Oregon

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LAW ENFORCEMENT COMMITTEE
Meeting Summary
April 8, 2010

Members Present:
Dan Linscheid, Chair
Ken Hoffine
Grant Davis
Ed Butts (excused absence)

Staff Present:
Mari Lopez
Jenn Gilbert
James R. (JR) Wilkinson
Allen McCartt
Jill Van

Others Present:
Joanna Tucker-Davis, AAG

The meeting was called to order at 8:00 a.m. in the conference room of the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) office at 670 Hawthorne Avenue SE, Suite 220, Salem, OR 97301. Law Enforcement Committee (LEC) member Ed Butts was excused from the meeting. In his absence, Grant Davis participated as a LEC member.

Informal Conferences

2531
The LEC met with the respondent a PLS, in a second informal conference to discuss a Notice of Intent to Suspend Registration and Assess a $3,000 Civil Penalty for violations of Oregon Revised Statute (ORS) 672.200(4), Oregon Administrative Rule (OAR) 820-010-0635(1), (5), OAR 820-015-0026(1),(2), OAR 820-020-0015(7),(8) and OAR 820-020-0025(1). The Board opened a case against the respondent when he failed to respond to an audit of his Professional Development Hour (PDH) units for the July 1, 2004 to June 30, 2006 biennial renewal period.

The respondent initially stated that he had again searched for the address of the OSBEELS office and it remained incorrect. Executive Secretary Lopez noted that the address on the OSBEELS Web site, at www.Oregon.gov/OSBEELS is correct and has been correct for a long time. It was later learned that Swinehart was using Google to search for OSBEELS and not the Oregon.gov Web site. Lopez informed the LEC that OSBEELS has no control over what Google uses for its information. She also reminded the respondent that the correct address and Web site for

OSBEELS is noted on all OSBEELS letters and forms that are sent out and were sent to the respondent. Davis noted that the address concern was not relevant to the informal conference.

The respondent presented concerns with the previously proposed settlement agreement from the February 11, 2010 LEC meeting. He felt the payment plan was pretty severe. He also stated he didn't understand why discipline was being administered the way it was for what his infractions were. He again reiterated that he had raised a question about what qualifies for PDH units and what does not, and that he was told he would have to submit his question in writing. The respondent stated that he had done that a week or 10 days earlier and had learned that he couldn't get an answer to his question until the Professional Practices Committee (PPC) meets. Lopez interjected that that was not the case. She stated she had reviewed the respondent's questions and they were questions OSBEELS staff could answer; they were very straightforward. She noted that staff simply had not had the opportunity to sit down and answer them all yet.

The respondent then noted that when he had brought in his PDH documentation for the next renewal period and asked Investigator McCartt if it could be certified, it sounded to him like that was going to be real complicated. Lopez stated that OSBEELS does not preapprove courses, seminars, or workshops and that OSBEELS only reviews the material if someone is being audited. The respondent stated that as part of the settlement agreement he was to bring in his PDH documentation. He said he had the documentation with him and showed it to McCartt, but that McCartt was unable to tell him if it would be approved or not. McCartt interjected that the respondent did not have his full 30 PDH units worth of documentation at that time and that he still didn't have the PDH documentation from the Professional Land Surveyor's Organization (PLSO) conference. McCartt reiterated that the settlement agreement required the respondent to show proof of 30 PDH units in order to renew his license. Swinehart stated that it was surprising to him how complicated the whole thing was.

Then the respondent went on to discuss the allegation of untruthfulness. The respondent stated that in signing his renewal card, he wasn't trying to be untruthful, but that he thought he had completed enough continuing education; he'd just done it through self-study. He went on to state that when he reads the requirements and what is allowed and what isn't, it is a problem for him. The respondent again addressed the issue of receiving a letter from OSBEELS and that he had tried to contact the Board and didn't get a response. He felt that the situation was going overboard.

The respondent then addressed what he believed the intent of continuing education was—to ensure competency of registrants. He didn't feel the discipline was addressing competency but rather whether he responded to the Board in time. He noted that he was trying to figure out a way to supply credits for the whole audit period to the next renewal period. If there was something he could do instead of a civil penalty it would be better for him, because a civil penalty would be tough. He didn't feel the action should be so punitive.

The respondent suggested he show a full 3 periods of credits (90 PDH units) [and the Board could tack on another 30 units] before he renews on June 30, 2010 or he would not be able to renew. Chair Linscheid asked if the respondent had received his credit confirmation from PLSO. The respondent stated he had not received anything and had called PLSO twice since the last

Board meeting and that he received a call last Sunday afternoon confirming the PLSO would send them out. To date, he has not received them.

Chair Linscheid then asked if the respondent's suggestion was to postpone his providing proof of PDH units. The respondent responded that he didn't have any documentation, because he had only done self-study. Lopez reminded him that according to the Rules, only 6 units could be claimed for self-study, and this restriction has always been in the Rules. The respondent acknowledged that it may have always been in the Rule, but that he didn't understand it. Davis asked if it was that he didn't understand it, or if he hadn't read it. The respondent replied that he hadn't read it close enough.

Next the respondent asked what constituted a tutorial. He wanted to know, if he had a textbook that had a chapter with questions at the end, would that be considered a tutorial? Davis noted that it seemed every other registrant understands what the requirements mean, but that the respondent was the one that didn't. Davis commented that he believed that the respondent initially thought he could accomplish all PDH units via self-study. However, only 6 units are allowed through self-study. Davis noted that the Board would give him credit for 6 units of self-study and required the respondent to show the remaining required PDH units. The respondent then asked again about tutorials and what they cover. Investigator Van interjected that reviewing a textbook with questions at the end of a chapter is self-study, because there is no entity monitoring the accomplishment, there's no instructor, no certificate of accomplishment, no one certifying he performed the action. Lopez then reminded the respondent that if he had read the Rule, it would tell him the maximum amount he could claim for every type of continuing education. The respondent then stated he didn't realize there was a limit on Web-based seminars. Again, Lopez reminded him that it was in the Rule that had been cited on the numerous letters he'd received from the Board.

Chair Linscheid noted that he was amazed and concerned that no other registrants have raised such concerns before. Lopez also stated that she would have expected the respondent to have asked these questions before renewing his registration instead of at the point where we are now. The respondent replied that he wished he had too. He was also surprised that the Board had not heard the same concerns, because he'd heard them from many others.

The respondent then proposed again that he be allowed to show proof of PDH units from July 2004 through June 2010 in lieu of a civil penalty. Lopez noted that the Rule does not allow the Board to accumulate units. The respondent lacked the 30 PDH units for the audit period and he became a Law Enforcement case because he didn't have those hours. The Rule does not allow the Board to require the respondent show proof of PDH units beyond the audit period. Chair Linscheid noted that there is nothing that can be done about the period in question unless the respondent has proof of those PDH units. Again, the respondent proposed that he be able to show proof of 90 PDH units in lieu of a civil penalty. However, it was noted that the Board does not have the flexibility, according to Rule, to allow what the respondent proposed.

Discussion then ensued about the respondent's inadequate response and follow-up with OSBEELS regarding the audit and his PDH units. After the discussion, the respondent again

proposed making up the credits in lieu of suspension and a civil penalty. The LEC excused the respondent so the Committee could deliberate.

After deliberation, Chair Linscheid stressed to the respondent that even after all that had taken place regarding the respondent's case the Board still had not received one piece of documentation regarding the respondent's PDH units.

Upon consideration, the LEC proposed to require the respondent to document his required 30 PDH units from July 1, 2008 to June 30, 2010 in order for him to be renewed for the next period. The LEC also proposed to suspend the respondent's registration for 90 days beginning May 11, 2010 and reduce the civil penalty to $1,000, payable in 10 monthly payments. The respondent requested a statement be inserted in the settlement agreement that he did not agree with the accusations. Lopez then noted that because the respondent would be suspended at the time of renewal, he would be in delinquent status upon renewal. Lopez asked if the LEC wanted to recommend waiving the delinquent fee. The LEC proposed the civil penalty be reduced to $920 to compensate for the delinquent fee the respondent would need to pay. **The LEC recommended the Board approve the settlement agreement of a 90-day suspension and a $920 civil penalty.**

<u>2516</u>
The LEC met with the respondent in a second informal conference to readdress a settlement agreement reached with the respondent at the February 11, 2010 LEC meeting. The settlement agreement was reached in the case regarding the respondent's failure to provide documentation of compliance with continuing professional development requirements, failure to cooperate with the Board, and being untruthful, violations of OAR 820-010-0635,(1),(5); OAR 820-020-0015(7),(8); and OAR 820-020-0025(1). The Board opened the case against the respondent when he failed to respond to an audit of his Professional Development Hour (PDH) units for the July 1, 2004 to June 30, 2006 biennial renewal period.

Chair Linscheid noted that the LEC had previously proposed a $1,500 civil penalty or for the respondent to retire his license. Chair Linscheid continued that there was supposed to be a statement in the settlement agreement that the respondent was not to apply for reinstatement of registration at any time after March 10, 2010. However, that statement was not in the recordings of the February 11, 2010 informal conference. The respondent had opted to retire his license in lieu of the civil penalty. However, when the settlement agreement was subsequently sent containing the statement, he refused to sign it.

Chair Linscheid noted that the intent of the previously proposed settlement agreement was for the respondent to retire his license. If he were to come out of retirement 2 weeks after the Board's action, it would not be in keeping with the Board's intent.

The respondent noted that when he met with the LEC on February 11, 2010, there was an oral settlement agreement and that his understanding of the agreement was a $1,500 fine or retirement of his license. He stated that nothing was mentioned about never reapplying. When he saw the written settlement agreement, it did not match what he had agreed to in the LEC meeting.

Chair Linscheid apologized that the LEC had not caught that at the time; however, it did not make much sense to not have that prohibition in the agreement. Without it, the respondent would be able to renew within weeks or days after the Board's approval. In addition, Chair Linscheid noted that the respondent had previously indicated that he would retire his license. It would not have made sense for the respondent to retire his license and then request reinstatement again. The respondent reiterated that the settlement agreement he had received was not what he had agreed to.

The respondent then noted that what he had seen in other cases was that the prohibition to reapply had been associated with more egregious offenses. Therefore, he felt that having that recorded in his record was more serious and he did not want that. In addition, the respondent stated that if this was to be the case, then he would have to reconsider the settlement agreement proposal.

The respondent went on to note that it was very unlikely that he would find a position that requires a Professional Engineer (PE) license. However, he would rather have the option available to him in the future. Therefore, based on the proposed settlement agreement, he had gone to Portland State University (PSU) and paid his fees for a Mechanical Engineering Review class worth 30+ PDH units, so that he would have the PDH units in case he needed to use them. If he would have known he would never be able to reapply, he would not have spent the time or money for the class.

Overall the respondent's concerns were:

1. The agreement left out the prohibition to reapply;
2. Prohibiting his reapplication seemed extreme to him, and he'd probably reevaluate his decision to retire in lieu of the civil penalty under the circumstance; and
3. He acted in good faith based on what he heard in the last informal conference meeting, but now the ground rules had been changed.

Chair Linscheid noted that when most registrants retire their license, they typically don't reapply until after at least 5 years have elapsed, which means they have to sit for the exam again. The respondent noted that he understood that, but that he felt pressure in the last informal conference and he had evaluated what he had heard and made a decision based on that. However, now the situation had changed.

AAG Tucker-Davis noted that the respondent had indicated he had enrolled in the PSU class with the intent of reinstating his license. AAG Tucker-Davis then asked the respondent what retiring his license meant to him. The respondent replied that it was unlikely that he would use his license, as he had only used it twice in his career, but that he wanted the option kept open. The respondent then reiterated that he believed the prohibition from reapplying statement had been generally associated with more egregious transgressions. LEC member Hoffine then noted that the respondent's failure to respond to the audit was pretty egregious.

Chair Linscheid then reminded the respondent that the LEC had previously offered to reduce the civil penalty to $1,500 for reasons presented during the last informal conference, or he could

retire his license. Chair Linscheid recognized that retiring a license may have meant a temporary thing to the respondent, but that it did not to the Board. The Board takes it very seriously. An LEC member interjected that the LEC was not trying to be tricky, but that it's typical that when someone retires their license as a result of a Law Enforcement case, they don't reapply. Therefore, it may not have occurred to the LEC to specifically state it—it was understood.

The respondent then asked, since he had enrolled in the PSU course and spent $500 and his time in good faith, if the LEC would consider reducing the $1,500 civil penalty further. It was then asked and noted that the respondent had signed up for the course prior to meeting with the LEC in an informal conference. The respondent, however, noted that he had not paid the fees for the course until after meeting with the LEC and reaching a settlement agreement. He stated he had signed up for the course so that, in the event he wanted to renew his license, he would have the 30 PDH units. Investigator McCartt interjected that the respondent had explained to him that he had signed up for a course to make up his deficient PDH units, but that he hadn't paid for it yet, because he was uncertain how the case was going to end up.

Upon consideration, the LEC proposed to impose a $1,500 civil penalty. In addition, if he chose to renew his registration, the respondent would be required to provide proof of 30 PDH units for the applicable period. The respondent agreed. **The LEC recommended the Board approve the settlement agreement.**

2543
The LEC met with the respondent to discuss a Notice of Intent to Assess a $2,000 Civil Penalty for violations of ORS 672.020, ORS 672.0451),(2) and OAR 820-010-0720(1). The Board received an anonymous complaint that alleged the respondent was practicing engineering without a license. In support of the allegation, a copy of the respondent's business card and Web site were included. The respondent's business card listed his title as Consulting Engineer, Chemical Engineering, Technical Sales. In addition, the respondent's Web site identified chemical, biological, and process engineering as his organization's activities.

The respondent began by acknowledging that he understood the importance of engineer registration and public safety. He then stated that he had completely revised his company Web site and no longer uses business cards that identify him as a consulting engineer. He also recognized the importance of making those changes.

With respect to starting his business, the respondent stated he had called Investigator Wilkinson in 2006 asking for guidance on how to proceed. He stated he was conscious of not practicing engineering. He understood that engineering was protected work, but that he had not turned out final design or performed engineering calculations impacting customers in the bio-fuels industry. He also stated he always informed his clients he was not a professional engineer and his work could not be relied upon as such. According to him, he tried to conduct his business appropriately, but unfortunately missed the significance of the reserved word "engineering." He stated that he had not taken away that understanding from his conversations with Investigator Wilkinson in 2006, but that he acknowledged the mistake.

The respondent continued in stating that from 2006-2008, he'd cooperated with firms that was working bio-diesel projects in an effort to become part of those firms, not an external entity. He stated he learned from his mistake, but that he does not offer engineering services.

The respondent then went on to explain what his firm was trying to accomplish in the bio-fuels industry. The have built a good company and are selling fuel. He hoped the LEC would consider what he's gone through in trying to get off the ground and become a player in the industry. The respondent requested the LEC hold him personally harmless, so that he would not be held up as an individual that had violated ethical standards that he truly believed were important.

Davis, in an effort to ensure the respondent understood, offered an explanation of the difference between internal (industrial) engineering and external (offering to the public) engineering.

The respondent stated that he had changed his Web site to specifically identify that his firm does not offer engineering services. Then he stated that he still listed chemical engineering as one of his core competencies and asked if that was okay. Davis responded that the PPC would be able to respond to the respondent's question/concerns. Davis recommended the respondent outline his concerns in a letter and submit it to the PPC for review. **The LEC recommended the Board approve closing the case with a letter of concern.**

<u>2552</u>
The LEC met by teleconference with respondent who allegedly engaged in the unlicensed practice of land surveying when she distributed a business flyer listing property boundary marking as one of her services, in violation of ORS 672.025(1), ORS 672.045(1)(2), and OAR 820-010-0720.

The respondent stated that she never had any intent to give the impression she was surveying and that it had never occurred to her that her actions could be construed as surveying. She continued that if she had intended to convey surveying, she would have used the word "surveying," yet she had not. She said she understood that a person has to be licensed in order to survey.

The respondent then went on to explain what she did in her business. She explained that if a client had several acres of property with trees, she had to be sure of where the property line was so she didn't cut down trees outside the client's property. The respondent then stated that a lot of people don't know where their property line is, so she marks the trees by running a ribbon down the property line.

The respondent continued that if the client did not know where their property line was, then she would go down to the court house and look it up. She could get a complete description of the client's property at the county records office. She believed perhaps she made the wrong choice of words in her flyer, but that she was not surveying and did not intend to. She simply needed to know what the boundaries were in order to cut trees down.

Chair Linscheid stated that, if in cases where a client does not know where his/her boundary is, it appeared to him by the respondent's flyer that she was offering a boundary determination service

and that was under the protective realm of surveying. Chair Linscheid then asked the respondent what would happen if her client relied, even to their own detriment, on where she said their line was. In that case, that would be an authoritative statement. The respondent countered that anyone could go down to the county records office and see where the property line was.

When asked if the respondent had corrected the flyer, she stated she went out of business in December 2008. In addition, she forfeited her business and contractor's license in January 2009. It was recognized that the respondent had gone out of business at the same time the complaint was filed against her. Chair Linscheid asked how long the respondent had been in business. The respondent responded that she had been in business since 2007, not even 2 years.

An LEC member then asked if the respondent's spouse was still looking at county records and then marking people's property lines for them. The respondent stated that he was now working with his son and that it only happened when a situation came up requiring it. She then stated that as far as she knew that situation had not come up. When asked what her husband's son did, the respondent stated that he was in the tree service business. Upon consideration, **the LEC recommended the Board approve closing the case with a letter of concern.**

2542
The LEC met with respondent, a PE, regarding his allegedly operating an office without a resident engineer in violation of OAR 820-010-0720(1). It was alleged that in or about 2008-2009, the respondent operated a branch office of an engineering firm in Oregon, and advertised offering engineering services in the DEX telephone directory. The engineering firm employed three Oregon registered professional engineers, but there was no full-time Oregon registered professional engineer performing duties at least half of his or her working time in the Oregon office.

The respondent's attorney, Melissa Bates, started by asking why the case was against the respondent specifically and not the engineering firm. She stated that part of the allegation involved a phone directory advertisement, but that the ad was not an ad for the respondent, but rather an ad for the engineering firm. Chair Linscheid noted that the Board only has authority over licensees, not corporations. Bates then went on to ask that if there were several Oregon registrants that work for the engineering firm, then why all the registrants of the firm weren't facing allegations. Board Investigator Van noted that when a company, not specifically an individual, is facing allegations, then the responsible person for the organization is the respondent. Since the respondent is the General Manager of the engineering firm, he is the responsible person in the organization. Bates argued that the OAR is confusing because it states "licensees, entities." Since the respondent had not personally violated the OAR, but the firm may have, it seems odd that the respondent faces the allegation.

Moving on to the discussion of the full-time licensee issue, Bates argued that according to the firm, the respondent is a full-time manager under the Rule, and that if he is not in his office it is because he is pulled away for his professional duties as a professional engineer. Therefore, they were unclear as to why the respondent wasn't meeting the exception. Bates argued that, according to the language of the Rule, the respondent is meeting the exception.

Investigator Van stated that when the respondent provided his breakdown of time spent in the firm's California and Oregon offices, he identified 70% of his time was spent in California and only 30% was spent in Oregon. Bates then argued that in a perfect world the respondent would spend 50% of his time in Oregon. However, the way the economy works and with the ramping up of various projects, the respondent spends more time in Oregon when he needs to be and more time in California when he needs to be there. In addition, sometimes when he needs to be working on Oregon projects, he does so in California because he has the technology to do so; the same applies to California projects. Bates went on to state that with all that said, there was no requirement in the Rule to be in Oregon physically. Bates interpreted the Rule to simply say that he should be in Oregon offices 50% of his time unless his duties require otherwise. According to Bates, the respondent's duties do require otherwise; therefore he meets the exception.

The respondent then added that he had read the Rules and asked himself what the letter and the intent of the Rules was. He noted that ORSs and OARs were intended to work hand in hand to ensure adequate supervision and control under a registrant. He then asked what OSBEELS had in mind and believed that what the Board wanted to ensure was that when a firm or individual offers themselves up as an engineer or offers to perform engineering services and executes those services that it is under the authority, responsibility, and control of an Oregon registrant. The respondent understood the Rules as requiring an employee of the firm, not a contract engineer; and for the engineer to be a manager so that there would be someone in control who understands the responsibility of working in the discipline and is in responsible charge of the work. Therefore, the respondent understood that what the engineering firm was doing met that test. He stated that in the last month and a half the engineering firm had turned away 7 or 8 projects that, by their evaluation, didn't quite meet the character of being able to be in responsible charge of the work. The respondent reiterated that he holds that charge very seriously and that he would affirm and testify that that is how his engineering firm conducts its business.

The respondent then commented on his understanding of the letter of the Rule as it is written. According to the respondent, the exception that allows engineers to be in the office 50% of the time, unless duties require him elsewhere, was written specifically for engineers like him. If the Board determined that it wasn't written for engineers like him, then he would request guidance on how he could comply. He continued on that his engineering firm was doing a good job and he truly believed that they had met the intent and the letter of the Rule. The LEC agreed that the Rule was written for engineers like the respondent in similar situations. Upon consideration, **the LEC recommend the Board approve closing the case as allegations unfounded.**

2505

The LEC met with respondent, a PLS, and Certified Water Right Examiner (CWRE), regarding allegations that he failed to follow accepted land surveying standards in preparing a record of survey. The respondent surveyed property in connection with a property line adjustment using 1999 deeds as justification for monumenting the east line of two tax lots. Another surveyor in a subsequent survey determined that the respondent set monuments on a line approximately 33' east of an existing fence line. The fence was built after monuments were set based on surveys going back to 1857. It was therefore alleged that the respondent's survey ignored boundary precedence of an original survey and a parcel with senior rights and he failed to explain why he disregarded the 1907 line in favor of a deed call over monumentation.

The respondent's Attorney, Norm Webb, asked if the Board was directing him in how he should perform the survey in question. Davis replied that it absolutely was not the intention of the Board.

The respondent then described his actions. He stated that the complaint was that he followed the deed instead of historically documented surveys. However, according to the respondent that is what surveyors are supposed to do. He noted that he had several examples in textbooks that describe what a surveyor is supposed to do. The respondent stated that it entailed reviewing a deed's writings and putting the line on the ground. He stated that surveyors are not permitted to go outside the deed unless there are discrepancies or conflicts. In that case, then a surveyor would be able to go outside the deed to determine the intent. But, if the deed is clear, then one has to stay within the wording of the deed.

Webb assisted the explanation, noting that the essential question is whether or not the respondent should have used the bearing tree and the ¾" iron pipe located about 33' west of the point that he used. He noted that the respondent used the 20.20 chains dimensions from the Lewis Rogers Donated Land Claim (DLC) in describing the point. Webb then noted that there were other prior surveys that had used the bearing tree, but the relevant concern was that the deed lines control in this case. Webb's rationale for that was that in 1936 the same person owned all of the tracts involved. The owner then deeded those tracts in 1965. All the deeds by the grantor in that case used the deed lines – 20.20 chains. So, when one owner owns all three tracts and no one ever used the old bearing tree or the stake that was 33' west of the point one would arrive at if using the Lewis Rogers DLC corner, the respondent had to use the 20.20 chains as described in the deed.

Webb noted that he had worked on many cases involving this sort of work. Without question, Webb felt that the respondent had done the right thing. The deed was the primary intent of the parties. He also noted there are old legal descriptions used by others, but that there are reasons why one wouldn't use those.

Webb further addressed the additional issue of the fence that was not shown on the respondent's survey. He noted that if one looked at where the fence was, it was clear it was not a boundary fence. More significantly, the fence was put in when one owner owned all the tracts. When one owner owns all the tracts, the placement of a fence would not be indicative of a boundary line. Further, the fence is not a straight fence, but a meandering fence.

Another point of contention according to Webb was that Yamhill County's check sheet regulates plats. The respondent, however, conducted a survey, not a plat. Therefore, he believed that Yamhill County Ordinance 658 Section 3(2) did not apply.

The respondent then added that he had looked at random surveys looking for how many showed fences on them. He was only able to find one that showed a fence and he noted the purpose of the survey was to show fences on a lease area. Chair Linscheid then presented several examples of surveys that did show encroachments/encumbrances of structures.

Webb reiterated that the fence would not have been shown because it was a meandering fence and it was put in place by the individual that owned both parcels at the time; therefore, it did not indicate a boundary.

Chair Linscheid then relisted the historical reference of surveys conducted on the property in question, acknowledging that the 20.20 chains showed up in the 1857 survey. Later the bearing tree showed up in surveys. In 1910, the surveyor noted the 20.20 chains going to the bearing tree, although there was no way it could have been measured on the ground and that it was right. The next surveyor recognized the error; however, he did not call out the County Surveyor.

In his opinion, Webb believed what was involved here was simply a difference of opinion as to what method a surveyor should use. According to Webb, the respondent had used the right method in following the deed.

The respondent then stressed that the subsequent survey performed after his, by another surveyor, contained errors. According to the respondent, it was not performed in line with the deeds. He also reiterated that there was no original survey that established the boundary lines; it was the deed that recorded the boundary lines. He noted that it was his responsibility to stay within the deed when the words in it tell him exactly what to do. If there was then an argument about the line, it would belong between the neighbors and in the courts.

Ultimately, Webb argued that the respondent made a judgment call that was sound. Even if the respondent turned out to be wrong because he was not following proper practices, he made a judgment call for what he believed to honestly be the proper method to define the boundaries when there was no determination otherwise. The respondent was therefore not incompetent, he was quite competent. The respondent showed the bearing tree, then showed and explained why he used the deed lines.

The respondent argued that the intentions of the parties to a conveyance as expressed by the evidence of the writing are paramount to the considerations of the court in determining the meaning of the deed. The words in the deed are paramount to anything, except where the words have extrinsic ambiguity and conflicts. He noted that sometimes when there is conflict there is a need to go outside the deed to determine what was done, but in this case all kinds of things have been done. He contended that going outside the deed was not reasonable.

Chair Linscheid then pointed out that Yamhill County Ordinance 658 does include survey maps, not just plats. The respondent argued that if there is a structure over the line, he would show it on his survey; he'd have the neighbors out discussing it and trying to straighten the situation. He noted that he did not prepare the survey "in the dark." He stated that all parties discussed it and attorneys were involved. He again reiterated that the deed line had to be identified. According to him, one could not even claim adverse possession without knowing where the deed line was.

The LEC then reviewed the survey maps (current and historical) and aerial photos with the respondent and Webb to gain additional clarification regarding the meandering fence, the bearing tree, and the property lines.

Additional discussion ensued about what historical surveyors did, documented, and upheld over the years. The respondent then noted that the deed was written in 1906 and the surveyor in 1907 followed the deed. An LEC member then asked the respondent if he follows the deed, no matter what. The respondent responded that there were only two original corners that could not be changed. Following the setting of the original corners, a private surveyor came in and didn't measure correctly (33' long), setting a monument past where it should be. According to the respondent, that surveyor could have measured closer than he did. In order for the distance error to be acceptable, it should have been within 2 or 3 feet of the line at that time. The respondent believed that in 1907 it was absolutely possible for the surveyor to measure more accurately.

Chair Linscheid then readdressed the issue of the fence. Ultimately, the respondent contended that he could not survey to the fence. According to records, all deeds for the property and surrounding properties have been consistent over time. To change based on the survey would be contrary to the deeds. If neighbors wanted to argue regarding the fence line, then they could do that and request that the courts change the deeds.

The respondent then stated that if the deeds had called to the monuments identified in past surveys, then he would absolutely go to them, but the deeds did not. Chair Linscheid noted that the deeds are silent as to the bearing trees; they only call out the distances. The deeds also do not call to old survey lines. If they had, the respondent stated he would have gone to the old survey lines in a second.

Davis then asked if the respondent had gotten both property owners together when he determined the lines and explained it to them. The respondent responded affirmatively. He then explained that if the parties wanted to change the line, he said that he could measure it, prepare a new legal description, and have it changed.

Upon consideration, the LEC felt the only remaining concern was ensuring the respondent fully understood Yamhill County Ordinance 658. By showing the fence line, the respondent could avoid difficulties for future surveys. There is a professional obligation to show any encumbrances on survey maps as a measure of clarity. **The LEC recommended the Board approve closing the case with a letter of concern.**

<u>2495</u>
The LEC met in a second informal conference by teleconference with the respondent and his firm's co-owner and in person with their attorney Mary Kim Wood, to discuss a Notice of Intent to Assess a Civil Penalty of $1,000 for violations of ORS 672.007, ORS 672.020, ORS 672.045, and OAR 820-010-0720. The Board received an anonymous complaint that the respondent's engineering firm advertised as being an engineering company and offered the services of an engineer on the company Web site without employing a licensed professional engineer. In response to the Board company questionnaire, they confirmed that they offer and provide engineering services. However, they also asserted that their offering and services were exempt under ORS 672.060(6) because they offer services only to companies.

Wood began by stating that the engineering firm assumed the violation and now wanted to determine how to resolve the situation. She had spoken with her clients and they have already

begun the process of removing the word engineering from their Web site, their advertising brochures, and anything else they had. She noted that although it takes a little time to have approved, they would be amending the name of the company from engineering to product development. In terms of going forward, there were few issues from the respondent's standpoint. According to Wood, there is a long laundry list of different branches of engineering, and, with the exception of a tangential pass at mechanical engineering, almost none of them apply to what her client's firm does; and their work is not offered to the general public as a whole. She stated they are a company that provides work for other companies, mainly in product development. In that sense, her client's firm is more entrepreneurial than any other professional service. In looking at the OAR and ORSs, all of the concern is aimed at public safety. Wood argued that her client's firm does not fall into this category. Yes, they do have engineering training, but they believed the work they do is not the work the Board is looking to protect the public from.

Wood admitted that her clients stepped over the line by using the word engineering in their business, but their work does not amount to the work that requires a registered professional engineer. She noted that they used the word engineering in their business title, because they have engineering degrees, but they don't hold themselves out as professional engineers nor did they ever intend to. They even turn work away when PEs are required.

When asked by the LEC to clarify what they do, Wood replied that her clients do product design, analysis of products to make them better, more efficient, cost effective. And then they help businesses come up with a way to implement.

Davis interjected that the concern is that Wood's clients used the protected term of engineering. When one does so, the assumption is that they are registered professional engineers. If they are no longer going to use that term, then the discussion is over. He also contended that offering services to another company is actually offering services to the public. The provision for the exemption is to protect entities for in-house engineering.

Wood then summed up that her clients are willing to make the change to remove the term engineering, as stated previously and complete the changes within 60 days. Upon consideration, the LEC proposed to reduce the civil penalty to $500 and require compliance be met by June 30, 2010, provided Wood's clients agree in writing not to perform any professional engineering services for the public unless it's in compliance with Oregon professional engineering license requirements. **The LEC recommended the Board approve the settlement agreement.**

2549
The LEC met with respondent, represented by his attorney Hafez Darae, to discuss a Notice of Intent to assess a $1,000 civil penalty for violating OAR 820-010-0720 when he engaged in the unlicensed practice of engineering by offering to perform professional services without a licensee in a bid for a Project in March 2008. The registration for the professional engineer that the respondent used in preparing the bid was in exempt status at the time of the bid.

Darae began by asking for the original proposal. It was provided. He explained that the respondent's firm is a consulting firm working as owners' agents. In this case, they were

contracted to be the agent and were to coordinate reconstruction. The respondent's firm does not hold itself out as an engineering firm. To the extent they require engineering services, they retain engineers. In this particular case, it was the PE in exempt status, who had been friends with the respondent for a very long time. The respondent had approached this PE when the project came about and asked him to come on board, not as an engineer, but to help coordinate the work performed by outside engineers. Darae offered to provide documentation showing the respondent's firm contracts with licensed engineering firms that provide essentially on-call engineers that the respondent's firm can use on an as-needed basis. In the project bid, the respondent's firm listed the work to be done by those outside engineers that the PE would oversee. Darae believed that something had been lost since the complaint went back to a disgruntled employee.

Lopez interjected that the Board no longer has exempt status. However, at the time of the bid, the professional engineer was in exempt status. Lopez felt the Board should review the old rules that contained the definition of exempt status at that time.

Darae then argued that if anyone should be held responsible, it should be the respondent's firm and not the respondent personally. In addition, he argued that the work at issue was always going to be provided by a licensed engineer. The respondent never held himself out as an engineer; The respondent never said he was going to provide any engineering services of any sort. Therefore, they believed there was nothing to substantiate the respondent's engaging in the alleged violations. Darae went on to contend that aside from the above, the violations were critically important and he pointed out several concerns with the complainant's allegation.

Then, an LEC member asked how they could explain their own statement, "our in-house engineers." According to the LEC, it was misleading.

The respondent interjected to explain his company. He explained that his firm is a consulting firm. Davis interrupted stating the information presented was not relevant and asked how the respondent's firm could state it had in-house engineers when it did not. The respondent then stated that this particular PE the firms PE. He created a chart on the white board to defend his point. Investigator Van pointed out again that at the time that the respondent's firm bid on the project, the PE was in exempt status and could not practice as an engineer. After repeated questions about whether there were any true in-house engineers on staff at the respondent's firm, the respondent returned to his argument that the complaint stemmed from a disgruntled employee because this PE came on board and the had client kicked the former employee off of a job.

The respondent then stated that the PE was an employee of the respondent's firm, but admitted he may have been in exempt status. When the LEC pointed out that that was the violation the Board was concerned with, the respondent argued that he was unaware of what OSBEELS did for such violations and that he did not personally do anything with respect to practicing engineering. He then argued the issue was not about him, but about the company he had built for 20 years with a Top Secret clearance. He stated that all his work relies on ethics, and that he always has to ensure things are in order.

Davis then restated that the concern of the LEC was that the respondent's firm represented to its client as having in-house engineers. The respondent felt his firm did have an in-house engineer with this individual on staff. Davis clarified that the respondent's firm did not have an engineer, because the PE (being in exempt status) was not authorized to practice at that time.

Darae interjected arguing that the PE was an engineer (although in exempt status), was on staff, and did not provide engineering services. Davis then restated that an engineer in exempt status can not hold himself out to be an engineer. He then added that he didn't believe the respondent's firm meant to commit this violation, but that the issue at hand was that the firm represented it had an in-house engineer when it did not.

Darae then asked if the PE placed himself in exempt status and then pulled himself out of exempt status if the reactivation would fill the gap. The LEC responded "no." Unlike a Construction Contractors Board, OSBEELS Rules specifically state that when in exempt status one cannot hold themselves out as an engineer. Coming out of exempt status does not retroactively cover the entire renewal period. Lopez then added that a registrant would have to provide proof of their professional development requirements. Lopez continued in stating that the PE might have requested exempt status because he didn't want to comply with those requirements. Darae acknowledged this because this PE was employed in another field. The respondent next stated that he relied on this person to ensure compliance.

A discussion then ensued about whether the respondent could be held responsible for the violation or if his firm should be. Darae argued that the LEC could not disregard the firm's corporate form because the respondent signed a document as the representative of the corporation. AAG Tucker-Davis then stressed that the respondent needs to understand that his company offered to practice engineering, even though the respondent stated he didn't know that he didn't have a PE on staff. Darae contended that the respondent would like the whole issue to go away, but if that was not possible then the respondent should not be held personally liable for the violations.

In their defense, Darae pointed to several fundamental issues to consider. The violation was: 1) a first offense; 2) for a very short period of time; 3) clearly unintentional; and 4) committed by someone who is not an engineer and is unfamiliar with OSBEELS rules. Yet, the Board was levying the maximum penalty against the respondent personally.

AAG Tucker-Davis reminded the respondent that his firm, with respect to hiring outside engineers, cannot offer engineering services and then contract out for services. The respondent stated he understood and that his business provides consulting services. Upon consideration, **the LEC recommended the Board approve closing the case with a letter of concern to the firm, not the respondent personally.**

<u>2539</u>
The LEC met to discuss that the respondent had engaged in the unlicensed practice of engineering when on multiple occasions he identified himself as a professional engineer and his business as and engineering firm. The respondent failed to respond to any Board communication. A Notice of Intent to Assess a $9,000 Civil Penalty for violations of ORS

672.007, ORS 672.020(1), ORS 672.045(2), and OAR 820-01000720(1) was sent to the respondent and he failed to respond and/or request a hearing within the 21-days required. To date, the respondent has not responded at all.

For informational purposes, AAG Tucker-Davis began a discussion about the process of filing injunctions—something the Board might considering pursuing in addition to the civil penalty. She informed the LEC that OSBEELS staff had previously met with the DOJ to learn more about the process. AAG Tucker-Davis then explained that an injunction is an order that requires someone to cease doing something. The first requirement is to have something that requires being ceased. In the respondent's case, it would be practicing engineering without a license. The injunction would restrain him from doing engineering services, which the Board could pursue. She also detailed the injunction steps. If the respondent doesn't answer then there would be a default. AAG Tucker-Davis then outlined the costs associated with such a process.

If a person violates the injunction, then an Order to Show Cause could be prepared because the individual would be in contempt of court. The Order to Show Cause could result in payment, or there is the possibility in some circumstances that the individual could face jail time. In the Order to Show Cause process there would be another trial to show the individual is in contempt of court. AAG Tucker-Davis explained the costs in time and money associated with such a process.

Another option might be to use a temporary restraining order which could be used if it could be proven that irreparable injury would result if the court doesn't immediately act. There is also the option of a preliminary injunction that requires showing conduct occurring right now.

Lastly, if there was ultimately a Default Final Order, the Board could record the order, get a lien on real property, open a circuit case file, and then conduct a Judgment-Debtor Examination. That would require a person to appear in person and bring in others, such as a spouse, and talk about why they are not paying their debt. If the respondent doesn't show, a motion for show cause could be prepared because he would be in contempt for disregarding the judge's order. If the respondent shows, there'd be an opportunity to learn what the respondent's debts are and what they may be doing.

In discussion, it was pointed out that the concern with the respondent is to ensure he is not practicing without a license in order to protect public safety. Because OSBEELS does not have any current evidence of the respondent's engineering activities, the strongest option to identify if he is continuing to practice without a license would be to require him under the Judgment-Debtor Examination. Upon consideration, the LEC proposed to hold the $9,000 civil penalty and issue a Default Final Order. **The LEC recommended the Board approve the Default Final Order.**

Cases Reviewed

2519

The LEC discussed that the respondent, a PE, was a non-resident Oregon registrant selected to participate in an audit of his PDH units for the renewal period January 1, 2005 to December 31, 2006. However, all correspondence regarding the audit was returned to OSBEELS undelivered. Upon reviewing OSBEELS records, the respondent's last two renewal forms showed that he had

notified the Board of a change of address prior to the audit, but that it was not updated until after the audit letters were returned. In addition, once contacted by a Board Investigator, the respondent provided proof of his PDH units for the audit period. **The LEC recommended the Board approve closing the case as allegations unfounded.**

<u>2522</u>
The LEC discussed that the respondent, a PE, was a non-resident Oregon registrant selected to participate in an audit of his PDH units for the renewal period January 1, 2004 to December 31, 2005. The respondent had not initially responded to the audit due to his traveling schedule. Once contacted by a Board Investigator, the respondent apologized for not responding in a timely manner and provided documentation of his PDH units for the audit period. **The LEC recommended the Board approve closing the case as allegations unfounded.**

<u>2526</u>
The LEC discussed that the respondent, a delinquent PE, was a non-resident Oregon registrant selected to participate in an audit of his PDH units for the renewal period July 12, 2005 to June 30, 2007. Prior to April 5, 2007, OAR 820-010-0635(7) allowed non-residents to satisfy Oregon's Continuing Professional Development (CPD) requirement when licensed in and having met the mandatory CPD requirement for any NCEES member state. The Hawaii Board confirmed the respondent's license was active in Hawaii during the time of the audit and Hawaii does not require continuing education for PEs. The respondent would however be responsible for the prorated portion of PDH units (7.5) from April 5, 2007 to June 30, 2007. Chair Linscheid asked if the respondent had cooperated with the Board. It was noted that the respondent had not initially responded to OSBEELS letters, but Investigator McCartt was able to contact him on the phone and speak with him. It was discussed that because the Rule changed near the end of the respondent's renewal period, it may not have occurred to the respondent that it would apply to the current period. He may have thought it would not apply until the next renewal period. Lopez interjected that the respondent had not advocated for himself at all by not responding. Discussion ensued that if the case was clear cut, the LEC would issue a Notice of Intent to Assess a Civil Penalty. Davis reiterated that the respondent has not cooperated with the Board and that in the past the LEC has been pretty heavy handed for failing to cooperate. Therefore the LEC determined to issue a Notice of Intent to assess a $2,000 civil penalty for violating OAR 820-010-0635(1)(7).

<u>2532</u>
The LEC discussed that the respondent, a PE, was a non-resident Oregon registrant selected to participate in an audit of his PDH units for the renewal period January 1, 2005 to December 31, 2006. OSBEELS records did not indicate that the respondent responded to the audit. However, the respondent claimed he had contacted the Board office and explained his former employer's refusal to provide his PDH records and was told he would be contacted if additional information was needed. The respondent provided documentation to support his diligence in maintaining his PDH units following the audit period. Investigator McCartt contacted the respondent's former employer and received documentation showing the respondent's PDH units in excess of the requirement for the audit period. **The LEC recommended the Board approve closing the case as allegations unfounded.**

2548
The LEC discussed that respondent had allegedly used PE's official seal and was practicing engineering without a license. A review of the drawings in question showed no evidence that the PE produced them. Importantly, the changes were made at the job site in Washington State under the direction of the electrical contractor and/or electrical engineer. **The LEC recommended the Board approve closing the case as allegations unfounded.**

2550
The LEC discussed that respondent, a PE and PLS, had allegedly provided engineering services without having a licensed engineer physically present at least one-half of the time and did not hold paramount the safety, health, and welfare of the public in performance of his duties by not ensuring the proper completion of a right-of-way acquisition. The respondent provided documentation to substantiate his compliance with the resident registrant rule and show that he was not the surveyor for the right-of-way acquisition. **The LEC recommended the Board approve closing the case as allegations unfounded.**

2554
The LEC discussed that respondent, a CWRE, allegedly failed to submit a corrected Claim of Beneficial Use and Site Report to the Oregon Water Resources Department in violation of OAR 690-014-0220. In addition, the respondent failed to cooperate with the Board by failing to respond to the OSBEELS in violation of OAR 820-020-0115(8). It was noted that the LEC needed to readdress the possible revocation of the respondent's CWRE certificate. In addition, AAG Tucker-Davis stated there were concerns about the Board assessing a civil penalty for violations of CWRE Rules. Investigator Van then noted that the recommendation before the LEC had been revised to revoke the respondent's CWRE certificate and assess a civil penalty for failing to cooperate with the Board. Therefore, the LEC determined to issue a Notice of Intent to Revoke Registration and to Assess a $1,000 Civil Penalty for violating OAR 690-014-0220 and OAR 820-020-0115(8).

2555
The LEC readdressed a previously reviewed case in which the respondent allegedly was engaged in the unlicensed practice of engineering. The case was reviewed during the February 11, 2010, LEC meeting, but the LEC had requested an AAG Opinion on the matter.

Chair Linscheid took the committee into Executive Session as provided by ORS 192.660(2)(h) to consult with the AAG concerning the matter. Upon returning to open session, Chair Linscheid stated that no action was taken during Executive Session.

It was then noted that the respondent had made changes to the company Web site as soon as they were notified by OSBEELS. It was also recognized that as an Oregon registered contractor, ORS 672.060(12) may apply to the company. However, since the company's Web site initially offered engineering services in Oregon, **the LEC recommended the Board approve closing the case with a letter of concern.**

2558

The LEC discussed that the respondent allegedly was practicing engineering outside his area of competence when he prepared slope retention plan designs for a retaining wall project. After discussion about the impact of a pending civil court case on the same matter, the LEC determined to postpone review of the case until such time as the civil court case has concluded. A letter will be sent to the respondent requesting he advise the Board upon its completion.

2559
The LEC discussed that the respondent allegedly was engaged in the unlicensed practice of engineering by advertising on his Web site offering to perform foundation engineering certificates. Because the respondent's work is on single-family dwellings, the respondent is exempt under ORS 672.060(10). However, no record of the respondent's business registration or construction contractors licensing could be found. **The LEC recommended the Board approve closing the case as Board lacks jurisdiction and referring the information to the Oregon Construction Contractors Board and the Secretary of State Corporation Division.**

2560
The LEC discussed that the respondent was allegedly engaged in the unlicensed practice of engineering by advertising and/or offering to perform engineered foundation certifications on his company Web site. As a licensed Construction Contractor and a Certified Home Inspector he is allowed under OAR 820-010-0715 to offer services under specific conditions. In addition, the respondent updated his Web site to identify the professional engineer performing the services. **The LEC recommended the Board approve closing the case as compliance met.**

2561
The LEC discussed that the respondent, a PE, was allegedly advertising for or offering to perform services without employing a licensed land surveyor. The respondent is the President of an engineering and land surveying firm. The firm has two offices. The firm's Web site advertised its services, but did not initially identify which offices offered which services. Upon notification the respondent updated the Web site to identify that the Eugene office does not offer surveying services. **The LEC recommended the Board approve closing the case as compliance met.**

2562
The LEC met to discuss that the respondent allegedly was offering land surveying services without employing a resident land surveyor. However, LEC member Davis recused himself from any discussion as the company involved was his former employer. As a result, the LEC did not have a quorum and determined to postpone the discussion until the next LEC meeting.

2563
The LEC discussed that the respondent, a PE, allegedly violated the code of professional conduct and was practicing without registration. The complainant alleged that the respondent was practicing while in delinquent status and was negligent when expressing an opinion as a consulting engineer and expert witness in a City lawsuit against several engineering firms. Investigator Wilkinson noted that the respondent was an engineer at the time that he conducted his initial evaluation of the contract documents, but he was in delinquent status when he provided

his deposition. A compounding problem is that the attorney the respondent was working with has passed away, so there's no ability to verify records.

The complainant was concerned about what he perceived as a "flip-flop" by the respondent regarding his recommendations and the City's role. The complainant alleged that the respondent did not alert the City to their role in the initial filing of the lawsuit. However, the respondent alerted the City that it did have a part to play when it came time to recover damages, which caused the complaint. However, the respondent claimed to have alerted the City's attorneys and it was they who initiated the lawsuit.

An LEC member asked for clarification. Investigator Wilkinson stated that when the respondent conducted his first evaluation of contract documents and the plans, which he was hired to evaluate in an effort to help the attorneys determine whether or not to file the lawsuit, the respondent believed that his responsibility was to support the City in their lawsuit against an engineering firm. Apparently, the respondent did not put in writing that the City had some responsibility and that is what caused the complaint. The respondent stated that he had informed the attorneys of the City's role in this, but the attorney is now deceased so there is no way to verify.

A discussion about whether the Board should open a law enforcement case against the engineering firm began. Investigator Wilkinson stated that he had some concerns about the role the other firm played, to include the way they were working invoices and the change orders to implement the contract. It was recognized that that concern is what the respondent was opposed to in the first place. In order to dig deeper, the Board would have to rely on the respondent report. In addition, the engineering firm had been absorbed by a big firm in Seattle a number of years and no longer exists. **The LEC recommended the Board approve closing the case with a letter of concern and not opening a case against the engineering firm.**

2564
The LEC discussed that the respondent, a PE, allegedly failed to follow accepted engineering standards when he prepared plans for an aircraft hanger. In discussion, Investigator Van pointed out that a number of authorities had coordinated with the respondent and the City to review an alternative water-based fire protection system since the initial preparation of that plan. However, the City had returned to the original foam-based fire protection system. The complainant alleged that no one would reasonably even suggest such an alternative system. This discounts, however, that fire officials had been part of the planning process. Lopez pointed out that that was not necessarily the right thing, even if fire officials did agree. The LEC members recognized that none of them had the appropriate knowledge base to make a determination. Therefore, the LEC determined to refer the case to a Professional Reviewer for evaluation.

2566
The LEC discussed that the respondent, a PLS, allegedly failed to provide right of entry notice when conducting a survey for a portion of a property west of the complainant's property. The respondent provided documentation to support his claim that he had provided notice to the complainant and no evidence was provided to support that he had not. However, it was pointed out that the respondent made the claim he didn't need to provide notice because he did not enter

the complainant's property since his crew only set a monument on the line. Investigator Van pointed out that the respondent may not fully understand that in order to be in compliance with ORS 672.045(4) he is still required to provide notice when setting a monument, even if he doesn't set foot on the property. **The LEC recommended the Board approve closing the case with a letter of concern.**

2570
The LEC discussed that the respondent, a contractor, allegedly had presented the certificate or seal of another and engaged in the unlicensed practice of engineering when he submitted plans for installation of a swimming pool. The engineer who had designed the plans had given the respondent the authorization to submit the plans as he had provided them to the respondent. **The LEC recommended the Board approve closing the case as allegations unfounded.**

New Business

Preliminary Evaluation:
The LEC discussed a preliminary evaluation of information submitted by a registrant. The registrant reached a settlement agreement with the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects. In compliance with OAR 820-020-0045, the registrant is required to report the action taken by the Missouri Board. Upon consideration, the LEC determined not to open a law enforcement case.

Preliminary Evaluation:
The LEC discussed a preliminary evaluation of a complaint submitted alleging that a PE included misleading and/or false information in his proposal for a project. Upon consideration, the LEC determined that the complaint was outside the Board's jurisdiction and to not open a law enforcement case.

2494 – Thomas Swart / County Surveyor's questions
The LEC discussed questions received by Clackamas County Surveyor Pearson regarding Swart's settlement agreement with the Board and whether Swart was required to submit survey maps for the unrecorded monuments that were the subject of case number 2494. Investigator McCartt noted that there are two other County Surveyors that were simply letting Swart's unrecorded monuments go because they believe it is in the best interest of the public that Swart discontinue performing any land surveying work.

AAG Tucker-Davis asked if Swart had violated his settlement agreement, because it required him to transfer his work. However, investigators noted that it was not possible for other surveyors to complete his work, because Swart set the monuments. While engineers can take over another engineer's work, the issue of surveyors taking over another's unrecorded monuments has not been reviewed in the past. Even if possible, no other surveyor would take over another's unrecorded monuments, particularly in the case of poor surveying.

Chair Linscheid noted that Swart could write a letter to the County Surveyor stating that he cannot comply with the 45-day filing rule, because his license had been revoked. It was then

noted that the Board could not require Swart to write that letter. Lopez then noted that the Board could write the letter stating Swart cannot file the surveys in question because of his revocation. The LEC determined to prepare letters to the three County Surveyors involved in the case.

2499 – Violation of Settlement Agreement
The LEC discussed that the Board received from Multnomah County subsequent complaints against the respondent for allegedly failing to file two surveys in 2007. Therefore, it appeared that the respondent had violated his settlement agreement. In review, the settlement agreement stipulated that if the respondent was found to have been in violation, the penalty would be the revocation of his registration and the assessment of the full $6,000 civil penalty.

AAG Tucker-Davis then pointed out that the respondent should be entitled to a hearing with regard to the new violations. AAG Tucker-Davis recommended the Board send the respondent a Notice advising that he is in violation of the settlement agreement and give him the right to a hearing. The LEC agreed it was best to ensure the respondent is given the opportunity to go through a public process.

In further discussion, it was determined that the true issue is whether or not the two new allegations are indeed violations. If they are, then the respondent would be in violation of his settlement agreement. The LEC discussed whether a new case should be opened against the respondent or if these violations would be rolled into case number 2499.

Upon discussion it was determined to issue the respondent a Notice of Intent to Revoke Registration and to Assess a Civil Penalty of $8,000. The Notice would include a $2,000 civil penalty for the two new violations, and the full $6,000 (of which $2,000 was previously suspended) would be assessed for the violation of the settlement agreement. However, the offer of an informal conference would not be made, because the LEC would not recommend anything less than what was described here. In clarification, it was determined that the Board would need to provide the respondent an opportunity to respond to the new allegations. The respondent could respond to the Notice of Intent. The LEC determined to issue a Notice of Intent to Revoke Registration and Assess a Civil Penalty of $8,000.

Unfinished Business

2545 – Request for Re-review of Case
The LEC discussed that the respondent submitted a request for the LEC to re-review his case. In reviewing the case, Investigator Van briefed that the Board had not reached a settlement agreement with the respondent during an informal conference; therefore, proceedings had begun for a formal hearing. However, the respondent submitted a letter to the Office of Administrative Hearings (OAH) as well as OSBEELS on March 30, 2010, requesting the LEC re-review his case before going to a hearing. In addition, he submit additional arguments on his behalf.

An LEC member reiterated that the respondent had prepared a survey map and set a point on line with a monument. AAG Tucker-Davis asked if the LEC felt an expert witness would be necessary to discuss that what the respondent did was establishing a boundary. Chair Linscheid

pointed out elements of the respondent's survey map that identified the respondent's authoritative identification of a boundary.

AAG Tucker-Davis then presented information on the process of a Motion for Summary Determination (MSD). If all parties agree on the facts, but the only disagreement is the law, then she could file a MSD that might save everyone from going through a hearing. If the judge then determines that a hearing is necessary, the MSD would have flushed out the facts.

An LEC member then reemphasized that the respondent had not originally called his survey a topographical survey, but that now he was calling it that. However, no elements on the survey pointed to it being a topographical survey, and the respondent had stated on it that he set a monument. In addition, the respondent's survey maps were shown to other surveyors and it was clear to others that it was a boundary survey.

It was also pointed out that although engineers can do some surveying, the respondent was unaware that ORS 672.025(3) prohibited engineers from setting monuments. After re-reviewing the case, the LEC determined to continue with the hearing process and a MSD. AAG Tucker-Davis would prepare a letter to the respondent so stating.

Settlement Agreements: Cases Subject to Collections, Cases Subject to Monitoring
See Cases Subject to Collections and Cases Subject to Monitoring reports. No further discussion.

Case Status Report
There are 64 open cases. No further discussion.

The meeting adjourned at approximately 3:38 p.m.