

MEMORANDUM

October 16, 2008

TO: Interested Persons

FROM: Lance King LSIT

SUBJECT: **Boundary by Agreement**

Introduction

This memorandum is prepared for the purpose of providing research information about the doctrine "Boundary by Agreement" it is hoped that it will provide the reader with additional information that will allow this doctrine to be more recognized and allow these agreements to be recorded in the County Clerks Office across Oregon. This report is merely a bundle of information and personal opinion. The author of this report is not qualified to write about or discuss the many laws pertaining to surveying or real property title issues.

The Boundary by Agreement doctrine is founded on common law principles, which have been codified by state statute in many jurisdictions. The doctrine is applicable in a vast majority of states where the title to land is recorded. The doctrine allows landowners with uncertainty or disputes regarding their boundaries to enter into an agreement to settle the uncertainty. The agreement will be upheld in a court of law. The agreement of the landowners is not an agreement to create a new boundary to replace the former. Nor is it an agreement to exchange portions of their lands or to transfer ownership between the parties. It is an agreement to settle the uncertainty that exists in the location of the existing boundary. As such, the agreement will not fall under the purview of the Statute of Frauds and is an acceptable remedy.

The source of law in the United States and in Oregon is legislative enactment, judicial decision and administrative rules, with that in mind we will look at source of law and how it relates to the Boundary by Agreement doctrine.

* Underlining by Author

The Federal Government and Boundary by Agreement

The BLM manual and the BLM circular entitled "Restoration of Lost or Obliterated Corners and Subdivision of Sections, A guide for Surveyors" (1974) are not statutes, even though the Courts of Appeals appears to have treated them as statutes, states "Where the lands are in private ownership it is a function of the county or local surveyor to restore lost corners and to subdivide the section. Disputes concerning these questions must come before the local courts, unless settled by joint survey or agreement."

They go on to say “In many of the States there is a well-established practice for filing notes and plats of surveys, usually in one of the county offices. Otherwise the record ordinarily would be filed as an exhibit with a deed, or agreement, or court decree, ect.”

The Oregon County Clerks and Boundary by Agreement.

ORS 93.610 states, “Separate books shall be provided by the county clerk in each county for the recording of deeds and mortgages. In one book all deeds left with the clerk shall be recorded at full length, or as provided in ORS 93.780 to 93.800, with the certificates of acknowledgment or proof of their execution, and in the other all mortgages left with the county clerk shall in like manner be recorded. All other real property interests required or permitted by law to be recorded shall be recorded in the records maintained under ORS 205.130 or in records established under any other law.*

(2) Counties maintaining a consolidated index shall record deeds and mortgages and index them in the consolidated index in such a manner as to identify the entries as a deed or mortgage record. All other real property interests required or permitted by law to be recorded shall be recorded in the records kept and maintained under ORS 205.130 or in records established under any other law.*

ORS 93.630 states, “The county clerk shall also keep a proper direct index and a proper indirect index to the record of deeds, mortgages and all other real property* interests required or permitted by law to be recorded*, in which the county clerk shall enter, alphabetically, the name of every party to each instrument recorded by the county clerk, with a reference to where it is recorded.

ORS 205.130 states, “The county clerk shall:

(1) Have the custody of, and safely keep and preserve all files and records of deeds and mortgages of real property, and a record of all maps*, plats, contracts, powers of attorney and other interests affecting the title to real property required or permitted by law to be recorded*.

(2) Record, or cause to be recorded, in a legible and permanent manner, and keep in the office of the county clerk, all:

(a) Deeds and mortgages of real property, powers of attorney and contracts affecting the title to real property, authorized by law to be recorded*, assignments thereof and of any interest therein when properly acknowledged or proved and other interests affecting the title to real property required or permitted by law to be recorded;*

(e) Instruments recognized under state law or rule or federal law or regulation as affecting title to or an interest in real property if the instrument is properly acknowledged or proved; and

(B) All instruments presented for recordation when required or permitted by law to be recorded that affect the title to or an interest in real property, other than instruments recorded in the deed and mortgage records or the statutory lien records;*

(4) Perform all the duties in regard to the recording and indexing of deeds and mortgages of real property, contracts, abstracts of judgments, notices of pendency, powers of attorney and other interests when required or permitted by law to be recorded that affect the title of real property,* and in regard to the entry of satisfaction and discharge of the same, together with other documents required or permitted by law to be recorded.

The Oregon Courts and Boundary by Agreements.

65 Or. App. 586; Ross v. Delorenzo:

The court states: There are three essential requirements for application of doctrine of boundary by agreement: there must be initial uncertainty or dispute as to true location of boundary; uncertainty must be resolved by agreement, expressed or implied, to recognized particular line as boundary; and parties must evidence their agreement by subsequent activities. Resolution of uncertainty may provide consideration for agreement by which adjacent landowners fix uncertain indefinite or disputed boundary. Element of doctrine of boundary by agreement that there be initial uncertainty or dispute as to true location of boundary is liberally construed; it is not necessary that boundary be unascertainable, only that parties be uncertain about its location. Fact that boundary could have been located by survey does not prevent application of doctrine of boundary by agreement. For application of doctrine of boundary by agreement, boundary recognized must be mutually intended as permanent, not as tentative or temporary boundary or as mere barrier; parties must intend to resolve uncertainty. If agreement by which adjacent landowners fix uncertain, indefinite or disputed boundary is memorialized in writing, it may be recorded in the chain of title to establish recognized dividing line.*

99CV3178CC; A111902 Gibbons v. Lettow

The court states in regards to boundary by agreement; There are three essential elements:

"First, there must be an initial uncertainty or dispute as to the 'true' location of the boundary. The stated purpose of this requirement is to prevent the agreement from falling within the Statute of Frauds or violating other real property conveyancing requirements, for it establishes that the parties are resolving a dispute by mutually fixing an unknown boundary rather than by making a conveyance of land. The element of resolution of uncertainty may also provide the consideration for the agreement.

"Second, the uncertainty must be resolved by an agreement, express or implied, to recognize a particular line as the boundary. The boundary recognized must be mutually intended as permanent, not as a tentative or temporary boundary or as a mere barrier. The parties must intend to resolve the uncertainty; an attempt to locate the 'true' line cannot change the boundary described in the deed.

"Finally, the parties must evidence their agreement by subsequent activities. If the agreement is memorialized in writing, it may be recorded in the chain of

title to establish the recognized dividing line*. If there is an express oral agreement, courts have required occupation to the boundary line in question."

18 Or. App. 144, 524 P.2d 569 Cascadia Lumber Co. v. Oregon State Highway Commission

Several statements made by the courts in regards to boundary by agreement: Several Oregon cases deal with the doctrine of parol boundary agreements. The Statute of Frauds problem is disposed of by using the fiction offered by most courts; viz., that the parties take title, not from the agreement, but from their deeds as interpreted by their agreement. "Oregon appears to have taken the liberal view with respect to the extent of uncertainty that must exist prior to the agreement. In Thiessen v. Worthington it was only required that the agreement be a settlement of a disputed boundary, or one that is uncertain or unascertained. In Kincaid v. Peterson it was only required that the agreement grow out of a disputed, indefinite, or uncertain boundary.

The court goes on to state: "if the agreement was a valid boundary agreement between their respective predecessors in title, it is binding upon them. The agreement was duly recorded* and, as such, constitutes notice to them both."

The Surveyor and Boundary by Agreement

ORS 93.310 (2) states "When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurements, either of lines, angles or surface, the boundaries or monuments are paramount." This seems to say that surveyors must recognize boundaries, which may be established by occupation or any doctrine that would legally create a boundary.

The Oregon Administrative Rules

The Oregon Administrative Rules for Engineers and Land Surveyors require as per 820-020-0015 **Registrants Shall Hold Paramount the Safety, Health and Welfare of the Public in the Performance of their Professional Duties**

(1) Registrants shall at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public. If their professional judgment is overruled under circumstances where the safety, health, property or welfare of the public are endangered, they shall notify their employer or client and such other authority as may be appropriate.

It could be argued that in order to "protect the* safety, health, property* and welfare of the public", the Land Surveyor with the assistance of a land Attorney would by law be required to, at the request of a client and adjoining landowner document and assist with the recording of a Boundary by Agreement document so that it may be binding on all future parties.

Summary

It seems evident that ORS would allow and requires County Clerks to record documents affecting title to real property, that Boundary by Agreements are documents that affect interests and title to real property that such a document should be recorded so that it may be delivered to future parties at conveyance. It seems evident that the Oregon Courts have

made it clear that Boundary by Agreements are allowed in Oregon and that they have in the past been recorded into the chain of title, that as stated in case's as recent as 2001 they allow these agreements and if in writing to be recorded in the chain of title. It also seems evident that a Land Surveyors if competent in providing this type of services along with the assistance of a land Attorney if requested by a client and an adjoining landowner to aid and assist with such an agreement that he or she would be required to make the public aware of such agreement as requested by the parties and cause such an agreement to be reduced to writing and recorded with the County Clerk for all to see.

Thank you for taking the time to read this memorandum, please feel free to respond with any thoughts and ideas you may have, as I continue to practice surveying as an LSIT and continue my education to become a Professional Land Surveyor I request your expertise, knowledge and years of experience.

Sincerely,

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