By Joel Leininger, LS

Joel Leininger is a principal of S.J. Martenet & Co. in Baltimore and Associate Editor of the magazine.

Boundaries by Acquiescence

We retracement surveyors, for the most part, labor within a stable and consistent part of the law. By this, I mean that from place to place, and over time, there is little variation in the doctrines defining correct practice. Monuments, everywhere, trump courses and distances, in the event of a conflict. Natural monuments, everywhere, trump artificial monuments. Sure the Public Land System approach deviates from that in colonial areas, but despite the impact on the landscape, the actual doctrinal deviation between the two systems is surprisingly small. There are many knobs and wrinkles across the country, but, for the most part, retracement is retracement.

That is, until we broach the subject of boundary establishment by acquiescence. A couple of issues ago, we addressed the dilemma of pincushion corners, and the theories driving our treatment of them. From a couple of different quarters came whiners assuming that because I did not mention acquiescence, I was either ignorant of the doctrine, or remiss in overlooking it. Neither is true. But of all the rules governing property lines, this one is the most dangerous for surveyors; it requires a deeper understanding of the intentions and actions of the parties than any other boundary element. It does not lend itself to independent verification. And, the rules concerning it are a complex jumble of conflicting standards across the country.

The Basics

At its most elementary, boundary by acquiescence is the laying-out (or adoption) of a boundary in a particular location by one person, and its being allowed to remain there undisturbed by the affected neighbor. It is grounded in the desire for stability in the parcel fabric and to discourage litigation. Most jurisdictions agree on those points–and only on those points. The rest of the elements of acquiescence are all over the map, excuse the pun. Some commentators argue that the doctrine does not apply to the Federal government; others extend that non-application to states and municipalities. It clearly applies to disputes *between* states; there are numerous Supreme Court cases where acquiescence proved controlling.

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Generally, courts distinguish practical location from acquiescence by considering whether or not there was a formal agreement between the parties (see "Practical Location," December 2005, in the online archives at *www.amerisurv.com*). Recall that practical location results when parties put into effect an ambiguous agreement. The subsequent actions of the parties clarify the otherwise unclear pact. Acquiescence requires no formal agreement, but looks to those actions nevertheless. The quiet enjoyment by parties on either side of a demarcation line, over time, ripens into that line becoming the actual boundary between the parties. Sometimes. In some states, the original location of the boundary must be unknown to the parties for the doctrine to kick in; in others, that element is irrelevant. In some states, the line has to be visible; in others, not so much. In some states the occupation must have continued for the prescriptive period, while in others it must have occurred "for a long time." Whatever that means. Standards like that drive technically-oriented people crazy. Because, although the courts are free to interpret fuzzy standards like that, no one else (surveyors, attorneys, title people) will be comfortable forecasting how a court would respond.

Okay, Now What?

Given all that, how should we include potential acquiescence in our analysis? It seems clear to me that our first task is to forget everything we might have read on the subject not written *specifically for our state*. I can't overstate this point. There seems to be no consensus across the country over what particular factors are necessary for acquiescence to move written boundary locations. Thus, inter-state debates over the subtleties of the doctrine are, at best, a waste of air, and at worst, likely to lead someone astray. Indeed, some states seem to have no appellate decisions on the topic at all. In those jurisdictions, it is possible that acquiescence, as a boundary doctrine, *does not exist.*

Second, research your state's appellate decisions on acquiescence, specifically focusing on the required elements for it to ripen. (A side note here: if you are one of the many surveyors who believe that expressing our opinions on adverse possession is outside of our bailiwick, put

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your pencils down now and close your booklets: your acquiescence experience is over. Proceeding further requires opining on unwritten acts and intentions.)

As I have pointed out before, gathering the relevant facts is the problem. Although it may be easy to determine the current limits of occupation (emphasis on *may*, here), determining the *longevity* of that occupation might prove more difficult. Factor in requirements as to the intent of both parties, and one should quickly realize opining on acquiescence is no walk in the park.

Opinionated Deficiency

Although I am a strong advocate for our being willing to opine on unwritten transfers of land as surveyors, the courts have several distinct advantages in this area. First, the courts can command participation of the involved parties. In contrast, parties are free to ignore us, and are not penalized for it. We can initiate all the contact we wish, but cannot compel response. Second, the courts can place witnesses under oath. In most jurisdictions, surveyors do not have that power. And, I'm sorry to say, even in those areas where we can elicit sworn testimony, I suspect many people would lie to us or stretch the truth if it suited their purposes. (Outside a court hearing, there is no real penalty for being untruthful. We have a former president to thank for that.) Finally, our results are not binding on either party. Should they be dissatisfied with our work, they are free to hire our competitor. (I point this out not to belittle our efforts, but to underscore the likely notion that people do not consider the analysis of a surveyor to have the same *gravitas* as a court proceeding. Thus, they can pick and choose what they say to us.)

Thorough records are an indispensable part of an acquiescence opinion. Signed affidavits by owners on either side of the line, stating the nature of their intent and understanding of the boundary line, as well as the age of the occupation, go a long way toward documenting the unwritten transfer. It's not that unwritten transfers are not good for society (they, of course, are), it's that the facts giving rise to their operation can be hard to reestablish as the years roll by. Sometimes the only fact left is the name of the surveyor who opined that the trespass ripened into title.

Tread carefully here. I can't think of a single doctrine laden with more minefields for us.