ORIGINAL

BEFORE THE IDAHO BOARD OF LICENSURE OF PROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS

IN THE MATTER OF	)	Docket No.: FY 16.03
STEVEN WELLINGTON, P.L.S.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER

The above-entitled matter came on for hearing on October 23, 2017, and continued through mid-day of October 25, 2017, before all of the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors ("Board"), save for John Elle, who appeared as an expert for the Board staff. Michael Kane appeared as Board counsel. The Complainant, Keith Simila, was represented by Kirt Naylor. Respondent was represented by Terry Martin.

I.

INTRODUCTION

The primary witness for the Complainant was John Elle, PE, PLS. Mr. Elle testified at length as an expert to the various counts of the Complaint. Mr. Simila testified as the Executive Director of the Board. Respondent testified on his own behalf and did not provide testimony from a retained expert.

Respondent filed an Amended Counterclaim, essentially asking for a declaration by the Board that he did not violate the various statutes and rules alleged to have been violated by the Board. Respondent is presumed to have pressed his case on these counterclaims during his testimony, and did not provide any expert opinion on the matters alleged in the counterclaim. In addition, Respondent alleged that the complaint in this matter was untimely, retaliatory, and violated his rights. Respondent presented no testimony or other evidence pressing these claims.

Upon review of the evidence presented, the Board determines that the allegations made against Respondent are not proven to be violations of the statutes or rules to a clear and convincing level. As will be seen, this does not mean that Respondent acted within the statutes and rules or that the Board has found that Respondent acted appropriately. It simply means that, given the high burden of proof, the Board is constrained by the law and what was alleged as to each count.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Alleged Statutory Violations

A. <u>Count One.</u>

This count alleges a violation of Idaho Code § 55-1906. Respondent is alleged to have failed to reference a monument found by an earlier surveyor (Hunter Edwards) in 2014, when Respondent filed a record of survey in 2015. Close review of the evidence shows that the previous surveyor (Hunter Edwards) did not set a monument as defined in Idaho Code § 55-1902(6). Hence, Respondent referenced the Hunter Edwards survey but no monument had been set in 2014 for Respondent to have referenced in his 2015 survey. The allegations in this paragraph are not sustained. Section 4 of the amended counterclaim is sustained.

The Board notes that it would have been good practice for the Respondent to have referenced the location referred to by Hunter Edwards, despite the fact that Edwards had not "set" a monument.

B. Count Two.

This count alleges a violation of Idaho Code § 55-1906, in that Respondent is alleged to have failed to reference monuments, set by Hunter Edwards in a survey performed in 2001, when Respondent filed his 2015 record of survey. The evidence is that Hunter Edwards' 2001 monuments were not relevant to Respondent's scope of work, and not used to create the 2015 record of survey. Hence, this count cannot be sustained and section 4 of the amended counterclaim must be granted.

C. Count Three.

This count alleges a violation of Idaho Code § 55-1906 in regard to a monument set by Carl Edwards in 1996, which monument was not reflected in Respondent's 2015 record of survey. Respondent presented testimony that he was not afforded the opportunity to look for the monument, citing weather conditions and on at least one occasion being barred from the property.

In a technical sense, the Carl Edwards monument was not "found" as described in Idaho Code § 55-1906(1), and hence could not be referenced in the 2015 record of survey. Therefore, the count cannot be sustained.

However, section 4 of the amended counterclaim must be denied, as it appears that Respondent made no diligent effort to locate the monument in question during the three year time he had to locate it.

D. Counts Six and Seven.

These counts pertain to Idaho Code § 54-1227, which requires a land surveyor to set monuments at all unmonumented corners that have been field located. The evidence is undisputed that Respondent did not field locate the corners he set by computed position when he filed his 2015 survey and hence the counts as to the SE and NE corners of section 24 cannot be sustained.

While it cannot be said that Respondent is in violation of § 54-1227, section 1 of the amended complaint cannot be sustained. The BLM manual requires monumenting at the locations of the corners described by Respondent in the record of survey, despite the reference to field location found in § 54-1227. Had the complaint been worded as a standard of care violation, the Board would most likely have found Respondent to be in violation.

E. Counts Eight and Nine.

These counts pertain to Idaho Code § 55-1604. The section requires the filing of corner records for every "public land survey corner" that has been established, monumented or restored. The allegations in the counts are that Respondent failed to file a corner record for the SE and NE corners of section 24, even though he computed the corners and reflected them in his 2015 survey. There is no doubt that Respondent failed to file a corner record for the two computed corners described in the count. However, the corners in question are not public land survey corners as defined in Idaho Code § 55-1603(11). Hence, the counts cannot be sustained.

Having said that, section 2 of the amended counterclaim cannot be sustained. It is clear that Respondent filed a record of survey having computed two corners, and failed to file corner records of those corners, indeed having failed to monument such corners. This conduct is outside the procedures set forth in the BLM manual. The record of survey Respondent filed is a

permanent record of the county, and for all intents and purposes was designed to show the boundaries of his client's property. The Respondent claims that he was "forced" to file the survey because a lawyer told him that a judge told the lawyer that he should so file the record of survey. This double hearsay is far from compelling, and presumes that a judge would have an off-the-record conversation with a party's attorney and issue what would be tantamount to a judicial order in an ongoing litigation without a writing to that effect. The Board is doubtful of the Respondent's version of the events, and notes that had the counts been brought as violations of the standard of care the Board, absent compelling evidence, would most likely have found a violation.

Another explanation the Respondent propounded was that the positions of the corners might change depending on the outcome of the current ongoing litigation. Though not unreasonable on its face, the explanation fails. A strict interpretation of the Code says that one is required to set monuments if one files a Record of Survey. The concern of the Board is that there is now a Record of Survey filed that does not comply with Idaho Code and that can be relied on by others, may change depending on a court decision, and contains no language on the survey document to that effect. As it stands today, another surveyor could come into the area and unwittingly rely on the survey to his detriment and the detriment of the public. The Board feels that the survey should not have been filed without meeting all Code requirements and a statement on the document that the filing was being done at the direction of the court as expressed in a written order and that the corner positions as shown may change.

Alleged Standard of Care Violations

The Board begins by noting that the credentials of the Complainant's expert were unchallenged, and that the expert's opinions on the subject of standard of care were unrebutted

by expert testimony. Instead, Respondent acted as his own expert, challenging much of the opinions of the expert. As can be seen, the Board is troubled by the actions of Respondent in regard to the filing of his 2015 record of survey, and failing to monument the SE and NE corners of section 24. Nevertheless, the Board is constrained by the language of the actual counts regarding standard of care.

When speaking of the standard of care, one begins with the BLM manual and circular on the restoration of lost or obliterated corners. The guiding principal for land surveyors is that an original corner must be honored, despite the potential ability to use modern technology or find evidence that the original corner was not placed in a precisely accurate location to a level of mathematical certainty. Given the equipment of the late nineteenth century, and given that the terrain being surveyed was in some cases difficult to negotiate, it is not surprising that original corners sometimes do not mathematically agree with what GPS technology now might show. The aforementioned principal gives landowners repose, and they may develop their land without fear that surveyors could come along ten years, or fifty years, later and "prove" that the original corner should have been placed elsewhere. Needless to say, such an action would jeopardize the rights of innocent individuals, cause expensive controversies, and potentially put landowners in a situation where they could never be sure of the boundaries of their lands.

Sometimes original corner stones are lost or can be shown to have been moved. In those cases, a surveyor is charged by the BLM manual and circular to use all evidence available before resetting the corner. In this respect, surveyors become detectives, who must review many different kinds of information, from interviews to fences, from previous surveys to deeds, from remains of buildings to road locations. It is well below the standard of care to reject locations of original stone monuments by engaging in speculation, or incomplete and inadequate

investigation. However, it is quite another situation where one sifts through evidence, takes careful precautions to double check information, or relies upon unquestioned monuments, deeds, maps, and other data to come to an opinion as to the proper location of a corner. While another might disagree with the conclusions drawn, that in and of itself does not mean the standard of care was violated. Put another way, an informed difference of opinion does not equate to a standard of care violation.

F. Count Four.

The Board begins by noting that the various opinions set forth by the expert and Respondent, as well as other surveyors having to do with the corners in question can be traced to whether or not a surveyor follows the apparent findings of a surveyor named Shannon, who set a monument in 1897 (which monument was purportedly located and remonumented some 100 years later), or a surveyor named Spedden, who set a monument in the same area for the same corner in 1909 but at a different location. Much debate has ensued since then about which surveyor's corner should be accepted. The Board has listened to hours of testimony and reviewed dozens of documents which were offered to show that accepting the Spedden location over the remonumented Shannon location was a violation of the standard of care. Similarly, hours of testimony and dozens of documents were offered to demonstrate that the remonumentation of the Shannon corner was erroneous, and that Spedden's work was reasonable. Needless to say, Respondent falls on the Spedden side of the argument.

The Board is not in a position to find where the correct location of the corner should be. The jurisdiction of the Board is limited to the question of whether Respondent exercised the care required of a competent surveyor in reaching an opinion, after doing all the work required of a competent surveyor that lead to that opinion in like circumstances. The staff essentially alleges

that accepting Spedden was erroneous because Spedden made an error. Further the staff alleges that Respondent's methods in accepting Spedden were unfounded. There is much to support the argument that Spedden was wrong in 1909, but there is also much to support the argument that the surveyor remonumenting the Shannon stone was erroneous. In the end, there can be no question that Respondent put in much effort and reviewed much information to reach the conclusions he did. The Board is not in a position to state that it finds to a clear and convincing standard that Respondent fell below the standard of care required as to these issues, despite the fact that others disagree with his findings.

The staff alleges that Respondent fell below the standard of care by accepting a location set by a surveyor named Erickson. In actuality, Respondent did not accept Erickson's methodology but arrived at his conclusions by separate analysis, and in fact specifically rejected Erickson's methods. Respondent's conclusions were that his location of the corner in question was "close" to where Erickson located the corner, but he does not support Erickson's opinions.

The count cannot be sustained. Section 5 of the amended counterclaim is sustained.

G. <u>Count Five.</u>

This count alleges the same standard of care violation for the same location as discussed in Count 4. However, Respondent's alleged failure to take into consideration the information provided by an elderly landowner, and information on road plans are asserted as further demonstrations of the failure to abide by the standard of care. It does appear that Respondent took into consideration the landowner's information, as well as the road plans. Considering the other information utilized by Respondent, and for the reasons described above, the Board cannot sustain the count and must sustain section 5 of the amended counterclaim.

H. Count Ten.

This count pertains to allegations of violation of the standard of care and primary professional obligation to protect the public. The allegation asserts that Respondent's 2015 record of survey has the effect of denying Grangeville Highway District its property rights.

There can be no doubt that Respondent's record of survey has assisted those in opposition to the interests of the highway district to assert that the boundary of the district property is not where the district has believed it to be for fifty years or more. The matter is in litigation in the district court. Having said that, the Board notes that the survey, in and of itself, does not deny property rights. It is an opinion based upon information already in place, and one of many opinions as to the problems created by the differences between the Spedden and Shannon surveys. Put another way, Respondent did not create the controversy. He simply opined upon it.

The count is not sustained. There does not appear to be a counterclaim based upon this count.

Remaining Counterclaim Issues

There was no evidence presented regarding sections 6, 7 and 8 of the Respondent's counterclaim. The counterclaim is not sustained as to these counts.

In section 3 of the Respondent's counterclaim, Respondent asks the Board to find that the Respondent did not violate Idaho Code § 55-1904. The statute states that "After making a land survey in conformity with established principles of land surveying," a record of survey should be filed in a variety of circumstances. As described above, the 2015 record of survey did not conform with established principles of land surveying. The section of the counterclaim is not sustained.

III.

CONCLUSIONS OF LAW

The Board, having concluded that Respondent did not violate the Idaho Code sections cited in the complaint, nor the standard of care or the primary obligation, the complaint must be dismissed. The Board has stated its findings regarding the various counterclaim sections brought by Respondent above.

IV.

ORDER

IT IS SO ORDERED.

V.

APPEAL RIGHTS

This is the Final Order of the Board.

A. Any party may file a Petition for Reconsideration of this Final Order within fourteen (14) days of the service date of this Final Order. The Board will dispose of the Petition for Reconsideration within twenty-one (21) days of its receipt, or the Petition will be considered denied by the operation of law. Idaho Code § 67-5247(4).

B. Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this Final Order, or orders previously issued in this case, may appeal this Final Order and all previously issued orders in this case to an Idaho district court by filing a petition in the district court of the county in which: (1) a hearing was held; (2) the final agency action was taken; or (3) the party seeking review of this Final Order resides.

C. An appeal must be taken within twenty-eight (28) days: (1) of the service date of this Final Order; (2) of any order denying petition for reconsideration; or (3) of the failure within

twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 26 day of March, 2018.

IDAHO BOARD OF LICENSURE OF
PROFESSIONAL ENGINEERS AND
PROFESSIONAL LAND SURVEYORS

BY: _____
GLENN BENNET, P.L.S. – Chairman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of March, 2018, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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