

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:)	
)	
DENNIS WILLIAM McCREARY)	Case No. 980-A
1 Piety Lane)	
Downieville, CA 95936)	OAH No. 2011060879
)	
Civil Engineer License No. C 29462,)	
)	
Respondent.)	
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DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted, in accordance with Government Code section 11517(c)(2)(B), by the Board for Professional Engineers, Land Surveyors, and Geologists as its Decision in the above-entitled matter.

In adopting the attached Proposed Decision in accordance with Government Code section 11517(c)(2)(B), the Board for Professional Engineers, Land Surveyors, and Geologists hereby reduces or otherwise mitigates the Order by modifying Condition 3 to allow the respondent additional time to comply, as follows:

3. Complete a Land Surveying Course. Within 12 months from the effective date of this decision, respondent shall successfully complete and pass a course in land surveying, approved in advance by the board or its designee.

This Decision shall become effective on November 11, 2012.

IT IS SO ORDERED October 11, 2012.

original signed

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
Department of Consumer Affairs
State of California

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS,
AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DENNIS WILLIAM MCCREARY
Downieville, California 95936

Civil Engineer License Number C 29462

Respondent.

Case No. 980-A

OAH No. 2011060879

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 21 and 22, 2012, in Sacramento, California.

Karen R. Denvir, Deputy Attorney General, represented complainant, Joanne Arnold, P.E., Interim Executive Officer of the Board for Professional Engineers, Land Surveyors and Geologists (board), Department of Consumer Affairs.

Barbara A. Brenner and Shohrah Ghorishi, Attorneys at Law, Stoel Rives LLP, represented respondent, Dennis William McCreary, who was present throughout the hearing.

Evidence was received, and the record remained open to permit the parties to submit written closing arguments. On June 15, 2012, complainant filed a written closing argument, which was marked for identification as Exhibit 25. On July 13, 2012, respondent filed a written closing argument, which was marked for identification as Exhibit JJ. On August 8, 2012, complainant filed a written reply, which was marked for identification as Exhibit 26. The record was closed and the matter was submitted for decision on August 10, 2012.

AMENDMENTS TO THE ACCUSATION

At hearing, complainant requested the following amendments to the Accusation:

At page 3, paragraph 8, line 13: the number "97" should be "27";

At page 3, paragraph 8, line 14: the words “An investigation into the complaint revealed that” should be stricken;

At page 3, paragraph 9, line 21: the word “property” should be followed by a period and the rest of the sentence stricken; and,

At page 3, paragraph 10, line 27: the word “survey” should be followed by a period and the rest of the sentence stricken.

Respondent did not object to these amendments.

FACTUAL FINDINGS

1. On July 12, 1978, the board issued Civil Engineer License Number C 29462 to respondent. The license will expire on March 31, 2013, unless renewed.

2. On June 13, 2011, complainant filed the Accusation in her official capacity. Complainant seeks to discipline respondent’s license on the basis of negligence and/or incompetent professional performance, misrepresentation, and respondent’s expression of a professional opinion that was not based on accepted land surveying principles.

3. Respondent timely filed a Notice of Defense to the Accusation pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

Land Survey of 27 Bear Court, Pike, California – February 2006

4. On February 3, 2006, respondent entered into a Contractual Agreement with Bruce and Deborah Roney to “[p]rovide all services required to obtain a parcel map for property at 27 Bear Court, Pike, CA. Tentative Parcel Map, Percolation and Mantle Tests, Final Parcel Map.” (Roney Property). The Roney Property is 10.31 acres, and adjoins a 20.59 acre parcel owned by Shirley L. Briggs and her two sons (Briggs Property).

5. During the course of his survey, respondent found monuments marking the four corners of the Roney Property, and set his own monuments in approximately the same locations.¹ Using “G.P.S. and total station data collection instruments,” respondent also found a monument marking the center of the south line of the Briggs Property/north line of the Roney Property, but placed his own monument north of that monument, thereby moving the Roney Property line onto the Briggs Property. In April 2008, respondent filed his Parcel

¹ Respondent’s monuments consisted of a one inch O.D. G.I.P. Plastic Cap Stamped R.C.E. 29462.

Map with the Sierra County Recorder. It showed the south boundary line of the Briggs Property/north boundary line of the Roney Property to be in a different place from the boundary line shown on an unrecorded Record of Survey prepared by Allan W. Beeson (Beeson) in 1969. By the way respondent drew the boundary line on his 2008 Parcel Map, the size of the Roney Property was increased. Based upon this increase, Mr. Roney sought to subdivide the Roney Property into two parcels. When viewed in conjunction with the Roney Midpoint Map, drawn on May 27, 2011, by T.E. White, the Roney Property boundary line was moved north onto the Briggs Property by 24.70 feet at its greatest distance.

6. Bruce Roney is the owner of 27 Bear Court in Pike, California. At hearing, he testified to the contents of his March 17, 2007 letter written on behalf of respondent, in which he confirmed that in September 1991 his realtor “showed us 4 corners marked with a metal pipe, a wood lath stake and flagging.” Thereafter, in the summer of 1992, he contacted his neighbor Edwin Briggs to “determine our mutual property line.” According to Mr. Roney, Mr. Briggs “showed me a metal stake approximately midway on our property line and said that he didn’t know why it was there but he assumed that it was on the property line.”

Land Survey of 95 Bear Court, Pike, California – August 1969

7. Allan W. Beeson has been a licensed Land Surveyor since 1964. In August 1969, he was retained by Brydon and Lavinger to survey the N.W. quarter of Section 17, Township 18 North, Range 9 East, M.D.B.&M., in Sierra County, California, and to subdivide the N.W. quarter into individual parcels of land for sale. Beeson used a one-minute transit and 300 feet of steel tape to survey the property. According to Beeson, he “ran a random traverse line, more or less, east and west,” and “20 feet south of the boundary line” to mark the boundaries of the N.W. quarter, and set monuments² marking the boundaries of seven aliquot divisions within the N.W. quarter ranging between 10.31 acres and 41.09 acres. Beeson prepared a Record of Survey for Brydon and Lavinger, but did not record the survey with the Sierra County Recorder because his clients “disappeared” without tendering payment for his services. He had never met his clients, and never had an opportunity to show them his monuments.

8. In October 1973, Shirley L. Briggs and Edwin P. Briggs, now deceased, purchased the 20.59 acre parcel in the N.W. quarter.³ At hearing, Mrs. Briggs asserted that they walked the property from “corner to corner” with their real estate agent, Paul Lemons, and relied on his representations regarding the boundary lines of the property. According to Mrs. Briggs, the Beeson monuments were marked and identified. The Briggs Property, more commonly referred to as 95 Bear Court, lies north of the Roney Property. Mrs. Briggs contends that during his survey of the Roney Property, respondent never spoke with her

² Beeson’s monuments consisted of a one-inch iron pipe with brass disc top, flagged by a tag with Beeson’s name and license number.

³ On September 11, 2007, Mrs. Briggs amended the grant deed to add her two sons, Robert Edwin Briggs and Stephen George Briggs.

about the monuments marking her property. Mrs. Briggs's testimony at hearing was credible.

9. In March 2007, at the request of respondent, Beeson checked his calculations and field work involving the setting of the southwest and southeast corners of north half of the S.W. quarter of the N.W. quarter, and "found it to be correct." Thereafter, in June 2011, at the request of respondent, Beeson checked his "field book and calculations" for "the corner at the midpoint on the line common to Briggs and Roney," and "found them to be in order." However, Beeson noted in a June 15, 2011 letter to respondent that the "monument is not in the same location it was set in 1969. THE CORNER WAS MOVED." [Emphasis in original.] He also wrote, "I have never been a fan of double corners. They perpetuate the feeling of laymen and property owners that surveyors can't be relied upon for consistent boundary locations." Beeson also went on to state that "[d]uring my 40 year practice at land surveying I have attempted to retain the location of existing corner monuments. If and [sic] old survey done to the accuracy of it's [sic] time differs from modern measurments [sic] the corners should be accepted and notes on the map can be made to include measured and record courses. I admit monuments found grossly out of position would not be accepted."

10. Beeson confirmed at hearing that "my calculations were correct," and "my monuments were set correctly." He denied ever telling respondent that he set his monuments incorrectly. He admitted, however, that he should have pulled his monuments after his clients disappeared because his Record of Survey was not recorded. However, once the properties were sold, it was not possible for him to pull his monuments as to do so would have started "World War III." Beeson asserted that depending on how each monument fits with the other monuments in the survey, it is within each land surveyor's discretion to accept the original monument, or reject it and set another monument. However, it is not within the local standard to reject monuments based solely on the fact that they disagree with calculations performed by another surveyor. In 2008, Beeson learned for the first time that the owners of the 20.59 acre parcel relied on his monuments when they purchased their land.

Complainant's Evidence

11. Joan Honda is a licensed land surveyor, and document reviewer for the Bureau of Land Management (BLM), Branch of Geographic Services. Her responsibilities include reviewing boundary surveys of federal interest lands to ensure they are technically correct, and preparing them for final approval. The BLM is tasked with managing the resources of the federal lands under its care. The BLM Manual Surveying Instructions serve as the BLM's guide to how federal lands were first surveyed under the public land survey system. There are 10 versions of the manual in existence. The 1947 manual guided surveys performed in 1969, and the 1973 manual guided surveys performed in 2006.

12. Ms. Honda defined an "original survey" as the federal survey performed to divide government-owned lands into public lands. She defined a "re-survey" as the survey performed to further divide the public lands. There are "independent surveys" which are performed as a result of an investigation into whether a survey was mathematically correct or surveyed fraudulently, and which do not take into account the original survey and

monuments, and there are “dependent surveys” which take into account the original survey and monuments.

13. When the BLM performs its surveys, they evaluate all of the records they find, including unrecorded surveys. According to Ms. Honda, the fact that a survey is recorded does not mean that the surveyor followed the proper procedures, and “the method employed during a survey is of greater concern than the fact that [the survey] is not recorded.” If the BLM finds monuments on the ground, they “find out everything [they] can about those local monuments,” including evaluating all the records pertaining to those monuments and speaking to adjacent landowners. Since 2006, it has been the standard of care for the BLM to consider the bona fide rights of adjoining landowners when conducting its surveys. Ms. Honda confirmed that a landowner’s reliance on the property boundaries is significant to their evaluation. If the BLM is unable to locate records, they evaluate each corner and corner monument separately and as a whole, to find out what happened. If one corner or corner monument is out of place, the BLM does not “throw the entire survey out.”

14. In addition, Ms. Honda noted that calculations performed on a re-survey that do not match the survey of another surveyor are alone insufficient grounds to reject a monument. According to Ms. Honda, it is not surprising when minor discrepancies exist between surveyors, and even between surveyors using the same survey equipment. If the BLM determines that property boundaries were established in good faith, “modern measurements should not overrule those positions.”

Complainant’s Expert Witness

15. Evan A. Page is a licensed land surveyor. He has been land surveying for approximately 31 years, and is currently employed as an Associate Boundary Determination Officer with the California State Lands Commission. Complainant retained him as an expert to determine if respondent adhered to the proper standards of practice when he surveyed the Roney property. Mr. Page explained that after Beeson performed his survey in 1969, the parcels were sold in the configurations as surveyed by Beeson. According to Mr. Page, each time the parcels were sold, the landowners recognized the Beeson survey, and no challenges were made to the Beeson monuments until respondent performed his survey of the Roney Property in 2006. Early in his review, Mr. Page determined that respondent had assessed the Beeson monuments and rejected them because they did not agree with respondent’s own calculations; however, Mr. Page required additional information to determine the “methodology and reasoning” behind respondent’s survey in order to complete his review and render an opinion on behalf of the board.

16. On November 9, 2009, Christine Doering, an Enforcement Analyst in the Board’s Enforcement Unit, sent a letter to respondent requesting additional information for the board to consider. Specifically, Ms. Doering requested, in pertinent part, that respondent address the following questions:

- (1) Did you locate any fences or indication of occupation and use in the area?

- (2) Did you interview either landowner (Briggs or Roney) as to their knowledge of the origin of the Beeson monuments...?
- (3) Did you attempt to determine whether the Beeson monuments had ever been represented to either current or past landowners as properly marking the property line?
- (4) Was the rejection of the Beeson monuments based on knowledge or a belief that those monuments had been moved from their original positions? Or was the rejection based upon a belief that the monuments were original set incorrectly?
- (5) What evidence indicate[s] that Mr. Beeson's monuments have been moved from their positions as originally placed?
- (6) How did the fact that the Beeson survey was unrecorded affect your decision to reject Beeson's monuments?
- (7) What was the basis for the methodology that you used to determine your client's boundaries?
- (8) What information ... did you make known to others with regard to the disposition of the Beeson monuments?

Ms. Doering gave respondent until December 9, 2009, to submit a response.

17. In his November 13, 2009 response to Ms. Doering's request, respondent acknowledged that his clients pointed out a fence line along the west boundary line, a short fence extending easterly from the west common corner of the Briggs/Roney Properties, a short random fence along the easterly line, and a water tank close to and north of the short random fence. Respondent admitted that he did not have direct involvement with the Briggs family regarding the property lines, and his clients only knew what their realtor had told them about the Beeson corner monuments. Respondent described the Beeson monuments as "arbitrary," and indicated that the monuments "should never have been construed to represent the true position of any property corners." He stated further that "[i]gnorance and judgment on the Briggs' behalf of the facts only leads to confusion..." Respondent maintained that Beeson advised him the monuments were set in error and should have been "reset," and as such, respondent rejected the Beeson monuments. Respondent felt that based on the technology used by him, as opposed to that used by Beeson in 1969, respondent's "determination of the property breakdown ... more accurately demonstrated the intent of the deeds ..., and [n]o lines of occupation were established by both adjacent property owners to the best of my knowledge."

18. When reviewing information on behalf of the board, Mr. Page's practice is to identify the methods used during a survey, identify the applicable standard of care, identify where the methods and standards "don't match," and determine whether or not the disparities constitute negligence, incompetence or "some other violation of law." After reviewing the file received from the board, Mr. Page determined that respondent's assessment of the information showed "very good research," and there was no reason for Mr. Page to assume that respondent's measurements were not good. However, Mr. Page asserted that "it's all about the analysis of the information found and what evidence was used as controlling, [and] what evidence was not used," and in his opinion, respondent should not have rejected the Beeson monuments; was negligent when he failed to talk to the adjoining landowners regarding their understanding of the boundary lines; and was incompetent when he failed to understand the physical evidence he encountered during his survey.

19. According to Mr. Page, when a land surveyor evaluates a past survey, it "is of little importance" if it is recorded or not. It is "important" that "it was performed by someone authorized and qualified to do so," and "without fraudulent intent." In addition, "[w]hether or not it meets the current standard of care and approaches the precision attainable with modern equipment is completely irrelevant." It is "of paramount importance" if "the points and lines of the survey had been recognized and accepted as correctly marking the boundaries for any length of time" Mr. Page contends that "[i]t is not the retracing surveyor's duty to correct an original survey, but to identify and perpetuate the corners where originally established on the ground," and "[a]s long as ... a survey was performed without fraud or gross negligence, it should be accepted." Mr. Page acknowledged that "[w]ith the Beeson survey, there is one point which may be determined to have been set in error ..., but the presence of one erroneous point does not necessarily invalidate an entire survey." Furthermore, Mr. Page asserted that respondent misrepresented on his parcel map that there was "no reference" to the Beeson monuments, because there was a reference, albeit an unrecorded survey. According to Mr. Page, it is the duty of the surveyor to inform those that follow of what was found during a survey. Without that, "then another following surveyor will have absolutely no idea how those points were established."

20. Mr. Page believes that respondent used the poorest of explanations for rejecting the Beeson monuments on the basis that Beeson's survey was unrecorded. While Mr. Page agrees that Beeson should have recorded his survey, the county does not approve the boundary locations and the general public is unaware of the requirements to file a survey map; therefore, landowners rely on the licensed surveyor. According to Mr. Page, if the Beeson survey had not been accepted, then a land surveyor could reject it. However, the Beeson survey was accepted by other land surveyors, as evidenced by the fact that it went unchallenged for 37 years.

21. According to Mr. Page, "[respondent] at no time spoke with Mrs. Briggs as to her knowledge of the Beeson monuments or her belief that they did or did not properly mark the Briggs-Roney line." According to Mr. Page, a prudent land surveyor would speak to the adjoining landowners to find out what they know and believe about the monuments, even if their belief was unreliable, and determine if they had hired a land surveyor. In addition, a prudent land surveyor would determine if the adjoining landowners have proof of the

corners, and would consider that in his analysis. Furthermore, respondent made misrepresentations to the board when he asserted that he rejected the Beeson monuments because Beeson told him the monuments had been set in error. According to Mr. Page, respondent's representations "contradict ... statements contained in the letter from Beeson to McCreary (3/20/07)."

22. In addition, Mr. Page opined that there was no indication in the file that respondent located the fences pointed out to him by his clients, searched for any remnants of fence along other portions of the boundary as marked by the Beeson monuments, located the water tank or any other indications of use, or performed an analysis of the occupation of use of land as it related to the recognition of the Briggs-Roney boundary. In addition, respondent failed to perform any analysis to demonstrate that the Beeson corners were not the corners. According to Mr. Page, respondent also "used the poorest of all possible explanations" for rejecting an existing survey by stating that the technology he used to survey the property did not match the measurements provided by Beeson, and should have indicating an analysis on his map as to why he rejected the monuments. Mr. Page asserted that mathematical discrepancies are not a basis to reject a prior survey. If that were the standard, then no landowner could ever rely on the points on the ground because better equipment could show otherwise. In addition, it is commonly understood in land surveying that older and newer measurements "will show minor discrepancies even if you employ great care in your measurements." Mr. Page reiterated that if one monument is moved, it does not invalidate an entire survey. If it did, anyone could move one monument to invalidate a survey. Only if a land surveyor finds that a monument was set in gross error or fraudulently, can the monument be rejected. On the whole, respondent's "explanations as to methodology and facts considered demonstrate that he willfully ignored evidence that was necessary to properly evaluate the previous survey," and he "demonstrated ignorance as to the value of certain physical evidence and disdain at the idea of gathering testimonial evidence of his client's adjoiner."

23. In his report dated February 23, 2007, Mr. Page also opined that:

Mr. McCreary states that he determined the boundary of his client's property in accordance with the BLM [Bureau of Land Management] Manual, yet appears to have neglected to utilize the guidance of the chapters most applicable to his survey. He took it upon himself to disregard the previous survey and claimed to have followed the instructions of the BLM Manual, yet seems to have done so selectively at best. He rejected clearly marked monuments for which a record was available, and which had long been recognized by the local landowners, yet accepted an unmarked iron pipe as marking the Center 1/4 Corner without verifying its relationship to the exterior 1/4 corners of the Section. It seems that to be consistent in his methodology, he should have based his survey on the original exterior GLO [U.S. General Land Office] corner positions for Section 17.

Respondent's Evidence

24. Respondent has been a licensed Civil Engineer since 1978. He also has 34 years experience in land surveying, which he is authorized to practice by virtue of his engineering license.⁴ Respondent's license has never been disciplined by the board. At hearing, respondent asserted that after contracting with Mr. Roney, he reviewed the deed for the Roney property, and conducted a site walk of the entire property. Mr. Roney pointed out to him the Beeson monuments, which respondent was "shocked to see" due to "the lack of valid information that is normal when you do a survey." Mr. Roney did not point out to him the midpoint monument. During their walk, respondent observed "a fence shooting off to the east from the northwest corner"; "a nice little grass area ... then ... this V-type fence"; and a water tank belonging to the Briggs. However, when he filed his survey with the county recorder, he concluded that "there was no representation of occupation that these fences were trying to delineate."

25. After locating the Beeson monuments, respondent "went back many times to research one line at a time" by using other surveys to locate the corner points of the Roney property. He also "thoroughly" analyzed Beeson's unrecorded survey. At hearing, respondent asserted that "Beeson realized he made gross errors in his preparation of his unrecorded Record of Survey"; however, respondent's testimony contradicted the statements in Beeson's March 2007 and June 2011 letters to respondent, as well as the testimony of Mr. Beeson at hearing. Considering this information, respondent determined that the midpoint monument was not where it was in 1969, and that Beeson's "bearings were off," so he concluded that he would not plot his map using the Beeson monuments.

26. Respondent created his Parcel Map using eight recorded instruments, and the Beeson unrecorded survey. However, on his Parcel Map respondent indicated "no reference" to monuments placed by Mr. Beeson. At hearing, respondent asserted that "my definition of 'no reference' is there is no legal ... or recorded information that anybody could get," and claimed that he did not note Beeson's unrecorded survey on his map because "I am not required to put that on there." Respondent believes a survey must be recorded in order to be valid, and if Mr. Beeson had recorded his survey, respondent would have noted it on his Parcel Map. According to respondent, the purpose of recording maps is to provide a "second eye" before recording the map "so there are no mistakes." Once the map is filed and recorded, it gives other surveyors easy access to the maps for reference. However, respondent's testimony contradicted the testimony of Mr. Page, in which Mr. Page asserted

⁴ Business and Professions Code section 6731.2 provides that "[a]ny registered civil engineer may offer to practice, procure, and offer to procure, land surveying work incidental to his or her civil engineering practice, even though he or she is not authorized to perform that work, provided all the land surveying work is performed by, or under the direction of, a licensed land surveyor or registered civil engineer authorized to practice land surveying. Further, any registered civil engineer may manage or conduct as manager, proprietor, or agent, a civil engineering practice which offers to practice, procure, and offers to procure, such incidental land surveying work."

that the county does not approve the boundary lines on a parcel map. Respondent contends that he did, however, note Mr. Beeson's monuments and telephone number on his Parcel Map "so others can call him." According to respondent, Beeson's "map was not accurate." In his opinion, "there were so many blunders in [the Beeson] map that I felt it would add more confusion than help." Respondent admitted that although he could have given the Beeson map to the county, "it was Beeson's map and I'm not recording it for him."

27. Respondent contends that he appropriately rejected the Beeson monuments at the northeast, northwest and center points because they had been rejected by a prior surveyor. In addition, respondent asserted that because his four controlling corners were based on a mathematical breakdown using a global positioning system (GPS) and a random traverse, he was able to determine that Beeson's points were off in the northeast corner by 2.79 feet, the northwest corner by 9.7 feet, and the midpoint by approximately 25 feet. Respondent described Beeson's survey as a "blatant error of closure," and offered that Beeson's "error of closure is way too far off to be accepted for any survey." According to respondent, he would not have had to take "extra steps" to generate his Parcel Map if "the Beeson map was accurate." On cross-examination, however, respondent admitted that he did not notice the typographical error on Beeson's unrecorded survey in which the north line was inadvertently labeled northeast instead of southeast. Respondent admitted that by changing the label of the north line to southeast that the Beeson survey fits perfectly. However, according to respondent, "it's not my job to make his map fit."

28. Respondent explained that while performing his surveys he tries to "talk to as many people as he can." He admitted that adjoining landowners "are your best help in researching a project." However, respondent did not talk to the Briggs during his survey, and at first indicated that he "did not feel there would be any credibility there," and was "a little fearful of engaging" with the Briggs because of stories he had heard from the neighbors. Respondent contradicted his own testimony, however, when he later admitted that he gave Mrs. Briggs an opportunity to talk to him and "she didn't appear to me to be bad." Nonetheless, respondent asserted that during his survey, the Briggs "had plenty of time to ask [him] questions," and to show him the monuments. In addition, respondent did not speak directly with Mr. Beeson regarding his 1969 survey, and whether Beeson had moved the midpoint monument. According to respondent, it was not his responsibility to do so.

29. Respondent explained that although he is not an expert on the BLM Manuals, he did use them during this survey "to assure [himself that he] divided the section properly. According to respondent, that "was about what I needed."

30. Respondent asserted that he was "in the field many, many, many days," and "put more work into this than [he] normally would." It took respondent approximately one year to complete his survey. Respondent contends that "precision was a factor and to be accurate and to display to the county the proper location ... as to where [the Roney] property was."

Respondent's Expert Witness

31. Dennis Meyer has been a licensed land surveyor for 34 years, and serves as the President and CEO of Andregg Geomatics (Andregg), a private consulting firm located in Roseville, California. His responsibilities include managing the day-to-day activities of the firm, including problem surveys and business issues. Mr. Meyer has personally performed approximately 2,000 private land surveys, and has been involved with approximately 8,000 private land surveys since joining Andregg. Mr. Meyer was retained to evaluate the board's accusations against respondent, and to testify as an expert on respondent's behalf.

32. Mr. Meyer testified that the standard of practice for land surveyors is to retrieve all records available, including unrecorded surveys from the county; conduct a field review before bidding the job; develop the scope of work and fee; contact other surveyors; and assemble a field worksheet for the surveyor. In preparation for his testimony, Mr. Meyer evaluated a variety of documents, including respondent's survey of the Roney Property, Beeson's unrecorded map, record maps, board letters, letters from respondent and the county, and Mr. Page's written expert opinion.

33. Mr. Meyer opined that it is the standard of care for a land surveyor who locates an unrecorded map during his fieldwork to determine if there is an identifying number on the map that can be traced back to the surveyor, as well as to verify the accuracy of the unrecorded survey. According to Mr. Meyer, unrecorded maps "could be the best information out there." Mr. Meyer also asserted that land surveyors should analyze the deeds, and the deeds of adjoining landowners to determine if there are any fences or poles noted, and "how the points fit together." If there are no monuments noted in the legal description of the property, the original monuments "control," and will be senior to all subsequent monuments. In addition to evaluating the available property records, Mr. Meyer believes that it is prudent for land surveyors to talk to other land surveyors, and to contact adjacent property owners "if you suspect [they are] accepting monuments." Mr. Meyer was reluctant to opine regarding a land surveyor's duty to seek information from hostile adjoining landowners, but noted that in such a case, the land surveyor should seek assistance from a law enforcement officer, or in the alternative, "back off" and allow the attorneys to determine if the land surveyor should go on with the survey. Mr. Meyer opined that it is not the surveyor's job to resolve boundary line conflicts. Rather, it is the surveyor's responsibility to show property lines and occupation, and to display all the "best available evidence accumulated." Mr. Meyer opined that respondent was not negligent in his evaluation of the record documents because he investigated all the relevant evidence available for the Roney Property, including Mr. Beeson's unrecorded map, and looked at the totality of all the circumstances when he prepared his survey map. His survey also comported with the BLM Manual. In addition, Mr. Meyer opined that while "it would have been better for respondent to reference the Beeson unrecorded map on his parcel map," and while Mr. Meyer himself would have referenced the Beeson map to prove the boundary line, respondent's failure to do so was discretionary and not negligent.

Discussion

34. Mr. Page and Mr. Meyer presented as well qualified witnesses. However, Mr. Page's testimony regarding respondent's failure to properly consider the effect of, and the value of, the Beeson monuments; respondent's misrepresentations on his survey and to the board; and respondent's failure to properly consider the full set of evidence available to him was more persuasive and better supported by the objective documentary evidence than was Mr. Meyer's opinion.

35. Complainant established by clear and convincing evidence that respondent violated provisions of the board's statutes and regulations. Respondent was keenly aware of the existence of the Beeson monuments from 1969, and was aware that they had been relied on by subsequent property owners and remained unchallenged for over 30 years. Yet he chose to ignore the monuments because Beeson's Record of Survey was unrecorded, and because Beeson's calculations did not match respondent's calculations in the field. No evidence was presented by respondent to demonstrate that the Beeson monuments were set incorrectly or fraudulently. Therefore, at a minimum, the Beeson monuments should have been identified on respondent's parcel map, and the corners and midpoint analyzed to demonstrate why they were different from respondent's own calculations and why respondent, in his discretion, moved or rejected them. It was misleading to review and analyze the Beeson monuments and ultimately ignore them as if they never existed. Surveys necessarily rely on prior surveys, and they will be referred to by landowners and land surveyors long into the future as the properties change hands. It was imprudent and a disservice to his client for respondent to ignore the adjoining landowner who had additional information regarding the Beeson monuments. There was no basis for respondent to disregard the knowledge of the adjoining landowner, and respondent had every reason to find out what the adjoining landowners knew or did not know. As Mr. Meyer aptly stated at hearing, it is the surveyor's responsibility to show property lines and occupation, and to display all the 'best available evidence' to prove the boundary lines.

36. This is respondent's first disciplinary action by the board in 34 years of practice, and respondent raised a persuasive and credible defense to the charge by the board alleging that respondent misapplied the guidance of BLM Manual. However, the board must have confidence that the land surveyors it licenses understand and follow the applicable law. Given respondent's misrepresentations and his refusal to comply with the board's statutes and regulations, as set forth in the Legal Conclusions below, it would be against the public interest, safety and welfare to allow respondent to retain an unrestricted civil engineer license. However, it would not be against the public interest, safety and welfare to allow respondent to retain his license, subject to terms and conditions designed to monitor his practice and protect the public.

Costs of Investigation and Prosecution

37. Complainant has requested that respondent pay the reasonable costs of investigation and prosecution in the total amount of \$20,750 as follows:

a. Complainant submitted a Certification of Prosecution Costs: Declaration of Karen R. Denvir. Attached to the certification is a Matter Time Activity By Professional Type, which describes the tasks performed by the Office of the Attorney General in prosecuting this matter, the time spent on each task, and the amount charged. Between March 10, 2011 and May 15, 2012, the Attorney General's Office expended 102.5 hours working on this matter and charged a total of \$17,425 for this time.

b. Complainant also submitted a certification of Nancy A. Eissler, Enforcement Program Manager, certifying that complainant incurred a total of \$3,300 in technical expert costs.

38. At hearing, no evidence was presented by respondent regarding his financial ability to pay these costs. The costs to be assessed in this matter are set forth in Legal Conclusions 9 and 10 below.

Other Matters

39. Any other assertions raised by the parties which are not addressed above are found to be without merit.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Pursuant to Business and Professions Code section 8780, the board may discipline the license of a land surveyor for:

[¶] ... [¶]

(b) Any negligence or incompetence in his or her practice of land surveying.

[¶] ... [¶]

(d) Any violation of any provision of this chapter or of any other law relating to or involving the practice of land surveying.

[¶] ... [¶]

(h) A violation in the course of the practice of land surveying of a rule or regulation of unprofessional conduct adopted by the board.

2. To “protect and safeguard the health, safety, welfare, and property of the public,” the board has promulgated a Code of Professional Conduct for land surveyors, which is set forth in California Code of Regulations, title 16, section 476. A violation of the Code of Professional Conduct “in the practice of professional land surveying constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Section 8780 of the Code.” California Code of Regulations, title 16, section 476, sets forth, in pertinent part, the following grounds for disciplinary action:

[¶] ... [¶]

(c) Representations:

[¶] ... [¶]

(7) A licensee shall only express professional opinions that have a basis in fact or experience or accepted land surveying principles.

[¶] ... [¶]

(11) A licensee shall not misrepresent data and/or its relative significance in any professional land surveying report.

Cause for Discipline – Negligent and/or Incompetent Professional Performance

3. As set forth in Factual Findings 5 through 10, 15, 17, 19, 20, 22, 24 through 27, 32, 33, and 35, complainant established by clear and convincing evidence that respondent was negligent when he failed to properly consider the effect of, or understand the value of, the Beeson 1969 survey during his 2006 survey of 27 Bear Court in Pike, California. Land surveyors have “a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence.” (*Bonadiman-McCain, Inc. v. Snow* (1960) 183 Cal.App.2d 58, 70.) Therefore, cause exists to discipline respondent’s license pursuant to Business and Professions Code section 8780, subdivision (b).

4. As set forth in Factual Findings 11 through 14, and 23, Ms. Honda and Mr. Page’s testimony that respondent misapplied the guidance of the BLM Manual was persuasive. However, as set forth in Factual Finding 12, the BLM Manual is applicable to federal interest lands, and serves only as a guideline for use in private land surveys. Therefore, respondent’s misapplication of the guidance of the BLM Manual does not constitute negligence or incompetence. The term “incompetence” generally indicates “an absence of qualification, ability or fitness to perform a prescribed duty or function.” (*Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 837.) Respondent’s application of the guidance of the BLM Manual does not show an absence of qualification, ability or fitness to perform a

prescribed duty or function. Therefore, cause does not exist to discipline respondent's license pursuant to Business and Professions Code section 8780, subdivision (b).

Cause for Discipline - Misrepresentation

5. As set forth in Factual Findings 5 through 10, 15, 17, 19, 20, 22, 24 through 27, 32, 33, and 35, complainant established by clear and convincing evidence that respondent misrepresented data on his parcel map by noting "no reference" in regard to the Beeson monuments. Mr. Page's testimony on this point was persuasive. There is no justification for this misrepresentation. Therefore, cause exists to discipline respondent's license pursuant to Business and Professions Code section 8780, subdivision (h), in conjunction with California Code of Regulations, title 16, section 476, subdivision (c)(11).

6. As set forth in Factual Findings 9, 10, 17 and 35, complainant established by clear and convincing evidence that respondent misrepresented information to the board in his November 13, 2009 letter when he advised the board that Mr. Beeson had advised him that his monuments had been set in error. Respondent's representation contradicted Mr. Beeson's March 2007 letter to respondent in which Mr. Beeson indicated that his calculations and field work were "found to be correct." There is no justification for this misrepresentation to the board. Therefore, cause exists to discipline respondent's license pursuant to Business and Professions Code section 8780, subdivision (h), in conjunction with California Code of Regulations, title 16, section 476, subdivision (c)(11).

7. As set forth in Factual Findings 9, 10, 17, 25 and 35, respondent testified at hearing that "Beeson realized he made gross errors in his preparation of his unrecorded Record of Survey." However, respondent's testimony contradicted Mr. Beeson's March 2007 and June 2011 letters to respondent in which Mr. Beeson indicated that his calculations and field work were "found to be correct," and "found ... to be in order," as well as Mr. Beeson's testimony at hearing. There is no justification for respondent's misrepresentation at hearing. Therefore, cause exists to discipline respondent's license pursuant to Business and Professions Code section 8780, subdivision (h), in conjunction with California Code of Regulations, title 16, section 476, subdivision (c)(11).

Cause for Discipline – Expressing Professional Opinion not Based on Accepted Land Surveying Principles

8. As set forth in Factual Findings 5 through 10, 15, 17 through 22, 24 through 28, 32, 33 and 35, complainant established by clear and convincing evidence that respondent recorded his survey without considering the Beeson monuments or information from adjoining landowners, and therefore expressed a professional opinion that was not based in fact or experience or accepted land surveying principles. Mr. Page's testimony on this issue was persuasive. Therefore, cause exists to discipline respondent's license pursuant to Business and Professions Code section 8780, subdivision (h), in conjunction with California Code of Regulations, title 16, section 476, subdivision (c)(7)

Cost Recovery

9. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

10. As set forth in Factual Findings 37 and 38, complainant seeks \$20,750 in costs. The scope of the investigation was appropriate in light of the alleged misconduct. Respondent did not present evidence regarding his financial ability to pay the costs at this time. He was, however, successful in getting one of the charges dismissed or reduced. Accordingly, the costs shall be reduced by \$6,916, and reasonable costs are found to be \$13,834. Respondent shall be permitted to pay these costs over time according to a payment plan acceptable to the board.

ORDER

Civil Engineer License Number C 29463 issued to respondent Dennis William McCreary is revoked; however the revocation is stayed for a period of two (2) years, subject to the following terms and conditions:

1. Obey All Laws. Respondent shall obey all laws and regulations related to the practices of professional engineering and professional land surveying.
2. Actual Suspension. Respondent is suspended from the practice of land surveying for a period of 30 days beginning the effective date of this decision.
3. Complete a Land Surveying Course. Within 30 days of the effective date of this decision, respondent shall successfully complete and pass a course in land surveying, approved in advance by the board or its designee.
4. Reporting Requirements. Within 30 days of the effective date of this decision, respondent shall provide the board with evidence that he has provided all persons or entities with whom he has a contractual or employment relationship for the provision of professional engineering and/or professional land surveying services a copy of the Decision and Order of the board. Such evidence shall include, but not be limited to, the

name and business address of each person or entity required to be so notified. During the period of probation, respondent may be required to provide the same notification to each new person or entity with whom he has such contractual or employment relationship and shall report to the board the name and address of each person or entity so notified.

5. Submit Reports. Respondent shall submit such special reports as the board may require.
6. Cost Recovery. Respondent shall pay the board the sum of \$13,834 in reimbursement of the board's costs of investigation and prosecution, which payment shall be made during the period of probation according to a payment plan approved by the board.
7. Tolling of Probation. The period of probation shall be tolled during the time respondent is practicing exclusively outside the state of California. If, during the period of probation, respondent practices exclusively outside the state of California, respondent shall immediately notify the board in writing.
8. Violation of Probation. If respondent violates the probationary conditions in any respect, the board, after giving respondent notice and the opportunity to be heard, may vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of probation, an accusation or petition to vacate stay is filed against respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, the board shall have continuing jurisdiction until all matters are final, and the period of probation shall be extended until all matters are final.
9. Completion of Probation. Upon successful completion of all of the probationary conditions and the expiration of the period of probation, respondent's license shall be unconditionally restored.

DATED: August 24, 2012

Original Signed

REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings

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8 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND
9 **GEOLOGISTS**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 980-A

12 **DENNIS WILLIAM MCCREARY**
13 **1 Piety Avenue**
14 **Downieville, CA 95936**

A C C U S A T I O N

15 **Civil Engineer License No. C 29462**

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 1. Joanne Arnold (Complainant) brings this Accusation solely in her official capacity as
21 the Interim Executive Officer of the Board for Professional Engineers, Land Surveyors, and
22 Geologists, Department of Consumer Affairs.

23 2. On or about July 12, 1978, the Board for Professional Engineers, Land Surveyors,
24 and Geologists issued Civil Engineer License Number C 29462 to Dennis William McCreary
25 (Respondent). The Civil Engineer License was in full force and effect at all times relevant to the
26 charges brought herein and will expire on March 31, 2013, unless renewed.

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1 **JURISDICTION**

2 3. This Accusation is brought before the Board for Professional Engineers, Land
3 Surveyors, and Geologists (Board), Department of Consumer Affairs, under the authority of the
4 following laws. All section references are to the Business and Professions Code unless otherwise
5 indicated.

6 4. Section 8780 of the Code states:

7 The board may receive and investigate complaints against licensed land
8 surveyors and registered civil engineers, and make findings thereon.

9 By a majority vote, the board may reprove, suspend for a period not to
10 exceed two years, or revoke the license or certificate of any licensed land surveyor or
11 registered civil engineer, respectively, licensed under this chapter or registered under
12 the provisions of Chapter 7 (commencing with Section 6700), whom it finds to be
13 guilty of:

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15 (b) Any negligence or incompetence in his or her practice of land
16 surveying.

17

18 (h) A violation in the course of practice of land surveying of a rule or
19 regulation of unprofessional conduct adopted by the board.

20 5. Title 16, California Code of Regulations section 476 states:

21 To protect and safeguard the health, safety, welfare, and property of the
22 public, every person who is licensed by the Board as a professional land surveyor or
23 professional civil engineer legally authorized to practice land surveying, including
24 licensees employed in any manner by a governmental entity or in private practice,
25 shall comply with this Code of Professional Conduct. A violation of this Code of
26 Professional Conduct in the practice of professional land surveying constitutes
27 unprofessional conduct and is grounds for disciplinary action pursuant to Section
28 8780 of the Code. This Code of Professional Conduct shall be used for the sole
purpose of investigating complaints and making findings thereon under Section 8780
of the Code.

. . . .

(c) Representations:

. . . .

(7) A licensee shall only express professional opinions that have a basis
in fact or experience or accepted land surveying principles.

. . . .

1 (11) A licensee shall not misrepresent data and/or its relative significance
2 in any professional land surveying report.

3 6. Section 118, subdivision (b), of the Code provides that the expiration of a license
4 shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period
5 within which the license may be renewed, restored, reissued or reinstated.

6 COST RECOVERY

7 7. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
8 administrative law judge to direct a licentiate found to have committed a violation or violations of
9 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
10 enforcement of the case.

11 BEAR COURT PROJECT

12 8. On or about February 22, 2007, the Board received a complaint against Respondent
13 related to a land surveying project located at 97 Bear Court, Pike, California ("Bear Court
14 Project"), which was later determined to belong to homeowner B.R. An investigation into the
15 complaint revealed that the complaint arose out of a disagreement over the location of a boundary
16 line between B.R.'s property and an adjacent property, 95 Bear Court, which belonged to S.B.,
17 the complainant.

18 9. On or about February 3, 2006, homeowner B.R. entered into a contract with D. Mac
19 Engineering to perform all services required to obtain a parcel map for the Bear Court Project. A
20 review of the contract for the Bear Court Project reveals that Respondent signed the agreement.
21 Respondent performed his survey of the property, which resulted in the movement of the existing
22 property line into S.B.'s property by as much as thirty (30) feet.

23 10. The complainant alleged that Respondent performed his survey incorrectly and had
24 improperly rejected established monuments previously set. In 1969, land surveyor A.W. Beeson
25 had done a survey of 95 Bear Court ("Beeson Survey") and set monuments. The complainant
26 alleged that Respondent improperly rejected established monuments set during the Beeson
27 survey and that Respondent's boundary determination was influenced by his client's need to
28 have sufficient land area to accomplish a parcel split.

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FIRST CAUSE FOR DISCIPLINE

(Negligent and/or Incompetent Professional Performance)

11. Paragraphs 1 through 10 are incorporated herein by reference.

12. Respondent is subject to disciplinary action under section 8780(b) in that he was negligent and/or incompetent in his practice of land surveying for the Bear Court Project from approximately February 3, 2006, through December 2008, as follows:

13. Respondent misapplied the guidance of the Bureau of Land Management Manual, failed to properly consider the effect of the existing survey, appeared to be unaware of his obligation to consider all of the available evidence, and unaware of what constitutes valid and pertinent evidence.

SECOND CAUSE FOR DISCIPLINE

(Misrepresentation)

14. Paragraphs 1 through 13 are incorporated herein by reference.

15. Respondent is subject to disciplinary action under section 8780(h) for his violation of section 476(c)(11) of Title 16 of the California Code of Regulations, as follows:

a. Respondent shows several found monuments, but in inappropriately dismissing them, misrepresented data and its significance to the land boundaries depicted.

b. In a letter to the Board dated November 13, 2009, Respondent misrepresented Mr. Beeson's characterization of his 1969 survey. Respondent represented that Mr. Beeson had told Respondent that he had set the monuments in error and that they were never reset properly because the contract was canceled before he had an opportunity to do so. This statement by Respondent contradicts statements in a letter from Mr. Beeson to Respondent, in which Mr. Beeson states "I have checked calculations and field work involving setting of these corners and found it to be correct."

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THIRD CAUSE FOR DISCIPLINE

(Expressing Professional Opinion not Based on Accepted Land Surveying Principles)

16. Paragraphs 1 through 15 are incorporated herein by reference.

17. Respondent is subject to disciplinary action under section 8780(h) for his violation of section 476(c)(7) of Title 16 of the California Code of Regulations, as follows:

18. By failing to properly consider the full set of evidence available to him in arriving at his conclusions in the Bear Court Project, Respondent expressed opinions not based on the full set of facts and not based upon the proper accepted land surveying principles.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board for Professional Engineers, Land Surveyors, and Geologists issue a decision:

- 1. Revoking or suspending Civil Engineer License Number C 29462, issued to Dennis William McCreary
- 2. Ordering Dennis William McCreary to pay the Board for Professional Engineers, Land Surveyors, and Geologists the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
- 3. Taking such other and further action as deemed necessary and proper.

DATED: 5/16/11

original signed

JOANNE ARNOLD
Interim Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant

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