls within the definition of the practice of land surveying, a surveyor before the court may not testify regarding the law of boundaries. Even if the expert testimony is provided by a person who is licensed to practice law, the testimony will be limited to the facts.<sup>12</sup>

## DISCLAIMER

R&M Consultants, Inc. is not a law firm, does not offer legal services and this paper is not presented as legal advice. It is offered solely to provide a discussion of the subject and present the views of the author. Should you require legal advice on the issues outlined in this paper, we recommend that you obtain the services of an attorney.

9 12 AAC 36.250. STANDARDS OF PRACTICE FOR LAND SURVEYORS. A person who holds a current certificate of registration as a land surveyor shall at a minimum perform work that meets the Alaska Society of Professional Land Surveyors, ASPLS Standards of Practice Manual – 2013, Chapter 2, adopted by reference.

10 Tillotson authored the 1978 reference Legal Principles of Property Boundary Location on the Ground in the Public Land Survey States.

11 American Congress on Surveying and Mapping

12 "But it is well established that expert witnesses are not permitted to testify on what the law is." McGlinchy v. State, Dept. of Natural Resources, 354 P.3d 1025 (Alaska 2015)



# Lee v. Konrad

## BACKGROUND

This case involved a boundary dispute between adjoining neighbors. The neighbors owned lots within Shelikof Subdivision<sup>13</sup>, located in the northeast quarter of Section 5, T. 12 N., R. 3 W., S.M. to the west of Lake Otis road and to the south of Dowling road. Lee owned Lot 13 of Block 3 and Konrad owned Lot 14, both of which lie to the west of Ivan Drive. These are small lots about 8,600 square feet in size with approximate dimensions averaging 115' x 76'.

Lee purchases Lot 13 in 1989. At that time, the adjoining lot 14 was owned by the Southernns. In 1992, the Southernns hire *Surveyor A*<sup>14</sup> to survey Lot 14. In 1999, Lee erects a partial fence between Lots 13 & 14 with no objections by the Southernns. In 2005 or 2006, Lee

excavates a crawlspace and places fill next to the fence posts. The resulting fill spills into Lot 14 by 2 or 3 feet with no objection by the owner of Lot 14. Lee completes the fence between Lots 13 & 14 in 2007, 15 years after the survey performed by *Surveyor A*.

**Konrad Survey (*Surveyor B*):** In 2008, Konrad purchases Lot 14 and hires *Surveyor B* to survey Lot 14. *Surveyor B* finds 3 of the 4 corners of Lot 14 as existing rebar & caps set by *Surveyor A*, accepts them, and sets a rebar & cap at the missing southerly corner of Lot 14 adjoining Ivan Drive. Lee then pulls the corner set by *Surveyor B*. Konrad sends a letter to Lee challenging his actions. Lee offers to pay for half of another survey as long as it complied with his specifications and methodology.

**Lee Survey (*Surveyor C*):** In July of 2008, Lee hires *Surveyor C* to survey Lot 13. Lee's letter to *Surveyor C* stated the following: *"Enclosed is the signed contract. I would like a drawing of the house and how it sits on the lot...I do want to make sure no one uses...any existing rebar or LS marker, only the monuments at the corners of the subdivision should be used."*<sup>15</sup>

Due to the conflicting interpretations of the Lot 13/14 boundary location, Lee files suit in Superior Court to quiet title.<sup>16</sup> Konrad then counterclaims.

## SUPERIOR COURT TRIAL

The Superior Court decision starts by stating: *"This court is tasked with determining, from the available evidence, which of the two competing surveys most accurately determined the on-the-ground location of the boundary between the lots"*<sup>17</sup>

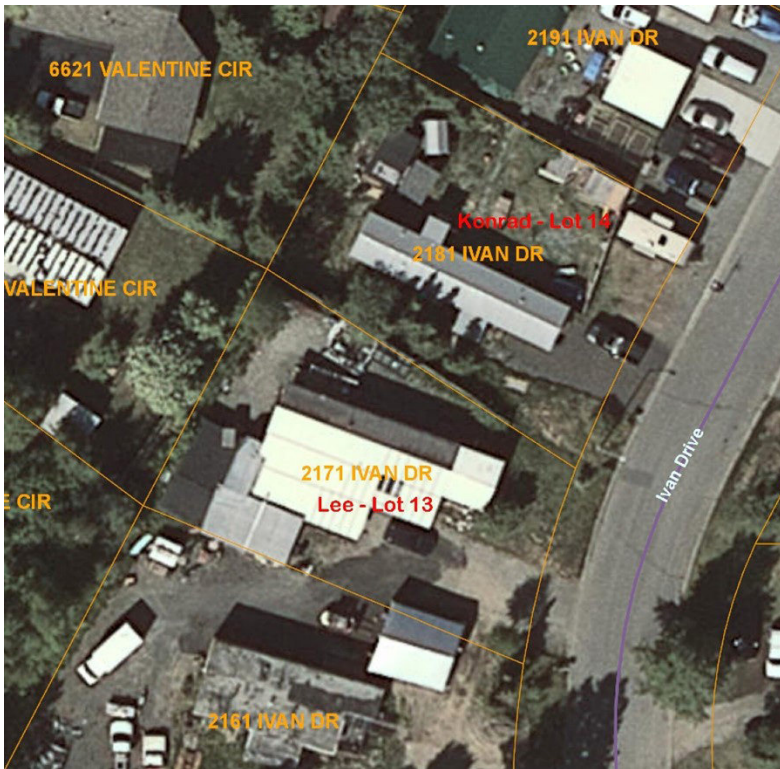


Figure 1 - Aerial Photo/GIS Overlay

<sup>13</sup> Shelikof Subdivision, filed as plat 72-113 on 7/10/72 Anchorage Recording District. This plat was refiled as Plat 79-58 on 5/22/79 to correct certain dimensional errors. None of the corrections had an effect on the lots that were the subject of this case.

<sup>14</sup> There are several professional land surveyors involved in this case. I will refer to them as Surveyors A-D so that this paper can focus on the facts of the case rather than surveyors as individuals or their companies. Identification of the surveyors and their company names can be found in the public record.

<sup>15</sup> *Lee v. Konrad*, Decision dated January 10, 2010, 3AN-08-097772CI

<sup>16</sup> 3AN-08-09772CI - Lee, Cody et al vs. Konrad, Barbara, Filed August 15, 2008.

<sup>17</sup> Ibid.

The basis for the differing opinions between *Surveyor B* (Konrad) and *Surveyor C* (Lee) goes to the methodology and evidence used by each surveyor to determine the boundary. *Surveyor B* “...relied upon the localized monumentation over outside boundary monumentation for control at least in part out of concern for upsetting expectations of the owners...”<sup>18</sup> In

doing so, *Surveyor B* gave weight to the 3 recovered corners established by *Surveyor A* along with corners established for Hannah Subdivision<sup>19</sup> that is located across Ivan Drive from Lot 14. *Surveyor B* testified at trial that he did not want to introduce errors onto what was being accepted as property lines. *Surveyor C* believed that there were significant problems with the local monuments near Lot 13 & 14 and while many local monuments could be found, none were original. *Surveyor C* decided to give weight to the exterior subdivision monuments to control the location of the Lot 13 boundaries to the exclusion of existing monuments and improvements such as fence lines. Using exterior subdivision control along East 68th Avenue, *Surveyor C* found corners along Ivan Drive to the north of Lot 14 in which the recovered positions were from 3-4’ south of the record position and 1-2’ East of the record position.

*Surveyor D* was hired by Konrad to evaluate and provide expert testimony regarding the *Surveyor B* & *C* surveys. His testimony supported the methodology used by *Surveyor B*.

The Superior Court’s Decision stated the following:

*The determination of the actual location of a disputed boundary is often a compound issue which presents questions both of law and of fact, and such is the case here. The correct on-the-ground location of a boundary line may be based upon the appropriateness of the survey method employed and the existing uses(s) of the properties.*

*When infirmities exist in the original survey and plat or it is difficult to determine the validity of found monuments, a community’s settled expectations of on-the-ground location of boundary lines may prevail. This is part of the basis for [Surveyor B] having chosen local monumentation rather than external monumentation.*

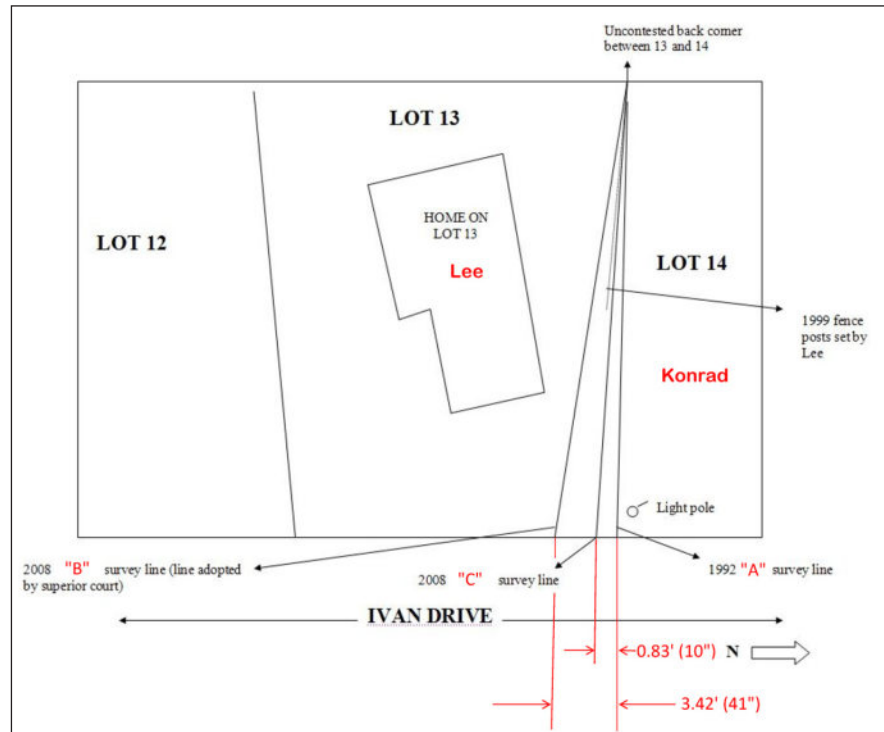


Figure 2 - Supreme Court Graphic<sup>20</sup>

## APPEAL TO THE SUPREME COURT

In September of 2012, Lee appeals the Superior Court decision to the Alaska Supreme Court. At first glance, it appears that the Alaska Supreme Court will provide surveyors with guidance regarding evaluation of corner evidence and retracement of boundaries. Unfortunately, that did not happen. The case included issues of trespass and adverse possession, but those will not be addressed in this paper. The briefs filed by both parties, included discussions of a variety of surveying principles:

- The appropriate methods to re-establish lot boundaries
- Follow the footsteps of the original surveyor – or?

<sup>18</sup> Ibid

<sup>19</sup> Hannah Subdivision filed as Plat 2001-159 on 11/16/01, Anchorage Recording District

<sup>20</sup> Text in red added. Dimensions extracted from 9/8/12 Supreme Court Appellant brief. For illustrative purposes only - not to scale.

- Error should be left where it is found and not spread to other lots
- Lot boundary control by exterior subdivision monuments - original?
- Lot control by local monuments established subsequent to the original survey
- Lot boundary established based on existing use or community's settled expectations
  - » Boundary by practical location, agreement, acquiescence or estoppel

Lee's initial brief provided the following statement that summarizes what I had hoped this case would resolve:

*Published Alaska cases afford little guidance in boundary law disputes not involving waterways. The evidence shows that Alaska surveyors follow widely disparate methods, some of which in this case conflict with boundary law principles which, we submit, were misconstrued, misapplied or disregarded by the court below. The present appeal affords an opportunity to not only resolve the dispute at hand, but also clarify Alaska law, affording guidance for the future, by which homeowners may protect their settled right to quiet enjoyment, by which surveyors may guide their work to better avoid legal disputes, and by which the trial courts may adjudicate future boundary disputes.*

The Alaska Supreme Court issued its ruling in Lee v. Konrad<sup>21</sup> on August 29 of 2014. It noted that the Superior Court focused on the survey methods used by the two competing surveys. With regard to boundary determinations, they stated:

*We have not considered a boundary line dispute of the type at issue here. We observe, however, that the determination of a disputed boundary often presents a compound issue involving questions both of law and fact. The relative weight of different types of evidence of disputed boundaries ordinarily presents a question of law, but the credibility of witnesses, including the weight given the opinions of surveyors, the location or existence of physical markers, and the timing of events, are question of fact.*

However, the Court determined that this was not a case of survey methodology or the weighing of evidence, but a case of boundary location by unwritten means. Specifically, the Court finds that this is a case for application of the doctrine of boundary by acquiescence: *"Boundary by acquiescence is an equitable gap-filling doctrine that may be available where estoppel and adverse possession are unavailable."*<sup>22</sup> For the first time, the Court references Justice Thomas Cooley<sup>23</sup> and his discussion of acquiescence:

*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.*

The Court discussed the varying approaches to acquiescence held by other states and then defined the doctrine of acquiescence for Alaska:

*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.*

## CONCLUSION

Applying the Doctrine of Acquiescence to the Lee v. Konrad boundary, the Supreme Court found that:

The basic requirements for boundary by acquiescence are established by undisputed evidence in this case: the boundary line between Lots 13 and 14 was definitely marked by rebar survey markers placed by [Surveyor A - 1992], fence posts and later a fence, and the owners of the adjacent lots mutually recognized and accepted that boundary line for more than seven years.

The boundary established by Surveyor A was deemed correct, however this determination was not based on surveying methods or procedures, but due to the long-term acceptance of the boundary by the adjoining lot owners and their predecessors in interest.

<sup>21</sup> Lee v. Konrad, 337 P.3d 510, (Alaska 2014)

<sup>22</sup> Note that estoppel involves the detrimental reliance by one party on the actions or statement of another and adverse possession involves an element of hostility between parties. Absent these issues, the Doctrine of Acquiescence provides a method to fix a boundary based on mutual acceptance.

<sup>23</sup> See *The Judicial Functions of Surveyors* by Thomas M. Cooley, Chief Justice, Supreme Court of Michigan, 1864-1885. This paper was made a part of the Alaska Society of Professional Land Surveyors Standards of Practice Manual 4th Ed. 1994/1995 and can be found at <https://www.alaskapls.org/s/Cooley2013.pdf>.



# Collins v. Hall

## BACKGROUND

This case also represents a boundary dispute between adjoining neighbors. The initial complaint was filed on July 29, 2014 by Ray M. and Carol J. Collins, Plaintiffs against David W. and Margaret R. Hall, Defendants.<sup>24</sup> In 2017, the Superior Court ruled in favor of Hall and Collins subsequently appealed the decision to the Alaska Supreme Court. On September 27, 2019, the Supreme Court affirmed the decision of the Superior Court.

This dispute relates to the location of the common boundary between Lots 14 and 15 of the Colt Island Recreational Development<sup>25</sup>, a subdivision of U. S. Survey No. 1755. A plat for Lot 15 was prepared by R&M Engineering, Inc.<sup>26</sup> in 2012 for owner D & M Hall Community Property Trust (*Hall* Plat). A portion of the Hall plat is used as the title page image for this paper. A plat for Lot 14 was prepared by J.W. Bean, Inc.<sup>27</sup> 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.

Colt Island is defined by U.S. Survey No. 1755 located within Section 35 of Township 41 South, Range 65 East, Copper River Meridian<sup>28</sup>. Colt Island lies between Admiralty Island and Douglas Island along Stephens Passage and is approximately 10.5 air miles southwest of Juneau.

U.S. Survey No. 1755 was performed in 1927<sup>29</sup> in order to define the boundaries and meanders of the homestead claim of Albert Forsythe. The survey consisted of a 115-acre island property. 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.

The single monument established for U.S. Survey 1755 was a Witness Corner Meander Corner (WCMC). From

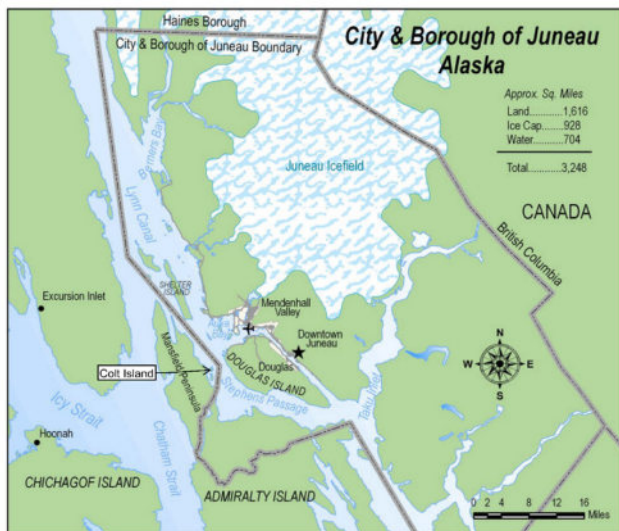


Figure 3 - Colt Island Location

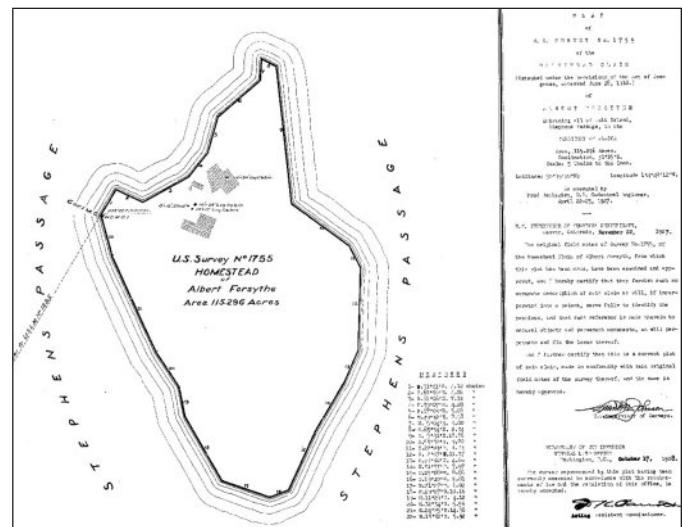


Figure 4 - U.S. Survey No. 1755

<sup>24</sup> *Collins v. Hall*, Case No. 1JU-14-771 CI, Superior Court, First Judicial District at Juneau

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> See USGS Quadrangle Juneau B-3, AK 1996.

<sup>29</sup> Colt Island was surveyed in April of 1927. USS No. 1755 was approved on October 17, 1928.



Figure 5 - WCMC1- Lumber Crayon Used for Clarity

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. The field notes for U.S. Survey 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 1/2 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."*

Plat 75-11, Colt Island Recreational Development, was a paper plat subdivision of U.S. Survey No. 1755. There is no indication on the plat that a survey was performed on the ground or that the corners of the lots were monumented. 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.

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 for 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.

Plat 2012-32: The *Hall* plat was previously referenced in footnote 26. The plat locates Lot 15 using the record dimensions and basis of bearing reflected on Plat 75-11, Colt Island Subdivision. Four existing Bean secondary monuments were found and 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. If the found Bean monuments are correct, the Hall's outhouse and shop building extend approximately 1 to 2 feet respectively into the Collins' Lot 14.

Bean's Plat 2014-46 appears to locate Lot 14 also 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.

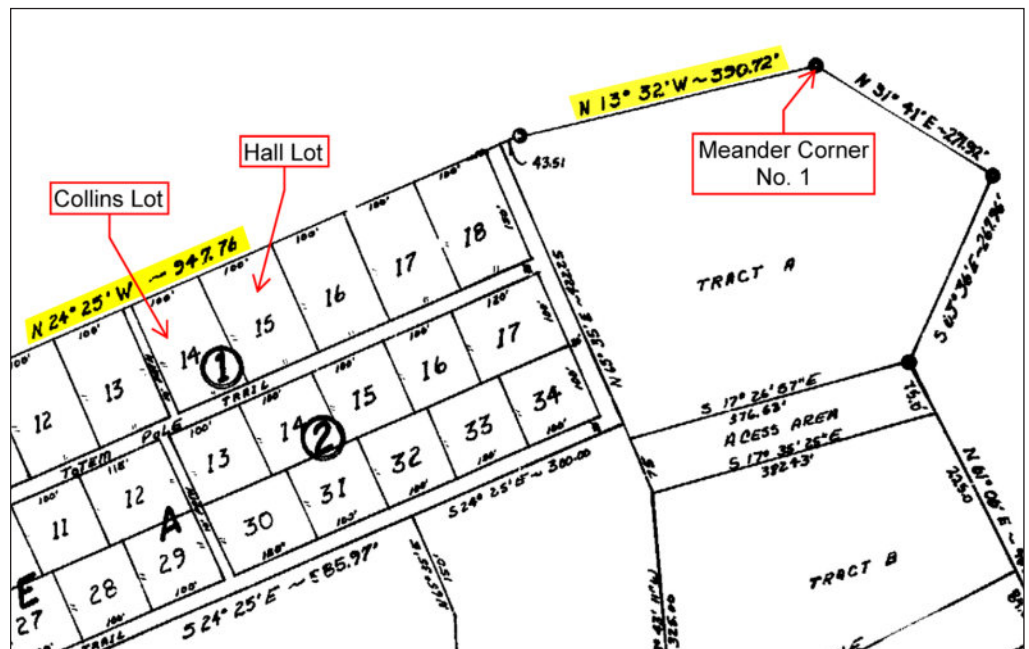


Figure 6 - Plat 75-11 Excerpt

While the Hall and the Collins plats appear to both use WCMC-1 of USS 1755 for the basis of position and the computed line between WCMC-1 and USLM 1285 on Admiralty Island for the basis of bearing, a comparison of these and other surveys indicate that each used a different point for WCMC-1. A measured distance between the basis of bearing monuments and WCMC-1 markings consistent the USS 1755 field notes validate the WCMC-1 used for the *Hall* plat. The *Collins* plat difference between the Basis of Bearing record and measured distances varies by more than 22 feet. The *Collins* plat also indicates a notable shift of the USS 1755 record westerly meanders from the beach to a point half way up the bluff slope.

This shift along with WCMC-1 markings in conflict with the USS 1755 field notes suggest that the *Collins* plat did not commence at the true point for WCMC-1. As a result, the focus of this dispute was one of original monuments, the “*point of beginning*” and “*walking in the footsteps*” of the original surveyor.

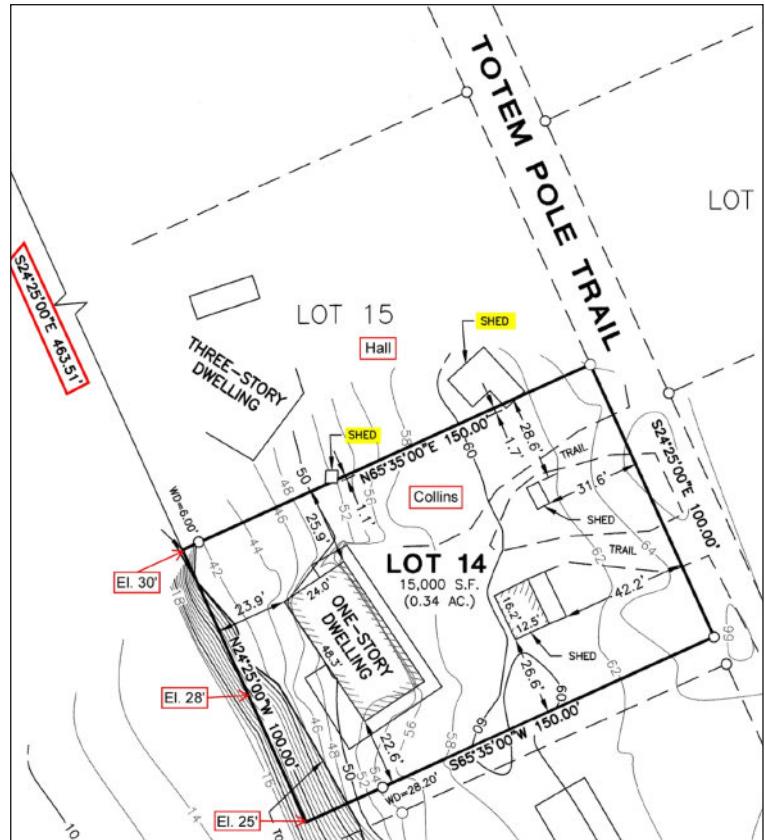


Figure 7 - Collins (Bean) Plat 2014-46 Excerpt

## SUPERIOR COURT TRIAL

The trial was held in the Juneau Superior Court in November and December of 2016. The Court issued its Findings of Fact and Conclusions of Law in July of 2017. Based upon the evidence and testimony the Court found that:

- The correct point of beginning for Plat 75-11, the Colt Island Subdivision of USS 1755 is WCMC-1 for USS 1755. Plat 75-11 is a “*paper plat*” that establishes no monuments, but it is an accurate representation of the USS 1755 boundaries. Therefore, monuments established by USS 1755 are to be used in locating lots created by Plat 75-11. USS 1755 only established one monument, WCMC-1. Therefore, WCMC-1 for U.S. Survey No. 1755 is the correct point of beginning.
- The monument used for the *Hall* Plat was WCMC-1 established by USS 1755 and therefore the correct point of beginning for Plat 75-11.
- The monument used for the *Collins* plat is not the WCMC-1 established by USS 1755. The Collins surveyor used this incorrect point to establish

control points and lot corners in the years after the filing of the Colt Island Subdivision Plat 75-11. None of these post Plat 75-11 monuments were placed into the public record until the *Collins* plat, 2014-46 was filed.

- The *Collins* plat surveyor also performed an Alaska Tidelands Survey<sup>30</sup> on Colt Island in 2002. In that survey, he used the original WCMC-1 as identified by the *Hall* plat suggesting that the Collins surveyor now recognized that the WCMC-1 used for the Hall plat was the correct WCMC-1.

The Court also noted that property lines established in a deed could be altered through the doctrine of “*boundary by acquiescence*” according to the 2014 case *Lee v. Konrad*. However, it was clear that the Halls never acquiesced to the boundary between Lot 14 and Lot 15 as established by the Collins’ surveyor. The Court found no “*other equitable doctrine that would warrant altering the property boundaries from those created by the deeds and written instruments.*” In conclusion, the Superior Court ruled that the Halls are entitled to quiet

30 Alaska Tidelands Survey No. 1620 filed as Plat 2004-10, Juneau Recording District.



title against the Collins to Lot 15 as surveyed according to the *Hall* plat 2012-32.

## APPEAL TO THE SUPREME COURT

*Collins v. Hall* was appealed to the Alaska Supreme Court in August of 2017. Briefs were submitted by March of 2018 and oral arguments held on February 6, of 2019. On September 27, 2019, the Supreme Court affirmed the Superior Court decision.<sup>31</sup>

In affirming the Superior Court decision, the Supreme Court concluded the following:

- The boundaries recorded in Plat 2012-32 (Hall) were correct.
  - » The Collins contend that Bean is the *original* surveyor due to his production of the Colt Island subdivision (Plat 75-11) even though Bean did not set any “*original*” monuments as a part of that plat. Collins argued that “*long established surveying principles*” would give priority to boundaries established by the original surveyor. The Halls argue that subsequent surveyors could not have known based on Plat 75-11 that Bean had used a different rock for WCMC-1 than was established by U.S. Survey 1755 in 1927.
- The deeds unambiguously define the subdivision lots according to U.S. Survey 1755.
  - » Alaska case law holds that the intent of the parties is key to deed interpretation and that a 3-step process is required to discern that intent: First, look to the 4 corners of the document to see if it unambiguously presents the parties intent. Second, if the deed is deemed ambiguous, consider the facts and circumstances surrounding the conveyance to discern the parties’ intent, and third, if the parties’ intent cannot be discerned, turn to the rules of construction.<sup>32</sup>
  - » The Court agreed that the deeds were unambiguous. However, as Plat 75-11 set no permanent monuments of its own and specifically refers to U.S. Survey 1755, the factual question to be answered is which rock was the witness corner established by U.S. Survey 1755.
- The rock marked “WCMC1 S1755” was the witness corner identified in USS 1755.
  - » Collins’ surveyor Bean testified that he initially did not find a rock scribed according to the USS 1755 field notes and instead used a rock with a faint “X”. Hall’s surveyors Johnson and Davis both recovered an appropriately scribed rock for WCMC-1 and verified its relationship with USLM 1285 across Stephens Passage on Admiralty Island. The measured distance varied from the calculated distance by 1.1 feet where the distance from the USLM 1285 to rock recovered by Bean varied by 22 feet.
  - » Collins suggested that the recovered rock scribed as WCMC-1 was not the WCMC-1 originally set for USS 1755 and had in fact been inscribed much later.
- The markers Bean placed in the 1970s were insufficient to control future surveys.
  - » Collins argues that even if the rock scribed as WCMC-1 is the original USS 1755 monument, Bean’s subsequently established monuments should control the Plat 75-11 boundaries. Collins relies upon Michigan Supreme Court Justice Thomas Cooley’s writings from 1878<sup>33</sup> placing priority upon *original* monuments even when those monuments conflict with the record plat locations. While Bean was the surveyor of record for Plat 75-11, according to the plat, he did not establish any monuments as a part of that effort. As a result, none of his subsequently established monuments rise to the level of *original* monuments as envisioned by Justice Cooley.
- No boundary had been established by acquiescence.
  - » Collins argued that under the doctrine of boundary by acquiescence, established in the 2014 *Lee v. Konrad* case, the lot corners set by Bean in 2009 for Plat 2014-46 should control the boundaries between Collins and Hall. This argument failed because acquiescence requires mutual recognition by both parties for 7 or more years. Hall did not recognize Bean’s boundary and even if he had, the required 7 years had not passed.

<sup>31</sup> *Collins v. Hall*, 453 P.3d 178 (Alaska 2019)

<sup>32</sup> See A.S. 09.25.040 Rules for construing real estate descriptions. These include the often cited rules for establishing the priority of conflicting elements in a conveyance description. They are only to be used once a court has declared a deed ambiguous. *Estate of Smith v. Spinelli*, 216 P.3d 524 (Alaska 2009)

<sup>33</sup> After *Lee v. Konrad*, *Collins v. Hall* becomes the second Alaska case to cite Justice Thomas Cooley!



» In addition, it was noted that the Superior Court considered and disposed of arguments that the Bean boundary between Collins and Hall had been fixed by either adverse possession or estoppel. A boundary by adverse possession failed because the 7-year color of title requirement had not been met. A boundary by estoppel failed as it would require the Halls to assert the boundary established by Bean and the Collins's detrimental reliance on such an assertion.

The Supreme Court remanded the case to Superior Court for consideration of a trespass claim that was not addressed in its initial decision. Collins then filed a Petition for Rehearing. The petition opens with a request that “...*this court trouble itself now and fix the problems that follow from the slip opinion issued in this case in order to prevent obvious harm to the body of surveying and property law in Alaska.*” The Collins continued to argue that Bean had recovered the original WCMC-1 established for U.S. Survey No. 1755 and that Hall's surveyors both used an incorrect point. The Petition also argued that Bean's monuments set years after the filing of Plat 75-11 should carry the weight of *original* monuments as Bean was the *original* surveyor.

The Halls respond to the petition and close with the following statement:

*The Collinses assert that the decision will “create chaos” on Colt Island, requiring the redrawing of established boundaries. But property line issues have plagued Colt Island for decades. If anything, the Court’s decision will at last bring some finality to these issues by establishing how boundary lines are to correctly be determined. Nor will the decision cause chaos throughout the state, as petitioners also claim. No chaos will ensue from defining*

*boundaries based on an original survey and its point of beginning and not on subsequent survey work that failed to use the point of beginning of the original survey and failed to do any monumentation.*

The Petition for Rehearing was denied on December 13, 2019.

## CONCLUSION

This decision supports the concept that original monuments established at the time of the original survey will be controlling on subsequent surveys even if the original survey and placement of those original monuments are in error. This case added the twist in that the original surveyor asserted that monuments he established years after the original survey should also control the lot boundaries as he was the original surveyor. The Court disagreed. While this conclusion may not appear earth shattering to many surveyors, it is the first time I have seen it discussed in this level of detail in Alaska.

Briefs filed as a part of the Lee v. Konrad case suggest that the policy of the law favors “...*settled expectations among adjoining owners.*” Cooley supports this concept in holding that original monuments should control even when placed in error or that improvements such as fence lines and building lines may best represent the original location of the monuments once the original monuments have been destroyed. While original monuments will be generally afforded great weight in determining boundaries, their status may still be set aside as a result of unwritten means of title transfer according to the doctrines of acquiescence, adverse possession and estoppel.

## What Did We Learn?

### THE CASES

In Lee v. Konrad we learned that Alaska law now recognizes the Doctrine of Acquiescence as a method to fix a boundary between land owners where estoppel or adverse possession would be inappropriate. However, we were not provided with any Alaska specific guidance regarding the obligation of the retracing surveyor to follow the footsteps of the original surveyor or acceptable retracement methodology including how the variety of recovered boundary evidence should be weighed.

If Lee v. Konrad had been decided on survey issues, there would have had to been a discussion of original monuments (and the original surveyor) vs. uncalled for monuments or those set by following surveyors. Many surveying texts and articles have suggested that only monuments set as shown on the plat by the original surveyor or those monuments called for in a conveyance document should be given any weight in a retracement survey. What does that say about all those uncalled for monuments that may have been set by a professional land surveyor to mark property boundaries as a part of a retracement survey? Are they all without value? Alaska implemented its Record of Survey statute<sup>34</sup> in 1985. Prior to that time, the Recorder's office did not have a category in which to file a survey plat other than those required for *original* surveys such as a subdivision or official State of Alaska cadastral plat. Many surveyors preferred to keep their surveys out of the public record in order to limit the competitive disadvantage that could occur by allowing free access to their work. Even when the Record of Survey statute became effective, the filing of a survey did not necessarily bestow any greater authority on the uncalled for monuments set as a part of these surveys.

The Superior Court decision in Lee v. Konrad considered the issue of the original surveyor and original monuments:

*In performing a resurvey, the cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed. When "objects" or*

*monuments" used by the original surveyor can be found, they should be used if found to be reliable... When infirmities exist in the original survey and plat or it is difficult to determine the validity of found monuments, a community's settled expectations of the on-the-ground location of boundary lines may prevail. This is part of the basis for [Surveyor B] having chosen local monumentation rather than external monumentation.*

Collins v. Hall provided direct discussion regarding the original vs. a subsequent surveyor, original vs. uncalled-for monuments, the importance of the *point of beginning* and the need for a retracing surveyor to support their identification of original monuments and boundaries with an appropriate level of research and evidence.

### THE FIRST SURVEYOR

In 2012, I attended a presentation by John Stahl<sup>35</sup> that discussed these types of issues in detail. Stahl reviewed the principles found in our standard surveying treatises and case law throughout the country and discussed characteristics of the *Original Surveyor*, the *Retracing Surveyor* and the *First Surveyor*. The distinguishing characteristics are as follows:

**Original Surveyor:** The *Original Surveyor* establishes boundary lines as a part of a subdivision of land in which the survey results in a property description used by the owner to transfer title to the property. Generally, the location of the monuments set by the *Original Surveyor* will control over location discrepancies as reported by the plat or property description of that survey. The rationale for this is the public's need for finality and uniformity of boundaries and land titles. The monuments are referred to as *called-for* monuments either by reference to a subdivision plat or by direct call in the property description.

**Retracing Surveyor:** The *Retracing Surveyor* locates a boundary line that has previously been established by an original survey. The *Retracing Surveyor* is said to be "*following the footsteps*" of the Original Surveyor.

<sup>34</sup> AS Sec. 34.65.030 Records of Survey, (1 ch 32 SLA 1985)

<sup>35</sup> Role of the First Surveyor – Facts and Fallacies, John B. Stahl, PLS, CFedS, 2012 Alaska Surveying & Mapping Conference, February – 2012

**First Surveyor:** The first survey fills the void when no original survey was run on the ground and no original monuments were set to represent the boundary line location. The *First Surveyor* monuments boundaries created by deed description where no monuments were called-for or the description refers to a paper plat.

The monuments set by the *First Surveyor* are generally referred to as *uncalled-for* monuments. Some would argue that *uncalled-for* monuments have no value except as evidence of unwritten rights. As these monuments were not set as a part of an original survey, they are not considered to be controlling in the sense of those set by the *Original Surveyor*. As a result, these monuments contain an element of ambiguity or uncertainty.

*When a parcel or parcels are created on paper, without a survey being conducted, and the surveyor is later requested to place one of these paper-described parcels on the ground, this survey should be considered the "first" survey, in that it is the first survey to be placed on the ground after the description. The difference is that whereas the original survey controls, the first survey is nothing more than an opinion by the surveyor of where the written description should be placed. As such, it is always open to collateral attack.<sup>36</sup>*

A question for the future is whether monuments set by the *First Surveyor* should have standing separate from their association with unwritten means of boundary establishment.

## CLOSING

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Alaska may not have a large body of case law directly related to boundary surveying and that may be due in part to it being such a young state. In addition, the reality is that the cost of taking a boundary dispute through the courts may often be more than the value of the land in dispute. I believe that may have been the case in the two cases discussed in this paper. Often, it is not about the money...it's about the personalities of the parties on each side of the line. These two cases could have gone either way. One argument respects the settled expectations of the community to hold monuments that exist in the field without regard to whether they are of record or set by the original

surveyor. Generally, these monuments will require the support of legal doctrines such as acquiescence, adverse possession or estoppel. The opposing argument gives weight to original monuments set by the original surveyor even if these monuments conflict with an associated plat or deed description or monuments established by subsequent surveyors. The facts of each boundary conflict must be considered in order to determine the appropriate solution.

One item of note for Alaska land surveyors both new and old: The two recent Alaska Supreme Court cases referenced in this paper cite the writings of Justice Thomas Cooley. As previously stated, these can be found at the Alaska Society of Professional Surveyors website and are recommended reading.

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<sup>36</sup> Evidence and Procedures For Boundary Location 6th Ed., Robillard, Wilson & Brown, P.335