



Editorial

>> Marc Cheves, PS



www.amerisurv.com

2013 Vol. 10 No. 7
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The American Surveyor (ISSN 1548-2669) is published monthly by Cheves Media LLC. Editorial mailing address: 905 W. 7th St., #331, Frederick, MD 21701. Tel: (301) 620-0784.

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Subscriptions prices in the U.S.: Free for qualified professionals. Canada: 1 year \$56.00 US; international subscriptions \$72.00 per year (Airmail), U.S. funds prepaid. Back issues (subject to sufficient stock) are available for \$4.95 + S/H.

New subscription inquiries and all other address changes should be sent to *The American Surveyor*, P.O. Box 4162, Frederick, MD 21705-4162. Fax: 301-695-1538. Subscribe online @ www.amerisurv.com

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Dykes v. Arnold

In response to Chad Erickson's two articles about *Dykes v. Arnold*, Steven Patterson, an LSIT and first year law student at the University of Missouri, wrote a letter with several criticisms of Chad's article. In looking over Steven's comments, some were minor—for example, Chad's misuse of the term precedence and precedent—because Chad's intent was clear. Another comment by Steven pointed out Chad's misuse of Appellate and appellant, but again, Chad's intent was clear.

A third comment, however, cut to the heart of the issue: "Mandatory authority vs. persuasive authority: Mandatory authority is precedent that is binding on that particular jurisdiction. Persuasive authority is precedent from another jurisdiction that *may* be considered by the court. Also, secondary sources, such as *Clark on Surveying* and other treatises, books and law restatements are only persuasive, not mandatory authority on courts. This distinction is very important."

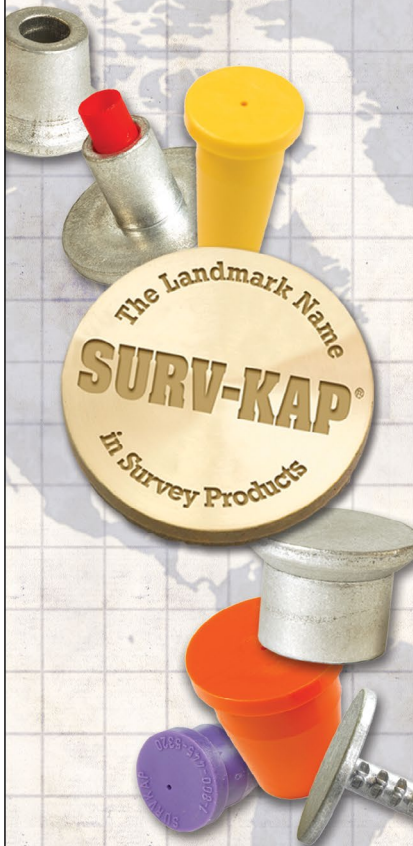
Steven's main criticism was with Chad's statement that *Dykes v. Arnold* has been used as persuasive authority in courts all over the nation. Steven said, "Only decisions by Appellate courts and the Supreme court of each state, and of course the U.S. Supreme Court, are binding on that state (mandatory authority). Federal Court decisions can be binding on that particular court, but most boundary issues are state law, so federal courts do not have a lot of these cases. Only the higher courts publish decisions, trial courts do not usually publish decisions because they are merely enforcing precedent in their jurisdiction, they are not creating new law. Again, this hierarchy and the mandatory/persuasive authority rules are very important."

Erickson: "Flying under the radar' is an aspect to be considered; sometimes my client's boundary conflicts were resolved when my Survey Reports, citing *Dykes*, persuaded the opponent to drop the case. Because they don't make it to court, such will not show up in a [case law] search. However, isn't this the highest service that we can offer to the public?"

Patterson: "Of course, I highly recommend surveyors help resolve their client's problems without litigation. However, if *Dykes* is not the controlling law in your jurisdiction, I would be hesitant to claim that it is. If it is analogous to other cases in your jurisdiction that are controlling, why not cite those? It would be irresponsible to cite a case that is not controlling authority in your jurisdiction, because it is quite literally irrelevant until a court in your jurisdiction says it is relevant."

Patterson: "Boundary law is a state issue, with the exception of inter-state boundary disputes, administrative decisions (e.g., BLM) and some riparian issues. State courts can most certainly use persuasive authority (e.g., *Dykes v. Arnold*—if not in Oregon—and *Clark on Surveying*), but will do so only when the mandatory authority in their state is insufficient or nonexistent. A state court will not even look at persuasive authority unless there is insufficient state precedent to resolve the issue. This brings me to my contention with the articles. Although it offers an interesting discussion and I would recommend everyone read it, I do not understand the infatuation with *Dykes v. Arnold*, especially if you do not live in Oregon. *Dykes* is a well-reasoned decision, but the holding is not surprising. The result is what one would expect; surveyors should try to adhere to monuments that fit occupation or possession, or which were subsequently used in other surveys. The decision is an Appellate Court decision, meaning it is binding only on Oregon trial courts and on the Oregon Court of Appeals. It is not even binding on the Supreme Court of Oregon and certainly not binding on the other 49 states."

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Patterson: “You stated in *Einstein*: “This case has since been recognized as persuasive in courts all over our nation.” In response to John Freemeyer’s feedback on *Einstein* you stated: “...it can be very persuasive, as it already has been, even in eastern states. Persuasive Professionals win cases.” While I agree that persuasive professionals win cases, surveyors do not have a lot to do with that. Persuasive attorneys win cases, attorneys do not readily take “precedent advice” from any non-attorney, nor should they.”

Erickson: “In the five times that my surveys have gone to court, in only one instance was my client blessed with an attorney who was knowledgeable in land boundary law. The others neither knew of precedent (“precedence” is a perfectly legitimate word and application, however I will henceforth respect your profession’s convention, and thank you for the insight) nor bothered to look for it. All attorneys were appreciative of my efforts to supply citations (although not always impressed with the citation itself).”

Patterson: “The issue I have with these statements is that I researched the cite history of *Dykes* and found it cited in only three (3) cases since its publication in 2006. Two (2) were from Oregon, one (1) from Montana. The Montana case merely used the township diagram from *Dykes*. I would like to know what you are referring to when you state that *Dykes* has been persuasive “all over the country” and “even in eastern states.”

Erickson: It is significant to note the lack of cases in opposition to *Dykes v Arnold*. I spoke with attorney Wesley W. Hoyt and he confirms your assessment that *Dykes* has been cited very little nationally. However, he had the following additional observations:

1. “As a property law attorney who has litigated these matters for over 40 years, it is clear that anyone touting a different principle of law (original corner is superior to mathematical corner) would be erroneously contriving a conflict...”
2. “The reliability of the principle announced in *Dykes v. Arnold* is so high, that I would be able to cite that case with confidence as adhering to the correct principle of controlling law for all US jurisdictions North of the Ohio River and West of the Mississippi River...”

3. “One must also consider the 1993 Mich. case of *Adams v. Hoover*, upon which *Dykes* is based.”

Patterson: “I agree 100%, a mathematical position will never control over an original monument. Again, this is one of my biggest contentions with *Dykes*. The holding that a retracing county surveyor is considered an original surveyor is problematic. Based on this logic, a county surveyor today, if he was the first surveyor to subdivide the section, would be considered an original surveyor. If a county surveyor in this position today were to stub in the center quarter corner, would a court uphold it against a correctly proportioned corner? If he truly is an original surveyor, based on the reasoning of *Dykes*, his erroneously set corner in 2013 would be considered original and error-free and the correctly proportioned corner set next week would be wrong. I do not think this is a rule that the Oregon court intended to articulate. The fact that other courts in the U.S. have not cited the case tends to support this. It was an equitable decision, which only courts can make, not a new boundary law principle.

“The case *Dykes v. Arnold* has been widely discussed in magazine articles, on blogs and by surveyors at length. It has been touted by fence-line surveyors everywhere as the “new standard in surveying.” The bottom line is that no court outside Oregon has even mentioned *Dykes* in a decision. At the end of the day, it does not matter if you love or hate the law. The law is the law. If your state does not follow *Dykes*, and no state has, then you are required to follow your state’s law, regardless of how much you like another state’s law. P.S. – none of this would even be an issue if the first person would subdivide the section correctly, the first time.”

Cheves: In summary, what you have just read is a condensed version of a lot of back and forth between Chad and Steven. Steven is correct: *Dykes* only applies (for now) to Oregon. Chad is correct in that *Dykes* represents a sea change, and it’s something all boundary surveyors should make sure any attorney they interact with is aware of. After all, if an original corner has no standing, where does this leave our work? And how is the public protected? 