

By Gary Kent, LS

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## Unwritten Easements and ALTA/ACSM Land Title Surveys

Section 5.E.ii. of the 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys requires that the field work shall include *“Evidence of easements or servitudes not disclosed in the Record Documents provided to the surveyor, but observed in the process of conducting the survey, such as those created by roads; rights of way; water courses; ditches; drains; telephone, fiber optic lines, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property.”* Section 5.E.iv. further states that *“Evidence of use of the surveyed property by other than the apparent occupants observed in the process of conducting the survey”* must also be included as part of the field work.

These requirements charge the surveyor with locating evidence of what may be unwritten easements which could have a negative impact on the title of the property being insured. The surveyor is not responsible to *assess* whether that evidence actually represents an unwritten right—that’s the job of the title company. However, if the evidence in the field is not located and documented on the plat, the potential problem will not be revealed, and the title company may incur a claim as a result. When a title company suffers a claim as a result of evidence that should have been observed in the field and shown on the plat of survey—but wasn’t—the surveyor

will usually, either directly or indirectly, be pulled in as a party to the claim.

Section 5.E.ii., quoted above, lists a variety of improvements or conditions that could result in unwritten easements. But what types of *evidence* should the surveyor be looking for while conducting the survey? The list is almost endless—manholes, valves, standpipes, vent pipes, signs, posts, paint marks, pavement cuts, overhead lines, poles,

*are listed below) existing on or serving the surveyed property as determined by observed evidence.”* The list of “representative examples” includes *“Railroad tracks, spurs and sidings; manholes, catch basins, valve vaults and other surface indications of subterranean uses; wires and cables ... crossing the surveyed property; ... all poles on or within ten feet of the surveyed property; ... and utility company installations on the surveyed property.”*

**“Surveyors should consider including Table A item 11(a) on every Land Title Survey—whether the client asks for it or not.”**

guy wires, caves, gates, meters, transformers, pathways, swales, fire hydrants, and utility pedestals all are indications of possible unwritten rights. Given that this list includes a wide variety of utility features that *might* need to be located and shown, surveyors should consider including Table A item 11(a) on *every* Land Title Survey—whether the client asks for it or not.

Table A item 11(a) states that the surveyor is to locate and show the *“Location of utilities (representative examples of which*

Always including Table A item 11(a) as part of the survey relieves the field crew from having to decide if some particular utility feature is evidence of an unwritten right or not—it will always be located regardless. A wrong decision could cost thousands of dollars or more if a significant unwritten right exists, but the observed evidence was not located and shown.

What actually constitutes an unwritten easement? One state’s court identified as many as nine types of easements

under common law. Among others, the possibilities include easements by grant, reservation, condemnation, estoppel, way of necessity, implication, dedication, prescription, and ancient window doctrine (a common law easement for light and air). Of these, at least six (estoppel, way of necessity, implication, [common law] dedication, prescription,

and ancient window doctrine) represent unwritten easements.


It would be beneficial if surveyors were familiar with these various types of easements. Such familiarity would help them have a better sense of what types of evidence they should be looking for when conducting a Land Title Survey. Since the concept of an unwritten easement is

a creation of common law, in order to understand the nature of an unwritten easement, one must understand the related court decisions. In general, the elements of each type of unwritten easement are consistent across state lines, but there will be small differences and can be significant differences in how different state courts look at the requirements.

For the typical surveyor, it should not be too difficult to conduct some basic research into case law in most states, even without access to significant and potentially expensive legal resources like LexisNexis®. Some states, like Arkansas, have particularly user-friendly and comprehensive judicial decision search engines. In any case, the surveyor can go to his or her state's website and from there find the state's judiciary web-pages. A modestly competent internet surfer can normally find a page with the state's supreme and/or appellate court opinions. There is usually, although not always, a search function whereby searches can be made on opinions using key words. For example, a search on the State of Arkansas's website on the term "adverse possession" returns 1,382 decisions dating well back into the 1800's.

Google Scholar® is another very user-friendly resource. According to its "about" webpage (<http://scholar.google.com/intl/en/scholar/about.html>) Google Scholar "provides a simple way to broadly search for scholarly literature. From one place, you can search across many disciplines and sources: articles, theses, books, abstracts and court opinions, from academic publishers, professional societies, online repositories, universities and other web sites. Google Scholar helps you find relevant work across the world of scholarly research."

Considering our particular topic of unwritten easements, a search on "Indiana and 'prescriptive easement'" in Google Scholar returned 273 links, although not all are exactly on-point. The Indiana Supreme Court's search page returned 37 decisions after June 5, 2005.

Given such readily available resources and the abundance of court decisions that can be fairly easily found and reviewed, a surveyor can and should be familiar with, and well-versed in, the law of unwritten easements in his or her state. Armed with such information, surveyors can more effectively address their responsibilities to identify and report evidence of unwritten easements when conducting ALTA/ACSM Land Title Surveys. 

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