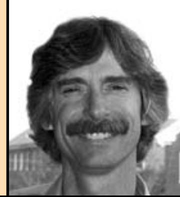

By Gary Kent, LS

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The Surveyor's Responsibility in Boundary Surveys and Disputes

In his article "The Myth of Inappropriate Opinions" [Fall 2004], associate editor Joel Leininger addressed what he called the "strange notion" held by some surveyors that they have a duty merely to bring boundary disputes to their client's attention–not "solve" them. As I read his column, the subjects of his derision included surveyors who will not "solve" boundary disputes as well as surveyors who do not feel empowered to even offer an opinion on the subject. I would like to explore these issues further.

The essence of conducting a boundary retracement survey is that the surveyor is offering his or her professional opinion as to the location and integrity of the boundary lines and corners of the subject tract *as it is described in the record document*. This statement itself has been widely cussed and discussed, and deserves some attention because I think it is widely misunderstood.

Surveyors who believe that it is their responsibility to "take the record description and put it on the ground" are, in some circles, the subject of much undeserved derision. I believe this is because of a lack of understanding on what it means to "survey the deed." It does *not* necessarily mean these surveyors are ignoring field evidence and prior surveys, and merely duplicating the geometry of the description on the ground. In fact, if that is what they are doing, they *should* be derided.

Gurdon Wattles in his book *Writing Legal Descriptions* stated "When the record is properly written or mapped, it becomes the controlling factor in any location or restoration of a boundary which may not have been monumented, or where the monumentation has been physically destroyed." He followed with "When the description is already on record in a document in the recorder's office, the survey must follow that description in retracing and establishing the lines therein on the ground."

Lest Wattles' statement be misconstrued by being taken out of context, recall for a moment, the Order of Importance of Conflicting Title Elements. Setting aside unwritten and senior rights, the most important elements are the written intentions of the parties. The best demonstration of that is a call for a survey.

Notwithstanding the fact that many, if not most, legal descriptions (at least in many of the public land states) do not include a call for a survey, one of the first tasks that the retracement surveyor should undertake is to attempt to ascertain whether or not the record description was the product of an original survey.

If it was, the job is clear–"retrace the steps of the original surveyor," and by definition, this is taking the description and putting it on the ground! When there was an original survey, the intent of the description created thereby–which is, after all, what we are trying to capture–is best ascertained from that survey. And, where there is a conflict, the monuments set on the survey may very well override simple words in the description itself. Make no mistake–*retracing the original survey is still "putting the description on the ground."*

Admittedly, determining whether or not a survey was performed as a precursor to the creation of the description may be very difficult, if not impossible, in many locales. In most areas, surveys are not, and have not, been regularly recorded. And even when monuments are found on a tract, determining the juxtaposition of the date of creation of the parcel, and the date of the survey that placed the monuments can be problematic. Were the monuments set on an original survey or were they set by some other surveyor merely retracing the description? It does make a difference, although delving into that is a topic for another time.

As part of attempting to determine whether or not there was an original survey, the surveyor should look to the record for calls to monuments and other indications of a survey, and to the field for evidence of possession or occupation (including monuments) that may date to the creation of the parcel. Admittedly none of this may result in a definitive conclusion.

If the description was *not* the product of an original survey (for example, it was created on paper without benefit of a survey) the job may be less transparent, although the task is *still* to capture the intent of the description. It's just that the intent will come not from the results of an original survey (because there wasn't one), but from the words in the document itself.

The courts have given more than ample guidance in this regard. The intent of the written document comes from the document itself unless there is an extrinsic ambiguity. Evidence from outside the written document may be sought *only* to explain the meaning of words existing within a written conveyance or to explain conditions existing as to the date of the document. Parole evidence may not be used to alter the terms of the document,

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but only to clarify them if there is an ambiguity.

Grantor's Intent Paramount

In an Indiana Appellate court opinion, *Pointer v. Lucas* (1960) 131 Ind.App. 10, 169 N.E.2nd 196, the court stated it brilliantly: "The grantor's intention controls, and the question for the court is not what the parties meant to say, but what they meant by what they did say."

Let us now step back and look at how unwritten and senior rights fit into this picture.

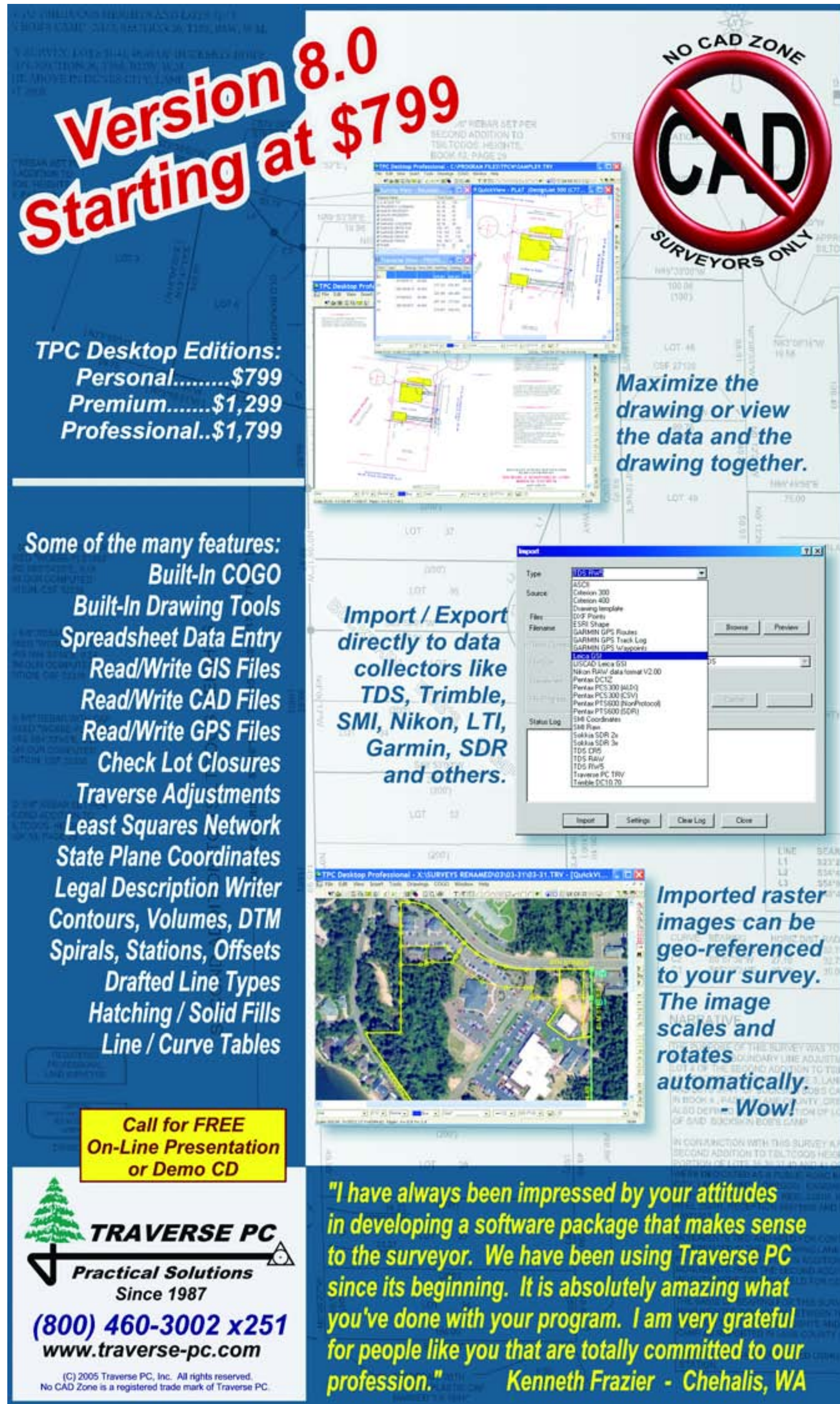
If there are discrepancies with an adjoiner, the junior-senior relationship must be understood in order to determine who has *written* title to the area in question. However, taking a pragmatist's (heretic's?) viewpoint, one might question the value of doing this in many cases, particularly when a title insurance policy will be issued. In the 4th edition of *Brown's Boundary Control and Legal Principals*, Walt Robillard and Don Wilson wrote, "The surveyor who is locating land from a title policy description need not devote research time to title matters other than that described or called for by the policy. The title company assumes responsibility for the correctness of the title as written. The surveyor's responsibility is only the interpretation of the description."

There are several reasons for taking such position. First and foremost is that regardless of which parcel is revealed to have the senior rights, the title company will not insure the area in question unless there is a recent written document recorded which conveys one party's interest to the other. Some might think this is a "cop-out" on the part of the title companies, but the fact is that there are two record descriptions and on their faces, they overlap. Most likely, both parties believe they own to the lines described in their respective deeds–a claim waiting to happen. (One could argue that if all conveyances involved a land survey, this problem could be eliminated. They might very well be right, but economics, market pressures and federal policy will prevent this from ever happening).

With regard to unwritten rights, perhaps the most important thing that can be written on the surveyor's responsibility is this: In most cases of real estate gained by unwritten means, the title itself is established upon the meeting of all legal requirements, including the statutory period of time, but *marketable* title cannot be gained without a court's determination. This all by itself should give pause to surveyors who are inclined to represent to clients that they definitively "own" certain property by virtue of unwritten rights.

Wattles weighed in on this by stating, "No one has the legal right nor vested authority to change any line of a recorded title without new and proper document in the recorder's office to support it." As a result, the surveyor may best serve the client by revealing and clearly explaining the potential unwritten rights and then giving his (admittedly non-lawyerly) opinion as to the ramifications of the situation.

Having provided all of this background, perhaps we can now address the subject at hand. What is the surveyor's role in "resolving" boundary disputes? Here are some possible steps (which are



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actually applicable whether there is an outstanding dispute or not):

One: The surveyor must determine the intent of the description, whether that is best demonstrated by an original survey or by the words in the record document.

Two: The surveyor must then telegraph that intent to its appropriate position on the ground. Every knowledgeable surveyor knows that this can be easier said than done. Many descriptions do not lend themselves to one "correct" interpretation; that's one reason we love surveying. We make our best determination (our professional opinion). As a part of our opinion, we should acknowledge and report the facts and evidence that might lead another opinion. And finally we should give support to our specific opinion.

Three: When there is what I will call a "latent dispute" (one that may have existed in the records or in potential unwritten rights, but the existence or extent of which became known only after a survey was conducted), the surveyor certainly has the authority (some would argue, the responsibility, and I do not necessarily disagree) to give guidance and advice to the involved parties on how the problem might be resolved (keeping in mind that he or she has no authority to actually "*resolve*" the dispute). Such advice might include explaining unwritten rights, how the intent of a document is captured, how an overlap or gap may have initially occurred, and what possible solutions there are. Such solutions might include the preparation of new descriptions, exchange of quit claim deeds, conducting and recording an agreement line survey, litigation or others.

Four: When there is what I will call a "patent dispute" (perhaps the surveyor was hired because of an ongoing disagreement between owners), the chance of mediating a solution between the parties is substantially less. Not only will the two parties be unlikely to sit down and discuss the issue in a civil manner, a unilateral solution from one side is virtually impossible. In this case, the best the surveyor may be able to do is provide the same advice outlined above, offer his/her assistance should they desire and wish the client good luck.

Surveyor as Facilitator

In regard to mediating disputes, Justice Thomas M. Cooley may have stated it best way back in 1881 when he stated in his book *The Judicial Functions of Surveyors*, "Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity *with the acquiescence of parties concerned*; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions." (emphasis added)

In summary, the surveyor has a role in the resolution of boundary disputes, but it is not to "resolve" the dispute. The surveyor should see his or her role as (1) making a proper determination of the boundary lines and corners according to the intent of the parties, (2) identifying potential disputes either in the records or on the ground, (3) explaining the facts, evidence and potential solutions to the client (and adjoiners if possible), and finally (4) with the acquiescence of the parties, facilitating a mutually agreeable and legally sound solution.

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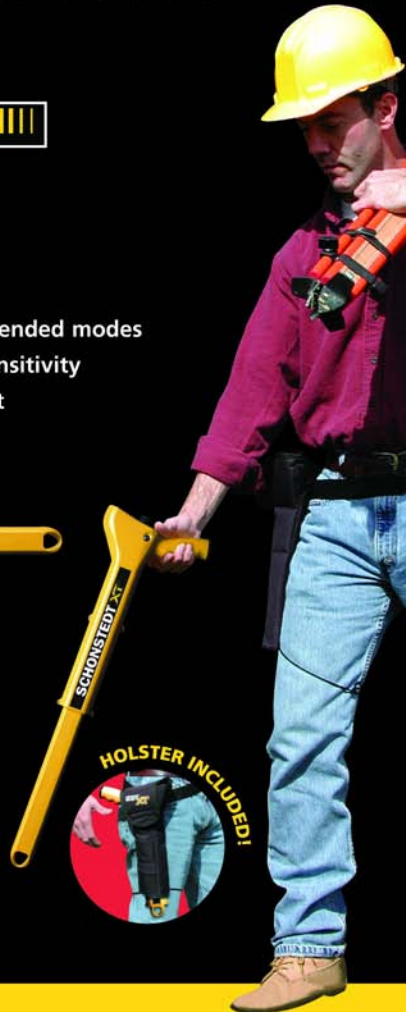

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