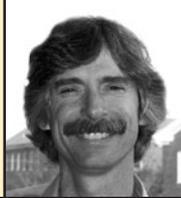


Reconnaissance



By Gary Kent, LS

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Retracement Surveys and Undocumented Corners (Part 2 of 2)

The original surveyor initiates the establishment of the corner and monuments it. In the case of a USPLSS corner, the acceptance of the deputy surveyor's plat locks in the corner. In the case of a monumented deed or property corner, it is the execution of a document creating or conveying an interest that actually creates the corner (surveyors can set corners, write descriptions and make maps or plats all day long, but unless or until an interest is actually created, they have no title meaning). Except in rare circumstances (*e.g.*, fraud or, in some cases, demonstrated blunder) the monument and the corner are essentially one and the same on an original survey.

The retracement surveyor's job is—as every surveyor knows—to retrace the footsteps of the original surveyor. Finding the lines and corners as originally established is the goal. If, however, those are gone (*i.e.*, not directly retracable on the ground), then they are to be reestablished based on the best available evidence.

But what about the many parcels that have been, and in many areas still are, created by conveyances in which there was no survey as a part of the creation of the description?

The courts have held categorically that the highest and best evidence of the lines and corners of a tract is from the written record. This is because the written words are presumed by the courts to represent the intentions of the parties. Of course, those lines and corners may be altered by unwritten rights subsequent to the original written conveyance, but that



This section corner in Huntington County, Indiana was related to a boundary dispute. After recovering nearby corners and a diligent search, the stone that was set April 13, 1883 was found several feet below the surface.

is a different topic. They may also be affected by senior rights.

The courts have also stated that the clearest expression of those written intentions is the survey on which that description was based, if there was one. Thus, where there was an original survey, the proper application of the written word in the deed is to retrace the original survey. As an aside, one consequence of this is that the term *deed-staker*, when used as a pejorative term, is a misnomer. The only proper way to retrace a parcel is to be a deed-staker. The well-documented problem is not deed-staking, it is those who take the simple geometry in a deed

description, blindly lay it on the ground, and disregard proper controlling calls.

Where there was no original survey, the parcel lines and corners were originally established by the record only. In order to retrace such a parcel, surveyors mine the written record for intent—applying the common law rules of construction when necessary—and establish the lines and corners accordingly. The intent may be expressed by simple courses—directions and distances—but more frequently, it is contained in various controlling calls (*to...; along...; with...*) that must be interpreted and fit with the evidence on the ground.

Thus, regardless of whether there was an original survey or not, a proper retracement involves determining the written intentions of the parties and placing those on the ground. If there was an original survey, that survey is the best representation of the intentions of the parties.

Control of Original vs. Retracement Surveys

Some surveyors posit that if there was no original survey of the parcel, then the first survey of that parcel does or should carry the same weight as the original survey. This author would tend to disagree with that approach as a *general* rule, but it is worth exploring and considering situationally. Remember, the issue is and always has been capturing the intentions of the parties.

The argument *against* relying on the first survey as if it were the original might be as follows. If the subsequent (“first”) surveyor was not a party to the original conveyance by virtue of not having conducted the original survey and not having prepared the description based thereon (or by not having prepared the original description where there was no survey), then it would seem irrational to rely on that person as being knowledgeable as to the intentions of the original parties. The intentions should come exclusively from the written record.



This found railroad rail ostensibly marks the position of a stone property corner set March 23, 1886. In 1943, an “iron corner post” was set in the same location. Was the railroad rail one and the same as the “iron corner post?” The surveyor in 1886 had also set a stone as a witness 2 rods to the north.



This witness stone was found 33 feet north of the railroad rail with a distinct “W” scribed on the south face (not readily visible in the photo).

The argument *in favor* of relying on the first survey as if it were the original might be as follows. If the subsequent (“first”) surveyor made a good faith and defensible effort to properly interpret of the written record, and conducted the survey in accordance with the normal standard of care for the given locale and time period, then could it not be considered to represent the intentions of the parties based on the evidence available at the time of that first survey?

There are several notable issues associated with accepting the latter approach wholesale. First, the best interpretation of the written record might very well involve interviewing those involved in the original conveyance (if there are any such persons remaining from that time period). However, relying on such information—particularly if it is in conflict whatsoever with the written record or with others that were interviewed—must be carefully considered because it might run afoul of the statute of frauds. This is why courts will not allow testimony from the parties that changes the terms of a written conveyance.

Secondly, relying on such a survey must be dependent on whether or not the survey represented a good faith effort that is a defensible interpretation of the written record. Unfortunately, in many (if not most) cases, there may be no information related to that survey other than some nondescript monuments found on the ground during your latter day retracement.

And if those monuments appear to be at odds with what the contemporary surveyor feels is a proper retracement, then it would seem an impasse has been reached. Evaluating the integrity of those monuments is problematic if their source is unknown. They could, however, be evaluated in accordance with the discussion above on Called for/ Documented monuments and perhaps a rational decision reached thereby.

After all is said and done, and regardless of how the contemporary surveyor approaches a retracement survey, the most important thing is that the methodologies and boundary law principles applied in conducting the survey be documented and made available for subsequent surveyors to review.

It is indefensible for surveyors to put great effort into finding, interpreting and resolving evidence, setting corners and preparing plats, maps or records of survey without documenting what was done, and why, for the benefit of future surveyors. To those who would argue with that statement, I would ask you to remember a particularly difficult retracement survey that you recently performed. What benefit would have been gained had they had clear documentation for all of the existing monuments that they found, and for the prior surveys that they know or suspect had been performed on and around the parcel they surveyed? Would it not be appropriate to leave evidence of *your* footsteps for the future surveyor? 