Considerations in Writing and Interpreting Deed Descriptions

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New York State Association

~of~

Professional Land Surveyors

Rochester, New York

Presented by

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The Schneider Corporation

January 22, 2014

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Biography of Gary R. Kent

Gary Kent is Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 31st year with the firm and his responsibilities include serving as project and account manager for several key clients, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a Bachelor of Science Degree in Land Surveying. He is registered to practice land surveying in Indiana and Michigan. Gary is chair of the committee on ALTA/ACSM Standards for ACSM/NSPS and is the liaison to NSPS/ACSM for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded "*Outstanding Associate Faculty*" and "*Excellence in Teaching*" awards for his efforts. He is also a certified instructor for the International Right of Way Association.

Gary is in eleventh year on the Indiana State Board of Registration for Professional Surveyors. He is frequently called as an expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying and GIS topics, and he also writes a column for *The American Surveyor* magazine.

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The Role of the Professional Surveyor in Writing and Interpreting Land Descriptions

Surveying is part Art, part Science, and part Law

The **art** aspect could be said to apply to the judgments and decisions in the field related to where, and to what extent, to look for evidence, and how that information is all presented. For example, having a gut feeling on where to dig to try and find a stone marker set in 1840, or how to most effectively run a survey line from one location across a ravine and river and through the trees to another location.

The **science** aspect is generally the science of measurement – using angle measuring devices (theodolites, total stations), distance measuring devices (electronic distance measuring instruments, steel tapes) and GPS (global positioning system which uses satellites).

The **law** aspects relate to the interpretation and resolution of legal descriptions and boundaries. There are virtually no statutes or legislated laws that tell surveyors how to determine boundaries; the rules for that are from a body of common law derived from hundreds of years of court cases related to boundary disputes and legal descriptions. Surveyors cannot make proper boundary determinations without studying and understanding what the "weight of authority" has been in case law.

Surveying can also be seen as part "*doing*" and part "*thinking*." It's one thing to make a measurement; with today's technologies, virtually anyone can make very precise survey-grade measurements. But it's an entirely different thing to understand where to make the measurements from, and to what, and how to apply those measurements to the facts and evidence at hand so a defensible boundary opinion can be made.

The retracement of a boundary is the professional opinion of the surveyor. That opinion is based on the evidence available to the surveyor; and if that evidence changes, the opinion may well change. Evidence comes in many forms – from the writings, from what is found in the field, from verbal and written statements, from measurements and from historical information.

Two competent surveyors faced with the same evidence will generally come to the same opinion, although there are occasions when the surveyors will simply have differing opinions as to how to interpret or weigh certain pieces of evidence. This can result in the two surveyors arriving at different conclusions as to a boundary location. If the surveyors cannot resolve the differences satisfactorily, and if the affected owners are inclined to litigate, a final determination will be made by a court.

Definition of Surveying – New York[1]

The practice of the profession of land surveying is defined as practicing that branch of the engineering profession and applied mathematics which includes the measuring and plotting of the dimensions and areas of any portion of the earth, including all naturally placed and man or machine-made structures and objects thereon, the lengths and directions of boundary lines, the contour of the

1 New York State Education Law – Article 145, Section 7203

surface and the application of rules and regulations in accordance with local requirements incidental to subdivisions for the correct determination, description, conveying and recording thereof or for the establishment or re-establishment thereof. [emphasis added]

New York State Land Surveying Practice Guidelines

Section 5

A. Research
The surveyor should develop, determine, and substantiate with reasonable certainty a professional opinion and provide a product that adequately addresses and reflects the historical development of the subject property or project. For the purposes of this section, a record is any documentary material filed in public repositories that maintain information about the location of real property.

1. For Boundary, Title or Similar Surveys:
   Research of records and record sources should be performed with sufficient scope and depth to identify with reasonable certainty:
   a. The location of the clients record boundaries;
   b. Conflicting record and ownership boundary locations within, abutting or affecting the client's property or access to the same; and,
   c. Exceptions, easements, encumbrances, rights of way, privileges, restrictions and reversions affecting the client property or access to the same in so far as they affect he professional determinations to be made be the surveyor.

   Note: None of the above is intended to require the surveyor to perform the title search. It is common practice for the surveyor to rely on title search information prepared by others qualified to do so.

Section 11

A. Deliverables
The surveyor should provide a professional opinion in the form of a written report, visual graphic representation, (map or electronic file) and/or correspondence as necessary, appropriate and/or as outlined in the agreement. Any such report or deliverable should be based on the surveyors' findings and professional opinion and should be:

1. Within and cover the scope of the agreement with the client;
2. Within the scope of the professional knowledge of the surveyor;
3. Supported by the facts, evidence and information relied upon by the surveyor;
4. In a format which will convey relevant and/or record information, and organized and displayed to be as comprehensible and understandable as possible to the client or their agent.

B. Mapping Requirements
All maps prepared should include the following information and all such additional information necessary to visually convey the findings of the survey to the client or their agent, other knowledgeable practitioners and/or the public.
A boundary survey map is a drawing that depicts the mathematical and physical features of a parcel of land with relation to deeds of record, map lines, and/or other pertinent reference data based upon an actual field survey. The map should:

1. Identify the client or project name;
2. Identify the surveyor, the surveyor's address and license number;
3. Identify the instruments affecting title to the parcel surveyed;
4. Identify the north reference and/or basis of bearings;
5. Provide sufficient data for the mathematical closure of the boundary lines depicted with the area enclosed indicated;
6. Clearly relate the record description calls to the parcel including deviations;
7. Identify record documents (i.e. mapping or other information) utilized in the establishment of the boundary lines surveyed;
8. Reference the parcel to the local political or municipal entities and/or boundaries (i.e. county, town, village, street lines, tax map parcel number);
9. Reference a datum and a specific benchmark or reference point when elevations are shown;
10. Identify the scale and any conversion factor necessary;
11. Identify character and location of visible physical features with reference to boundary lines as necessary to inform the owner of critical issues affecting title (i.e. encroachments, easements, structural projects and openings, visible utilities);
12. Indicate date of field survey completion and date of map preparation;
13. Identify and describe monuments found or set on the property being surveyed;
14. Identify all revision dates to original map with changes clearly stated;
15. Reference apparent easements, rights of way and lease lines;
16. Indicate applicable ties (i.e. building corners, intersections, other monuments)

Map information and or survey reports should be clear, legible, and sufficient in nature so when associated with the record description, the boundary lines are evident without supplemental data or information.

C. Survey Reports

A Survey Report if prepared, should provide a narrative description of the project, scope of work performed, a detailed description of the procedures, record information used, findings and the basis of the findings.

2011 ALTA/ACSM Land Title Survey Minimum Standards

6. **Plat or Map** - A plat or map of an ALTA/ACSM Land Title Survey shall show the following information. Where dimensioning is appropriate, dimensions shall be in accordance with the appropriate standard of care.

*** * ***

A. Boundary, Descriptions, Dimensions and Closures

i. The current record description of the surveyed property, and any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision.

Legal Descriptions

Purpose and Sufficiency

Legal descriptions exist for the purpose of describing the unique size, shape and location of real estate that is the subject of a conveyance. A legal description should uniquely describe *only* the subject parcel, and no other, without ambiguity.

A Land Description must be considered legally "sufficient" or the conveyance may be declared invalid or require reformation. "Sufficiency" means that a competent surveyor can locate the described real estate on the ground – with or without reference to extrinsic evidence. If a surveyor cannot locate the real estate, it is essentially an indeterminate tract of land. If the property cannot be identified, it is assumed that no conveyance took place.

Where there are conflicts or ambiguities in the description, the courts have held that what is contained within the four corners of the document will control unless extrinsic evidence is otherwise required to ascertain the intentions of the parties.

There are dozens of common law principles that aid in interpreting legal descriptions and that address conflicts in legal descriptions. Given those principles, very few legal descriptions are ever held to be insufficient by a court.

Sufficient? - An exception contained in a deed in Jefferson County, Missouri…

> *EXCEPTING also a piece of ground about 7 feet wide and 14 feet long near the Northeast corner of the West Half of the Northeast quarter of said Section, Township and Range aforesaid.*

"When words, or the lack of them, or the arrangement of them, used in descriptions results in ambiguity, both the interpretation of them and the physical location of the boundary lines from them become questionable." Writing Legal Descriptions, *Gurdon Wattles*

The Elements

Descriptions often are said to have three parts, although many descriptions will not have all three distinct parts and some types of descriptions may combine two or more of these parts.

The "Caption" gives the general location of the parcel (within a certain county, township and section, for example). The real estate that is the subject of the description cannot lie outside the area that is defined by the caption.

The "Body" of the description defines the distinct size, shape and location of the actual parcel.

The "Exceptions and Qualifications" remove those interests or portions of the land described in the body that ultimately are not being conveyed. For example, *"…, except, however, 10 feet off the entire south side of said tract."*

Types of Descriptions

The huge majority of legal descriptions will take the form of one, or a combination two or more, of the following:

Metes and Bounds

A metes and bounds descriptions is a legal description that describes real estate by directions and distances from a commencing and/or beginning point. It is the only type of legal description that actually circumscribes the parcel - describing its entire perimeter.

> *Example*
> Part of the Northeast Quarter of Section 15, Township 17 North, Range 4 East of the Second Principal Meridian in Hamilton County, Indiana being described as follows:
>
> **Beginning** at the Northeast corner of said Northeast Quarter; thence North 89 degrees 35 minutes 46 seconds West along the north line thereof a distance of 1201.35 feet; thence South 01 degrees 15 minutes 06 seconds West parallel with the east line of said Northeast Quarter a distance of a distance of 1167.88 feet; thence South 89 degrees 35 minutes 46 seconds East parallel with the aforesaid north line a distance of 1201.35 feet to the east line of said Northeast Quarter; thence North 01 degrees 15 minutes 06 seconds East along said east line a distance of a distance of 1167.88 feet to the **Point of Beginning**. Containing 32.21 acres, more or less.

Subdivision Lot

Described as a lot, or part of a lot, in a subdivision. The subdivision plat becomes part of the description by reference and the property is defined by the geometry on the record plat.

> *Example*
> Lot 23 in Pebblebrook, Section 4, an Addition in Hamilton County, Indiana per plat thereof recorded as Instrument No. 91-12345 in the Office of the Hamilton County Recorder.

Aliquot Part

An ‘aliquot part’ is a standard subdivision of a U.S. Public Land Survey System section of land.

> *Example*
> The West Half of the Southwest Quarter of the Northeast Quarter of Section 15, Township 17 North, Range 4 East of the Second Principal Meridian in Hamilton County, Indiana,. Containing 20 acres, more or less.

Area

In an acreage description land is described by defining a specific area of land in relation to a parent tract. Often, acreage descriptions are ambiguous; not in the *amount* of land being transferred, but in

defining the dividing line.

Example
Ten acres by parallel lines off the entire north end of the tract of the following described tract of land:

Part of the Northeast Quarter of Section 15, Township 17 North, Range 4 East of the Second Principal Meridian in Hamilton County, Indiana being described as follows:

Beginning at the Northeast corner of said Northeast Quarter; thence North 89 degrees 35 minutes 46 seconds West along the north line thereof a distance of 1201.35 feet; thence South 01 degrees 15 minutes 06 seconds West parallel with the east line of said Northeast Quarter a distance of a distance of 1167.88 feet; thence South 89 degrees 35 minutes 46 seconds East parallel with the aforesaid north line a distance of 1201.35 feet to the east line of said Northeast Quarter; thence North 01 degrees 15 minutes 06 seconds East along said east line a distance of a distance of 1167.88 feet to the **Point of Beginning**. Containing 32.21 acres, more or less.

Strip Descriptions

A strip description is typically used to describe a linear transportation or transmission route in a more concise manner than by metes and bounds or some other means.

Example
A strip of land 20 feet in width, the centerline of which is described as follows:
Part of the Northeast Quarter of Section 15, Township 17 North, Range 4 East of the Second Principal Meridian in Hamilton County, Indiana being described as follows:

Commencing at the Northeast corner of said Northeast Quarter; thence North 89 degrees 35 minutes 46 seconds West along the north line thereof a distance of 1201.35 feet to the **Point of Beginning**; thence South 01 degrees 15 minutes 06 seconds West parallel with the east line of said Northeast Quarter a distance of a distance of 1167.88 feet to the **Point of Termination**

Bounds

A bounds description defines a tract of land by that land which bounds it. It s a good way to eliminate the possibility of any title gaps or overlaps, but it can be ambiguous if the descriptions for the adjoiners are themselves ambiguous. It is frequently used in the metes and bounds (colonial states), but not very often at all in the Public Land States.

Example
Forty acres of land in Section 15, Township 17 North, Range 4 East of the Second Principal Meridian in Hamilton County, Indiana being bounded on the north by the land of Gary Kent, on the East by the land of Scott Lawson, on the South by the land of Ronald Miller and on the West by the land of Debra Butler.

Combination Descriptions ("Quasi - Metes and Bounds")

These are combinations of, or variations on, other types of descriptions.

Linear

Example
100 feet by parallel lines off the entire north end of the following described tract: Part of the Northwest Quarter of Section 12, Township 36 North, Range 8 East in Allen County, Indiana being described as follows:

Beginning at the northwest corner of said northwest quarter; thence North 89 degrees 12 minutes 07 seconds East along the north line thereof a distance of 1200.00 feet; thence South 01 degrees 13 minutes 14 seconds East a distance of 230.00 feet; thence South 89 degrees 12 minutes 07 seconds West a distance of 1203.25 feet to the west line of said northwest quarter; thence North 00 degrees 25 minutes 07 seconds West along said west line a distance of 230.00 feet to the Point of Beginning. Containing 3.25 acres, more or less.

Proportional Parts

Proportional parts descriptions are problematic and should be avoided when writing a description because while they create equal areas, they do not create a dividing line between those areas.

When interpreting such a description, the surveyor needs to recognize the weakness of the description. The facts on the ground may indicate how the affected parties interpreted how to create those equal areas. However, the facts on the ground may *not* indicate such or may not create equal areas.

Example
The East half of Lot 20 in Bridlewood Addition, per plat thereof recorded in Plat Book 18, Page 20 in the Office of the Recorder of Boone County, Indiana.

Division Line

Example
All that part of Lot 20 in Bridlewood Addition, per plat thereof recorded in Plat Book 18, Page 20 in the Office of the Recorder of Boone County, Indiana lying north of the following described line:

Commencing at the northeast corner of said Lot 20; thence on a plat bearing of South 00 degrees 01 minutes 35 seconds West along the east line thereof a distance of 125.00 feet to the **Point of Beginning**; thence North 88 degrees 37 minutes 25 seconds West a distance of 212.57 feet to the west line of Lot 20 and the **Terminus.**

Sequential Conveyances

While the principles with regard to intent are clear, the problem often faced by the surveyor is how to properly ***interpret*** the written intentions when the writings contain patent or latent conflicts.

While the courts have, by virtue of hundreds of years of rulings, developed a weight of authority to be given to the various elements of a description - what Curtis Brown called the "Order of Conflicting Title Elements" in Boundary Control and Legal Principles - the exact application of those rules is highly dependent on the individual set of facts and evidence for the given boundary.

The courts have held that, notwithstanding the weight of authority, the elements of the deed will be applied in a manner that best express the intentions of the parties. Thus, a call for what would normally be a higher ranking element may be overridden by an ostensibly lower ranking element if it can be shown, for example, that the higher ranking element was used in error. In keeping with this, all of the terms of a description must be considered in light of each other when attempting to resolve what the intent actually was.

The application of intent to resolve boundaries has a major qualification – intent is applicable only to the parties of the conveyances, it cannot affect third parties. Therefore, even when the intent is expressly understood, that intent may be otherwise altered by facts and circumstances outside the realm of the parties to the conveyance itself – in particular, unwritten rights and senior rights.

The Order of Importance of Conflicting Title Elements

1. Right of Possession (Unwritten rights)
2. Senior rights (in the event of an overlap)
3. Written Intentions of the Parties
    a. Call for a Survey
    b. Call for monuments
        i. Natural
        ii. Artificial
    c. Call for Adjoiner
    d. Direction and Distance
    e. Direction or Distance
    f. Area (quantity)

Issues for the Surveyor – Matters of Title vs. Matters of Survey

With respect to boundaries, the *surveyor* deals with matters of survey, primarily location – the "where" of a boundary. Sometimes the boundary location is not in question – the deed description is unambiguous and there are no issues with the adjoiners. Many times, however, the description(s) require interpretation to eliminate or resolve the ambiguities. Either way, we are in the realm of "where" which falls in the authority of the surveyor.

Alternatively, the *law* deals with "what" that boundary line is – in essence, what the boundary represents with respect to title (ownership). These concepts of "where" and "what" are often, however, not mutually exclusive. The best example of that is with unwritten rights.

> `What constitutes the line, is a matter of law; where it is, is a matter of fact.' *McCanless v. Ballard*, 222 N.C. 701, 703, 24 S.E.2d 525; *Jenkins v. Trantham*, 244 N.C. 422, 426, 94 S.E.2d 311. *Smothers v. Schlosser*, 163 SE 2d 127 - NC: Court of Appeals 1968

When there is a title conflict or boundary dispute, who can resolve the situation? The surveyor? The attorney? The title company? The judge or jury? The answer to all of those is "No" – at least not by themselves.

The only parties who have the ability to resolve the situation are the affected owners. They can do it the less painful way, by agreement, or the more painful way, by litigation (which is where the court comes in). One could argue that a judge or jury can resolve a conflict, but how does it get into court? Only at the initiative of one or both of the parties.

Unwritten Rights

The surveyor's role is to *understand* the elements of unwritten 'conveyances,' so they can advise the client of the possibilities. The surveyor, however, has no legal authority to move a line based on unwritten rights without a record document for support.

There are a number of means by which boundaries can be established by unwritten means. Yet each of these doctrines would seem to be contrary to the otherwise inviolate Statute of Frauds, which requires that conveyances of real property must be in writing. The courts have found a way around this conundrum; however, by determining that these doctrines do not transfer title, but rather merely fix what were otherwise uncertain lines.

Everyone can agree that the doctrine of adverse possession falls in the realm of title, not survey. The necessary elements typically include all, most, or some version of, the following: adverse or hostile, open and notorious, visible, actual, exclusive and with a claim of right or color of title. Some states also require payment of the property taxes due on the area being claimed. The statutory period varies from 3 to 21 years depending on the state, with some states providing for shorter periods if the claimant can show color of title, that the taxes had been paid, and/or if the nature of the possession was especially open.

Courts do not look kindly on the doctrine of adverse possession which is why every single element most be proven - typically by "clear and convincing" evidence. Failure to prove only one of the elements is enough to defeat the entire claim. However, when a claim of unwritten rights is perfected in a court of law, it (1) confirms that the line of ownership changed from the original written title line, and (2) creates marketable title to the ownership line.

With a few exceptions, the states view the unwritten boundary doctrines of acquiescence, practical location, and – obviously – parol agreement, as being manifestations of prior boundary line agreements, contrary to adverse possession which arises out of contentious situations. Even the

doctrines of estoppel and repose could be seen as representing boundary line agreements – in essence, inverse agreements, whereby the inaction of one party can be taken as an implied acceptance of a claim by an adjoiner.

Each of the various unwritten boundary doctrines has its own set of specific requirements that must be met in order for a court to perfect the claim. Some requirements are problematic in that they require a look inside the mind of the claimant; and some requirements are counterintuitive. As an example of the former, in some states a claim of adverse possession is defeated if it can be shown that the claimant did not intend to possess someone else's land (i.e., it was 'by mistake"). With regard to the latter, in some states, a parol agreement between two parties to set a common line is not valid if there is no conflict in the written title or if a survey would have otherwise resolved the uncertainty.

All of the doctrines that alter boundary lines by unwritten means are matters of title, not survey. And title by unwritten means can only be perfected by a court. If a surveyor decides to act on his or her opinion that unwritten rights have operated and move a written boundary line to conform with that opinion, he or she has stepped over the line - out of survey and into title. However, Thomas Cooley, Chief Justice of the Michigan Supreme Court in 1881, wrote "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…"

Thus, if the surveyor can bring the affected parties together and convince them to acquiesce to the line that represents surveyor's opinion (which was most often a long-established, and ostensibly a long-agreed upon line anyway), then the surveyor might have 'cover' to survey to the agreed-upon line. In such cases, however, it is virtually a given that the surveyor, after preparing such a survey, should also prepare descriptions and an exhibit showing and describing to the agreed upon line, and then go no further until the owners engage an attorney or attorneys to see that the proper written documents are prepared and recorded memorializing and providing notice of the agreed-upon line. Otherwise, what may have been an agreement in the moment could easily devolve into a dispute later on which the surveyor will most assuredly be dragged into.

Additionally, there are very important, but not always obvious, issues such as the treatment of mortgages that might be affected by the new line which must be properly vetted by an attorney. Also, if the elements of whatever doctrine the surveyor relied on as the basis for his or her opinion were not met (including those elements that impossibly require one to climb inside the head of one or both of the parties), the surveyor is at great risk if the written title line was disregarded and there was no acquiescence by the parties to the surveyed line.

But the surveyor may be uncomfortable or concerned about violating standards, practicing law or determining a matter of title. Or perhaps, despite an attempt, the neighbor and client simply could not be convinced to agree to the line that represents the surveyor's opinion. Either way, the surveyor will be left with surveying to the written title line and showing any conflicts with adjoiners' deeds or with occupation/possession. Except in a few states, this is actually what is expected of surveyors, and/or required by state statutes or administrative code/rule (standards).

Either way, no matter what line the surveyor decides to go with, there must be clear communication of the necessary information so the client does not act ill-advisedly and cause a problem with an

adjoiner. For example, perhaps there is a five foot overlap with an adjoiner and your client's written title line falls five feet over the neighbor's fence. If the surveyor deems it necessary to monument that location (or if the parties could not otherwise be brought to agreement), he or she had better clearly understand what is going on and advise the client accordingly. Why? Because the client will most assuredly assume that she owns to the rebar and take steps to exercise domain over to that line (5 feet over the fence) to the detriment of the adjoiner's rights.

> *"No one has the legal right nor vested authority to change any line of a recorded title without a new and proper document in the recorder's office to support it."* Writing Legal Descriptions, Gurdon Wattles.

Junior/Senior Rights

In most public land survey states and in many of the colonial states, surveyors do not routinely attempt to resolve junior/senior conflicts. Rather they simply report the potential conflict, which is what the ALTA/ACSM Standards require.

In New England and Texas; however, surveyors *must* 'resolve' junior/senior relationships in order to comply with their respective states' laws.

There are surveyors around the country, even outside New England or Texas, who would suggest that there is only one boundary; and in order to properly determine its location, the surveyor must resolve the junior senior relationship. This argument creates an interesting dichotomy in attitudes towards title. No knowledgeable surveyor would suggest that title should or could be resolved by a surveyor when it is potentially affected by unwritten rights (e.g., adverse possession, acquiescence) because they know it is the purview of the courts to ascertain whether or not such rights have been successfully achieved, and to perfect written title if they have.

Yet, most real estate attorneys would assert that resolving junior/senior rights is *also* a title issue, not a survey issue. The ALTA/ACSM Survey Standards ever since 1962 and in the 2011 version, in particular, also take this stance. When preparing an ALTA/ACSM Land Title Survey, the surveyor is to disclose the gap or overlap to the title company and client prior to delivering the final survey *"for determination of a course of action concerning junior/senior rights."* [2]

Aside from boundaries per se, surveyors *do* get indirectly involved in title when performing an ALTA/ACSM Land Title Survey. The primary purpose of the ALTA/ACSM Survey Standards is for the surveyor to locate and show those conditions observed that could adversely affect title to the property being surveyed. Such conditions would include potential prescriptive easements and adverse claims by others. By virtue of a proper and complete Land Title Survey, the title company is appropriately informed of such conditions and can, by virtue of listing them in the title commitment, likewise inform the interested parties, and help facilitate responses or solutions that will eventually aid in a successful real estate transaction.

[2] 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Section 6.B.vii.

Marketable Title

Marketable Title Acts exist in about 20 states under a variety of names. Alabama is not included in these states. The purpose of these acts is to allow for the removal of potential title defects of 'ancient' origin by essentially enacting statutes of limitation that act to clear away obscure property rights that might otherwise cloud title.

Under a Marketable Title Act, it is possible to extinguish ancient interests, whether they are revealed in the present day or in the future, unless the holders of such interests act to protect their interests by recent recordation.

Marketable Title Acts vary substantively in the states that have them. Differences include the property interests that are subject to the act, the statutory period of limitation, the period of time allowed for recording of notices preserving rights, and exceptions contained therein.

According to a combination of sources, states that have some form of Marketable Title Act include California (limited), Colorado, Connecticut, Florida, Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wyoming.

Marketable Record Title Act Example – North Carolina[3]

§ 47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

3 North Carolina General Statutes, Chapter 47B – Real Property Marketable Title Act

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use.

Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

§ 47B-4. Preservation by notice; contents; recording; indexing.

(a) Any person claiming a right, estate, interest or charge which would be extinguished by this Chapter may preserve the same by registering within such 30-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the real property is situated, setting forth the nature of such claim, which notice shall have the effect of preserving such claim for a period of not longer than 30 years after registering the same unless again registered as required herein. No disability or lack of knowledge of any kind on the part of any person shall delay the commencement of or suspend the running of said 30-year period. Such notice may be registered by the claimant or by any other person acting on behalf of any claimant who is

(1) Under a disability;

(2) Unable to assert a claim on his behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) To be effective and to be entitled to registration, such notice shall contain an accurate and full description of all real property affected by such notice, which description shall be set forth in particular terms and not be by general reference; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the real property at the time the notice is registered and a statement of the claim showing the nature, description and extent of such claim. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register of deeds shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and registered and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the real property to be affected against whom the claim is to be preserved at the time of the registration. (1973, c. 255, s. 1.)

Recordation Statutes

Where there is a gap or overlap between properties – representing some sort of conflicting junior/senior rights - some surveyors will (and in some states, like New England and Texas, must) research the chain of title to attempt to determine which deed is senior. Surveyors need to recognize that this is an exercise in title, and not a matter of survey. In doing so, the surveyor is essentially deciding who "owns" written title to the area in question. However, the answer is not always clear by simply examining the written record. This is because the effect and order of recordation and the date of execution of conflicting deeds can differ from state to state and may be dependent on whether there was notice to subsequent purchasers of prior conveyances.4 Another very simply way of saying this is that the first deed recorded is not necessarily the senior deed.

4 See http://www.legalmatch.com/law-library/article/recording-acts.html

Race statute

Also known as the "Race to the courthouse." The rule that the document recorded first wins and will have priority over any later recordings.

- States that follow the Race statute: Delaware, Louisiana, and North Carolina. [One source found also included Maryland]

Notice statute

A later buyer who pays fair value for the property and does not have notice that there were any other earlier conflicting interests, wins and will have priority over any later recordings. If a prior interest records first, but not until after a subsequent purchaser paid fair value, that recordation has no effect.

- States that follow the Notice statute: Alabama, Arizona, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia.

Race-Notice statute

A later buyer who pays fair value, does not have notice of any other earlier conflicting interests, and records first, wins and will have priority over any later recordings.

- States that follow the Race-Notice statute: Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio (regarding mortgages, Ohio follows the Race statute), Oregon, Pennsylvania (regarding mortgages, Pennsylvania follows Race), South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. [Note: one source found stated that Maryland is a race state]

Recordation Act – New York[5]

§ 291. Recording of conveyances. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment the rent to accrue therefrom as provided in section two hundred ninety-four-a of the real property law, in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees, if such

[5] Laws of New York, Real Property, Article 9 (Recording Instruments Affecting Real property)

contract is made in good faith and is first duly recorded. Notwithstanding the foregoing, any increase in the principal balance of a mortgage lien by virtue of the addition thereto of unpaid interest in accordance with the terms of the mortgage shall retain the priority of the original mortgage lien as so increased provided that any such mortgage instrument sets forth its terms of repayment. [emphasis added]

Title Insurance

In the United States, the system of land tenure does not, in and of itself, provide for a definitive guarantee or even assurance of ownership, except – to some extent - in the half dozen states where title registration is available (and even in those states it is not required and is seldom used). A deed is, of course, only *evidence* that a person may own the described tract of land. Thus, in the past, buyers and lenders relied on abstracts of title and associated opinions from real estate attorneys examining that abstract. Today, title insurance is the primary means by which interested parties receive their assurances as to the integrity of title.

Thus title insurance companies are relied upon to provide for the continuity, confidence and permanence in title that is necessary for a functioning democratic society. Because the system does not inherently provide the necessary assurances, title companies conduct searches and risk analyses and then provide insurance, so conveyances, mortgages, and other actions and transactions involving real estate can take place generally without the concern or liability associated with finding that someone else owns the property that you paid for and thought was yours.

Because of its importance and ubiquity in real estate conveyancing title insurance is relatively heavily regulated in most states.

Title Registration ("Torrens")

Torrens Title Registration is a system of registering land titles whereby the state essentially guarantees an indefeasible title to those included in the register. Once title to real estate is registered, it is transferred not by the traditional deed, but rather through the written registration.

In short, in an "abstract system" of title, the abstract is <u>evidence</u> of title. In the Torrens system, the Certificate of Title <u>is</u> the title.

The primary advantage of title registration is that it simplifies conveyances of real property and provides for a state guarantee as to the ownership of absolute title. It is very common in many parts of the world and at one time as many as twenty-one of the United States had Torrens statutes. However, according to one source, the only states that continue to provide for some form of title registration are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, North Carolina, Ohio, Pennsylvania, Virginia and Washington. Another source did not include Pennsylvania is this list. In any event, while title registration is not widely used in any state, Hawaii, Massachusetts, Ohio

and Minnesota probably see the most registered lands. Illinois repealed its registration of title law in 1992. At one time, twenty or twenty-one states had statutes authorizing title registration.[6]

Disadvantages of title registration are primarily the costs and time involved in the preparation and review of a complete abstract of title and survey, and the remedying of any deficiencies. It would appear that in many cases nowadays, due to underfunded indemnity funds, concerns of lenders over potential claims where there are exceptions to registration, and perhaps a simple lack of understanding of the title registration system, title insurance is still required even when the real estate conveyed is registered.

Written Intentions of the Parties

The courts have held categorically that the highest and best evidence of the lines and corners of a tract is 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 is a different topic.

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*.

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.

Control of Original Surveys vs. Retracement Surveys

Some 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 writer 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 this… If the subsequent 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 her as

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6 Reference is made to http://www.inversecondemnation.com/inversecondemnation/2010/04/land-court-schmand-court-state-disregards-torrens-title-claiming-unstated-preexisting-rights.html; http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/torrenact.html; and http://www.vuwriter.com/vumanuals.jsp?displaykey=UM00000004

being knowledgeable as to the intentions of the original parties.

The argument *in favor* of relying on the first survey as if it were the original might be this… If the subsequent (i.e. "first") surveyor made a good faith and defensible effort to properly interpret of the written record, and conducted her 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 survey?

There are several notable issues associated with accepting this 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.

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. 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.

Monuments

In deeds written without benefit of a survey, calls for monuments are presumed to reflect the intentions of the parties or they would not have been inserted. An uncalled for monument cannot; however, in most cases, be considered controlling when in conflict with other elements.

Monuments are ranked by their certainty – the likelihood of being confused or destroyed. Thus, natural are highest in ranking followed by artificial monuments and then record monuments (calls to adjoiners).

> [R]eferences to natural landmarks and artificial monuments take precedence over distance descriptions (see *Brown v Ames*, 290 AD2d 693, 694 [2002]). *Henshaw v. YOUNES*, 101 AD 3d 1557 - NY: Appellate Div., 3rd Dept. 2012.
>
> [W]here there is a discrepancy in deed calls, the rules of construction require that resort be had first to natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances and last to quantity (see *Thomas v Brown*, 145 AD2d 849, 535 NYS2d 836 [3d Dept 1988]). *Macklowe v. TRUSTEES OF THE FREEHOLDERS & COMMONALITY OF TOWN OF E. HAMPTON* 2012.

Original Monuments

The following can be stated categorically: a monument that can be positively proved to be incorrect, even though it has been accepted by numerous surveyors as being correct, cannot be held as the true corner.

Such a corner *may* represent the basis for current lines of ownership, but that does not make it the 'record' corner. Resolving the conflict between a record corner that differs from a corner that defines property lines (sometimes called a "title corner") as part of conducting a retracement survey is an exercise that is highly dependent on the specific facts and evidence of the situation – there is no single rule that can guide the surveyor in all cases.

In any case, a strong argument can be made that the most significant rule in all of surveying, in fact the entire crux of the U.S. Public Land Survey System, and the one least likely to be disregarded by the courts (and, hopefully, by surveyors), is that an *original, called-for, identifiable, undisturbed* monument has no error.

As noted above, there is a difference between a monument set on an original survey and one set on a retracement.

The original surveyor initiates the establishment of the corner and monuments it. In the case of a U.S. Public Land Survey corner, the acceptance of the deputy surveyor's plat locks in the corner. In the case of a monumented property corner, the execution of a document creating or conveying an interest 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 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 retraceable on the ground), then they are to be re-established 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?

"Called For"/Documented

Generally, monuments must be 'called-for' in a document of record in order to be controlling, although there are exceptions.

Whether a U.S. Public Land System corner or a deed/property corner (I am not discerning between these two terms for purposes of this presentation), it is highly desirable that a monument have some sort of documented history before it is considered as being held for a corner. A monument with a documented history at least has some level of credibility - subject to the evidence provided by that history and whether or not the monument has been disturbed. On the other hand, an *undocumented*

monument raises all kinds of questions like: Who set it? For what purpose was it set? Where was it intended to be set? When was it set? How was it set?

Holding a *documented* corner becomes a matter of the credibility of the evidence supporting its position – what its history is and whether or not it has been disturbed. However, holding an *undocumented* monument as a corner is inappropriate except when there is no better evidence. There are several scenarios in which the undocumented monument might be the best evidence.

An undocumented corner might be held by *common report* (also called *'reputation'*). This is most common in the case of original U.S. Public Land Survey corners, aliquot corners of the USPLSS and subdivision corners. It could also apply to certain property corners that are referenced by, or common to, numerous record descriptions. Paraphrasing from the Fifth Edition of Brown's Boundary Control and Legal Principles (Brown, Robillard and Wilson), a monument by common report is one that has been commonly accepted by numerous surveyors as being correct, but whose history is lost in antiquity, and the integrity of whose position can neither be proved nor disproved.

Holding a monument by common report is not something that is done lightly, these criteria are formidable. The definition lends itself to a critical evaluation of the evidence – or lack thereof – before deciding to accept an undocumented, un-called for monument as a corner.

Undocumented monuments ostensibly marking property corners will often not meet the requirements of a corner by common report. This is because such monuments often relatively local and obscure and would not have lent themselves to having *any* sort of reputation. They normally are not of a nature that resulted in numerous surveyors relying upon them as correct. However, this does not prevent such a monument from being held as a property corner when there simply is no better evidence. Particularly in the metes and bounds states, descriptions often are so old and poorly written that evidence provided by otherwise undocumented fences, walls, monuments and other features may very well be the best evidence there is.

Undisturbed

When a documented monument is found, the first question that should be asked is *–Is it in its original position? O*r put another way - *Has it been disturbed? D*etermining whether a monument has been disturbed, or not, could obviously be a somewhat subjective exercise, but it should not, however, be completely devoid of objectivity.

The accuracy of an original survey conducted in the past can reasonably expected to be less than that of a contemporary survey. The contemporary surveyor must try to determine when the earlier survey was performed, and to compare what has been found with what constituted an acceptable level of accuracy during that time period. This step should not occur in a vacuum, however; because it is also important to try and find out *who* did the survey. Some surveyors did work that was, accuracy-wise, either better or worse than their contemporaries and this needs to be taken into account. The fact that someone conducted a poor or inaccurate survey compared to normal standards does not necessarily invalidate the results of an *original* survey. (Inaccurate *retracement* surveys constitute an entirely separate issue that we will touch on later in this column).

Assessing the monuments from an older survey vis-à-vis what was acceptable or expected given the

specific period and surveyor should not be difficult for someone who has been surveying in an area for any reasonable length of time. If the surveyor does not already know this information, it is incumbent that he or she learn and become intimately familiar with it. Otherwise, one cannot assess old evidence with the requisite level of confidence.

An example of this can be found in certain areas of my state of Indiana. In some counties there were excellent surveyors in the past who, for whatever reason, measured very poorly. Their overall work is well known by local surveyors to be of a high level of integrity. When they said that they found or set certain monuments, it is well-documented that, in fact, they did. But putting faith in the quality of their measurements is a bad mistake. As a result, finding their monuments in unexpected locations is … well … expected. Knowing that simple fact allows the contemporary surveyor to accept a greater margin of error in 'found vs. reported' locations of monuments without determining that those monuments have been disturbed.

So, the contemporary surveyor should be able to assess a monument's location (i.e. has it been disturbed) in light of the time period it was set, the region (county, city or town, for example) and, if known, the surveyor who set it. Whether or not it meets the accuracy expectations of the circumstances under which it was set is one piece of information that should be assessed in the eventual decision of whether to accept it or not.

Identifiable

The integrity of a monument is also directly tied to the ability of the surveyor to identify it as being that same monument referenced, for example, in a deed, on a plat or map, or in a corner record. Except where local history provides some context (i.e. Surveyor X always used ½ inch rebars or Surveyor Y always set cotton gin spindles), nondescript or poorly described monuments are a major hindrance. Survey plats or maps that show "I.P." are maddening. Surveyors have seen "I.P.'s" that varied from ½ inch rebars to vertical railroad rails to copper pipe to 1 inch iron bars, to steel fence posts to "t" bars to buggy axles and everything in between.

The credibility of a certain monument is certainly raised up when it matches its description in the record. When it does not, its integrity is almost fatally flawed.

Distance and Direction

Where there is only a direction and distance obviously, the surveyor will hold both.

Where there is a conflict between a distance and a direction, it is more important to analyze the specific situation and rely on whichever is most appropriate in expressing the intent of the parties, than it is to blindly apply a rule. It is, however important to understand the common law in the specific state. At least one state (Texas) has even legislated the issue.

Area

Area controls only in two cases. First, when it clearly represents the intentions of the parties as with an area description (e.g., ten acres off the entire south end of the half-quarter section). And second,

when the description is so ambiguous that area must be relied upon to clarify other elements higher in the order.

Coordinates

Coordinates have historically been a function of direction and distance, thus they could not be above them in the hierarchy. However, with the pervasive use of GPS, where directions and distances may have been derived from coordinates, this may change. Time will tell.

Other Considerations

Preparing a New Description for an Existing Parcel

A boundary survey is most often performed specifically for purposes of retracing the boundary lines of a tract of land. The responsibility of the surveyor is to recover the best evidence available to rely upon in retracing the lines of the parcel described in the record. A new description should not be written unless deemed necessary and appropriate by the surveyor and title company (if there is one involved in the transaction). Generally, the following conditions might call for a new description:

- The parcel is being consolidated with others and the title company is being asked to provide a contiguity endorsement (i.e., insuring the perimeter of the total tract)
- The record description is fine, but imprecise enough that it is misleading
- The record description is poorly written, contains errors or otherwise needs to be modified to eliminate some title problem

Two Descriptions in the Same Deed

Metes and Bounds vs. Lot/Block

- In there is conflicting case law in some states as to whether a metes and bounds description will control over a recorded block or lot description.

General Descriptions

- The use of a general description (usually superseding or following the primary description) may aid in ascertaining the intent of an otherwise ambiguous description. It is well-established common law that the more specific of two conflicting descriptions will be held to control.

Referencing Records – Supporting information

When making references to documents, make them only to a <u>recorded</u> document whenever possible

An unrecorded map will also be controlling if called, but finding the document and confirming that it is the same one referenced can be problematic. Also, the parties must have had common knowledge and an agreed understanding of the facts on any mutually recognized map.

Mention of a map - recorded or not – is the same as a call for a monument, however, if based on a survey, the lines surveyed and monuments set on the survey will generally override the bearings and distances shown on the map.

Public records vs. Quasi-public records

1. Office of Pubic Records
   - Deed Books/Libers
   - Subdivision Plats
   - Condominium Plats
   - Minor Plats
   - Maps/Plats attached to deeds
   - Recorded Surveys

Quasi-Public records – try to not reference such documents in descriptions, although sometimes this cannot be avoided.

1. County Surveyor
2. Clerk/Court
3. City Engineer
4. City/State DOT
5. County Highway
6. etc.

Streets, Roads and Highways

Many court cases have affirmed that conveyance of land adjoining a street carries the underlying fee to the center OR TO THE ORIGINAL DIVIDING LINE wherever that line was. Such a claim is subject to 2 conditions:

(1) the easement and rights of the public, and
(2) Whether or not the grantor owned that part of the street at the time of the conveyance and, if so, were there words denying the conveyance thereof?

A. Fee in a road stays with the adjoining owner based on the original boundary
   1. "*California Rule*" says a description calling for a sideline and along a sideline excludes title to the street
   2. "*New Jersey Rule*" says nothing short of express intent to NOT include the street will exclude the street from being conveyed

B. Vacation or Abandonment
   1. There are no definitive settled rules of law for apportionment of vacated land
      i. prolongation of lot lines
      ii. proportional frontage
      iii. radial lines
      iv. by right angle

   In many cases, Surveyors would be advised to merely refer to that part of the vacated street/road adjoining the subject tract rather than try to describe it.

C. Reversion of Title
    1. This is actually a misleading term; it is actually the reclaiming of rights previously imposed on the property by virtue of a right of way easement, etc.
    2. Who does the strip revert to in the case of a strip that ran through a property and one side of the remaining land was sold to the sideline of the strip?
    3. Ordinances, laws and even court rulings do not impact clear written title regarding underlying fee title in vacated rights of way.

D. Lots and adjoining parts of vacated streets
    1. Streets and lots are two separate and distinct terms.
    2. Be sure the wording in the description is definitive - if the map is not clear, put a clarifying statement of intent - "Beginning at the northwest corner of Lot 10, being for purposes of this description, on the east line of the 60 foot right of way of Kent Street as shown on ..."

Railroads

Status of railroad rights of way varies. Must determine if original deed to railroad in fee. This is often not easy and is the subject of many court cases.

Also, note description of original grant/conveyance (did it describe a line or "to the center of the tracks" or "to the center of the tracks to be laid")

Understanding of words and phrases

A. Latent vs. patent ambiguities
B. Adjacent vs. adjoining vs. contiguous vs. contiguity vs. coincident with
C. Conveyed vs. described!

Do's and Don'ts

- Avoid calling for "deed" and "measured" dimensions in a description
- No abbreviations

Water Boundaries

A. The Surveyor must be familiar with state laws regarding riparian rights
B. Meander lines
C. Natural boundary lines
D. Boundaries of streams, rivers, etc.
    - Non-Navigable vs. Navigable
E. Boundaries of artificial water areas
F. Boundaries extended into relicted lands vs. boundaries theoretically extended for placement of docks in state-owned waters…