

July 28, 2008

Sidney C. Miller, Chairman
South Carolina Boundary Commission
c/o South Carolina Budget and Control Board
Office of Research and Statistics
1000 Assembly Street, Suite 425
Columbia, South Carolina 29201

Dear Mr. Miller:

We understand you would like to request an Attorney General's opinion on behalf of the South Carolina Boundary Commission (the "Commission") concerning an issue arising out of the Commission's efforts along with the North Carolina Boundary Commission to re-establish the boundary line between North Carolina and South Carolina. You explain as follows:

At the October 2006 joint North Carolina-South Carolina Boundary Commission meeting, a question was raised as to the appropriate methodology for re-establishing the 74-mile segment of the state line originally surveyed in 1772 between Lake Wylie (confluence of the north and south forks of the Catawba River) and the monument located near Tryon, North Carolina (point of beginning for the 1815 survey that runs westerly along the ridgeline).

The original 1772 survey was conducted jointly by surveyors appointed by the governor from each state, and subsequently ratified by both states.

The original 1772 survey plat shows trees marked every mile but is void of any reference to bearings and distances. Trees were called for every mile along the 1772 survey, but no monuments were set along the line during the course of this original survey. Marked trees were the only evidence left in the field from the original survey. We have not been successful in locating any of the old trees, but we have found references to some of the original state line boundary trees in land

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boundary records in the era after 1772 up until about 1850 when the trees likely have still existed and in some cases referenced in private property surveys conducted after 1772. In one case, we were able to establish the original geographic location of an old 1772 boundary tree (presently non-existing) by tracing the chain of boundary titles. We have found additional references to mile trees in other post 1772 land boundary surveys and are attempting to also bring some of them forward through chain of title to establish their original positions.

Representatives from the boundary commission from both states agree on the geographic position of the two end points. From the work we have done locating the positions of the boundary trees it is apparent that the original survey line did not run perfectly straight. This is as would be expected, because the original surveyors used a magnetic compass for direction which would not reasonably be expected to produce a straight line along the 74-mile length.

Based on this information, you request an opinion as to whether the two commissions should “try to re-establish the original line as surveyed and marked on mile trees in 1772, or should we establish the state line as a straight line between the two agreed end points?”

Law/Analysis

Federal courts recognize that states have sovereign power to fix their boundaries. Pope v. Blanton, 10 F.Supp. 18, 22 (D. Fla. 1935). However, this power is limited in that it is subject to the consent of Congress. Id. States also have the right to establish boundaries between their territories by compacts or agreements, with the consent of Congress under the Compact Clause contained in the United States Constitution. New Jersey v. New York, 523 U.S. 767, 810 (1998). Once two states ratify the compact or agreement and Congress assents, the boundary established by the compact or agreement becomes the law of the United States. Id. at 811 (citing Cuyler v. Adams, 449 U.S. 433, 438 (1981); Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

You mentioned in your letter that the 1772 survey contemplating the boundary between North and South Carolina was ratified by both states. Thus, we presume the states entered into a valid agreement establishing the boundary line between them. According to your letter, North and South Carolina are attempting, through their respective Boundary Commissions and in cooperation with their Geodetic Surveys, to re-establish the boundary originally established in the 1772 survey. The Legislature established the South Carolina Boundary Commission in 2006 as part of its 2006-2007 appropriations act. 2006 S.C. Acts 3195. According to this legislation, the purposes of the South Carolina Boundary Commission “is to work with the North Carolina Boundary Commission to

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resolve undocumented boundaries between South Carolina and North Carolina.” Id. However, no authority is given to this commission to establish a new boundary.

As for the North Carolina Boundary Commission, we are not familiar with the authority pursuant to which it is organized or established. However, regardless of the power and authority given to either the North or South Carolina Boundary Commission by their respective states, they may not amend the agreement entered into by the two states as it is now a law of the United States. Thus, while these two bodies may very well re-establish the boundary line existing under the agreement between the states in accordance with the 1772 survey, it is our opinion that they may not establish a new boundary line.

By your letter, it appears that North and South Carolina Geodetic Surveys are attempting to re-establish the boundary line in accordance with the 1772 survey, but due to the fact that the survey relies on trees that no longer exist, these two bodies are running into difficulties. Thus, you specifically ask whether they may establish a straight line may be established between two agreed upon end points.

As we concluded above, we do not believe the North and South Carolina Geodetic Surveys have authority to establish a new line without the two states entering into a new agreement with the consent of Congress. In addition, based on our research of the general law governing boundaries, we believe significant efforts must be made to follow the original survey. “The main purpose of a resurvey is to rediscover the boundaries according to the plat upon the best evidence obtainable and to retrace the boundary lines laid down in the plat.” Conwell v. Allen, 519 P.2d 872, 874 (Ariz. Ct. App. 1974). Or as stated otherwise, “[t]he essential rule governing the resurvey is to follow the steps of the first surveyor.” Sellman v. Schaaf, 269 N.E.2d 60, 65 (Ohio Ct. App. 1971). Thus, in conducting a resurvey to determine a lost line, the aim is to locate the original lines. Tyson v. Edwards, 433 So.2d 549, 552 (Fla. Dist. Ct. App. 1983). When an original monument existing along the boundary line is missing, the line of the old survey must be retraced if possible to re-establish the lines of the original survey and the monuments’ original positions according to the best available evidence. Lawson v. Murray, 365 So.2d 744, 745 (Fla. Ct. App. 1978). “The physical disappearance of a monument does not end its use in defining a boundary if its former location can be ascertained.” Therriault v. Murray, 588 A.2d 720, 722 (Me. 1991). If the monuments designating the boundary are lost or obliterated, extrinsic evidence may be used to reestablish the monuments. Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989).

Thus, according to these principles, we believe the North and South Carolina Boundary Commission must make an extensive effort to locate the original boundary line in accordance with the 1772 survey. Furthermore, we believe these two bodies lack the authority to redraw the boundary line as a straight line. Redrawing the boundary line as a straight line establishes a new boundary line, which contradicts the original boundary line established by agreement between the two states and

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thus, the law of the United States. If the two states desire to redraw the boundary line, they each must ratify the new line as the boundary and have such a boundary approved by Congress.

Very truly yours,

Henry McMaster
Attorney General

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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