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October, 2016

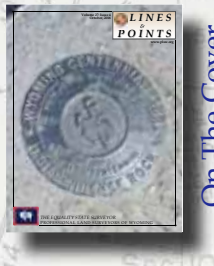
LINES & POINTS

www.plsw.org

THE EQUALITY STATE SURVEYOR
PROFESSIONAL LAND SURVEYORS OF WYOMING

P.L.S.W.

Publications Committee



On The Cover

Centennial Acre Monument
photo by: Morris & Hudson

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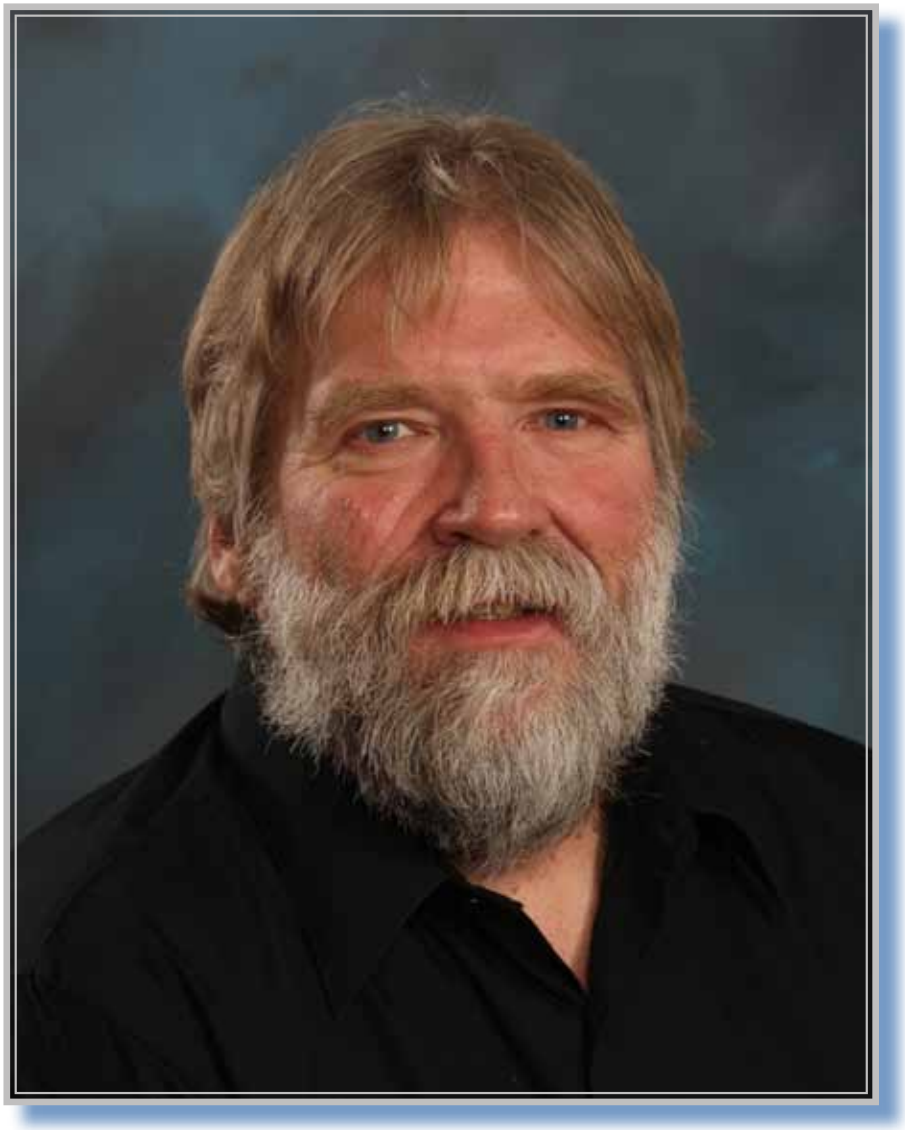
2016 PLSW SUSTAINING MEMBERS

- Jenn Heinrich - Frontier Precision Inc.
- John Baffert - Surv-KAP, LLC
- Chris Farnsworth - RDO Integrated Controls
- Kelly Goff - Underground Consulting Solutions
- Susan Hall - Trimble
- Tim Klaben - Berntsen International Inc.
- Troy Langston - Monsen Engineering

PLSW (Professional Land Surveyors of Wyoming; PO Box 725, Afton, WY 83110) is a statewide organization of Land Surveyors registered to practice in the Equality State of Wyoming. PLSW is dedicated to improving the technical, legal, and business aspects of surveying in the State of Wyoming. PLSW is affiliated with the National Society of Professional Surveyors (NSPS) and the Western Federation of Professional Land Surveyors (WestFed).

PRESIDENT'S MESSAGE



Greetings, fellow members and associates of PLSW:

Where did summer go? It seems like there is never enough time to do the things that you want to do and barely enough time to do the things you have to do. But, fall is here and is my favorite time of the year. The fall colors are beautiful and the crisp morning air can be quite awakening. The sounds of fall such as an elk bugling and geese honking make me realize that it is now the time to make the time to do the things I want to do.

Hopefully everyone has reviewed the contents of the "Resolution on Destruction of Survey Monuments" which is posted on the PLSW website. This topic will again be on the agenda for discussion at the November Board of Directors meeting to hopefully keep it moving forward. Send your comments by email to Karl Scherbel.

The Fall Technical Session will be held November 3rd and 4th at the Parkway Plaza, Casper, Wyoming. The speaker is Kristopher Kline. Mr. Kline is a regular contributor of articles to POB magazine and has published several books on survey related subjects. The topics that will be discussed are "How to Fix a Boundary Line (and How Not to)" and "Prescriptive Easements Like You've Never Seen Them". Both are interesting topics that should provide information for us to apply regularly. Hopefully you have already registered and made hotel reservations as there is also a High School Sports state tournament happening the same time. I look forward to seeing you all there.

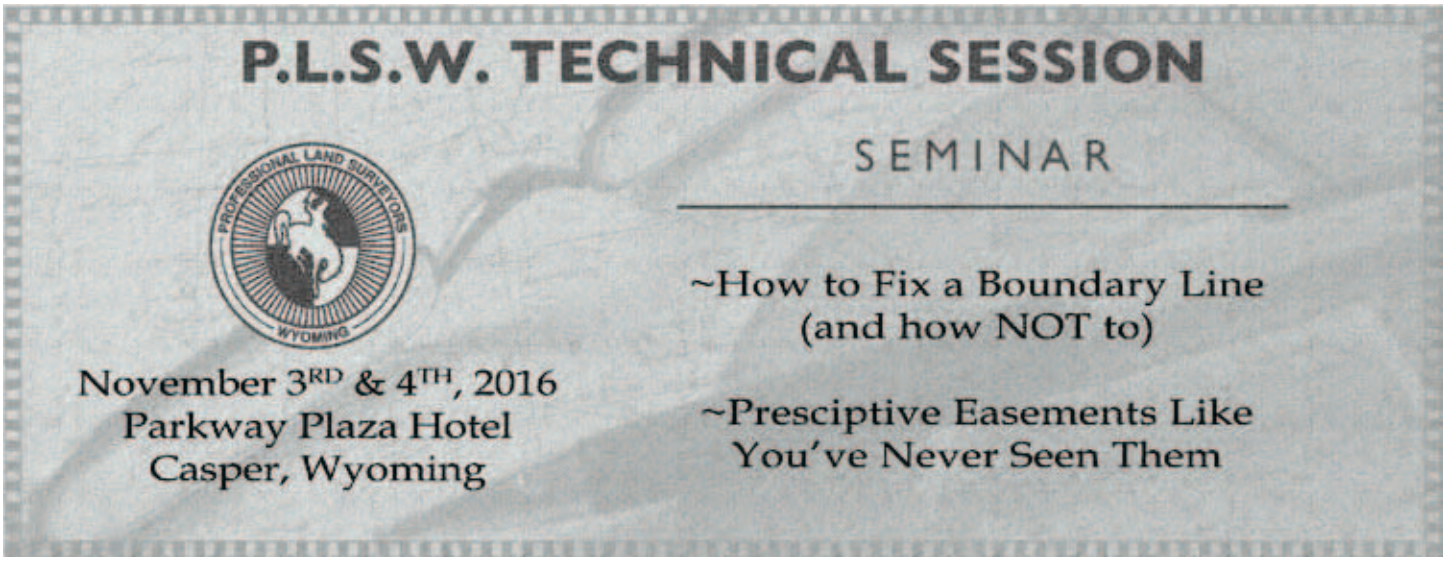
The outreach program that the State Board of Registration started has taken off with several of our members willingly providing presentations to local youth groups. I encourage others to get involved as this is a great way to get youth interested in a surveying profession. Along with the outreach program, we continue to offer the Trig-Star examinations, for which school participation has decreased slightly but the program has opportunity to grow with our support.

Be safe at work and home and take the time to do the things outside of work that you work to live for. Spend time with family, friends and enjoy what you enjoy doing.

Randy Stelzner, P.L.S., CFedS

President, Professional Land Surveyors of Wyoming

Deuteronomy 27:17Cursed is the man who moves his neighbor's boundary stone. Then all the people shall say, Amen!



Kristopher M. Kline, president of 2Point, Inc., has a four-year degree (class of '84) in General Science from Bridgewater College located in Bridgewater, Va. He has been involved in the surveying profession since graduation.

Kris became licensed in North Carolina in 1991 (P.L.S. L - 3374). He is a 1999 graduate of the North Carolina Society of Surveyors (N.C.S.S.) Institute, a three-year continuing education program that for many years drew national attention for the quality of its curriculum and instructors. Kris served for 3 years as Chairman of the N.C.S.S. Education Committee.

In 2001, Kris began offering continuing education courses in North Carolina on legal aspects of retracement. More recently, his teaching career has expanded to include conferences and seminars nationwide. Course offerings now include a broad range of topics, including adverse possession & other unwritten rights, riparian law, mineral rights and courtroom preparation. Customized courses tailored to the jurisdiction in which they are presented enhance their value to the professional. Kris has presented several keynote addresses for state conventions.

In 2011, he established "Unmistakable Marks," a new column published in "Point of Beginning" a trade magazine for surveying professionals. Kris presently submits bi-monthly articles for the magazine, with over 30 articles published to date. These articles are written for a national audience and generally focus on various legal aspects of boundary retracement.

In August 2013, Kris published his first book "Rooted in Stone: the Development of Adverse Possession in 20 Eastern States and the District of Columbia." This text considers adverse possession and prescriptive easements from their early origins to the present day. Separate chapters are dedicated to variations between jurisdictions in the eastern United States.

His second book, "Riparian Boundaries and Rights of Navigation" includes extensive discussion of the many definitions of the term "navigable." This short volume was completed in 2015 and focuses on property rights along smaller rivers, streams, lakes and estuaries. It considers the inevitable confusion that results when modern definitions are applied to early grants and the effects of subsequent legislation on riparian rights.

How to Fix a Boundary Line (and how NOT to)

This course examines various legal mechanisms which courts apply in order to fix the location of a disputed or uncertain boundary line or easement. Topics include: Adverse Possession (in depth, approximately 4 hours), Boundary by Estoppel, Conditional and Consentable Boundary Lines, Practical Location, Parol vs. written agreements, and Part Performance of Oral Contracts. A short segment on the doctrine of Merger is also included.

Prescriptive Easements Like You've Never Seen Them

While the basic concepts behind prescriptive easements are widely recognized, many developments in this area of the law are fairly recent. The course begins with the development of the Lost Grant Theory and its relationship to prescriptive rights in the United States. The various elements required for the creation of a prescriptive easement are discussed in detail. Tacking and claims by (and against) the state are considered, along with the scope & location of the resulting easement. This class also considers court rulings for prescriptive easements associated with: Parking Areas; Subterranean and Visible Utility Easements; Light and Air; Trees and Shrubbery.

ANNOUNCEMENTS

The Wyoming Engineering Society

2016 President's Project of the Year Award.

The guidelines for submission of a project may be found at:
www.eng.uwyo.edu/societies/wes

Entries must be received in Laramie on or before Friday, January 6, 2017.

Congratulations!

The members of the Professional Land Surveyors of Wyoming would like to recognize the achievement of the following new Wyoming registrants:

Brett Farmer	Cody, WY	LS 15644
David Kemper	Wilson, WY	LS 15645
Nathan Sturtevant	Sheridan, WY	LS 15646
Daniel Corriell	Denver, CO	LS 15699
Eric Wall	Evanston, WY	LS 15730

Lines and Points Article Rotation Submission Schedule By Chapter

Responsible Chapter	First Call Date	Last Call Date	Publication Date
Upper Platte Chapter	Thank You!!	(see "Centennial Acre Revisitation" in this issue)	
Southwest Chapter	December 1	December 15, 2016	January 1, 2017
Northeast Chapter	March 1	March 15	April 1, 2017
Northwest Chapter	June 1	June 15	July 1, 2017
West Chapter	September 1	September 15	October 1, 2017
Central Chapter	December 1	December 15, 2017	January 1, 2018
South Central Chapter	March 1	March 15	April 1, 2018

Point Collection from the Air!

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RDO Integrated Controls is your single source solution for senseFly products and support.

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Avoiding The Traps Of Gaps And Overlaps

SUR 460 Final Research Project

by Matthew Kneeland
Great Basin College, Fall 2015

A fairly common issue that land surveyors may encounter is the issue referred to in various terms including: hiatus, gaps, gores, overlaps, areas of confusion, and lappage. This is an issue the author has encountered numerous times over 17 years in various capacities in the land surveying field. Throughout this paper the terms gap and overlap will be used in reference to spaces between what should be adjoining properties and overlaps between properties that should share a common boundary, respectively. In researching the topic, it became apparent that little if any statutory law exists that specifically deals with the issues of gaps and overlaps. Therefore, the conclusion presented in this paper is based upon historical case law. Although this is a common issue for surveyors, based on the author's experience and colloquial evidence, few surveyors are confident in dealing with it. Further, based on the conclusion reached by this research, even fewer are dealing with it correctly. Compelling evidence exists to confirm that gaps and overlaps cannot, and do not, exist with respect to property boundaries. When these issues do appear to arise, they are not a survey problem. How then do surveyors encounter the problem repeatedly over the years, and continually find themselves entangled in the mess that arises from evidence that indicates a gap or lappage does exist?

Literature Review

There are two main groups in this topic: gaps and overlaps. Gaps are not encountered with nearly the frequency of overlaps and as such, the majority of our discussion will focus on overlaps. To begin, we will discuss the existing research on gaps.

Gaps: The most complete publication discovered in research on the topic of gaps is the Public Lands Surveying Casebook (The Casebook). Although it was prepared by the Bureau of Land Management, it provides useful information for a private surveyor. According to *The Casebook*, "in strictly legal contemplation they do not and cannot exist because all must have an ownership, there is no such thing as "no man's land".

Despite this statement that gaps cannot occur, there are several cases presented in *The Casebook* in which they do appear to occur. The first is United States v. Weyerhaeuser Company. In this case, there appeared to be a gap between Townships 27 and 28 South, Range 8 West of the Willamette Meridian in Oregon. Township 28 South was surveyed in 1855 and the plat and field notes were approved in July, 1856. Approximately 40 years later, Township 27 South was surveyed, the retracing surveyor did not find all of the corners along the north line of Township 28 South and new monuments were set. In 1961, it was discovered that the two lines were not coincident and there was a gap between the two townships. Weyerhaeuser was the successor in title to sections along the south line of Township 27 and sued for damages to timber cut in the gap left between the Townships. The argument was that the line was supposed to be run along the Standard Parallel and the accepted plat showed that the south line of the township was the Standard Parallel, which had been established by the survey for Township 28 South. Under this logic, the survey for Township 27 South could not create a new Standard Parallel. The United States successfully argued that Weyerhaeuser's land was patented based on the monuments set under the survey for Township 28 South and did not extend to close the gap between the townships. The government argued that since the land in the gap had not been patented, it was still public land and the government could dispose of it as it saw fit.

This case gives us an example of how the courts would handle gaps in public land, so long as the property within the supposed gap had not been patented, it would remain public land until the government saw fit to dispose of it. This view is confirmed in numerous later cases.

Gaps not affecting public land appear a bit easier to handle. According to Jeffery Lucas, 2011, someone owns the gap property and in a perfect world it would be the property of the junior deed holder to the common boundary; unless it was retained by the grantor. This falls in line with court rulings like United States v. Weyerhaeuser and Unites States v. Macmillan. In practice, the gap is

usually so small as to preclude consideration that the gap was retained by the grantor. In the case where gaps left are very small, the assumption is made that the grantor intended to grant the remainder of his estate to the junior deed holder rather than retain a trifling parcel of property. Lucas tells us that "the difficulties of finding some distant heir (or, more likely, multiple heirs) of the original grantor do not justify the cost, and equity will not support such an effort" (Lucas 92-93).

OVERLAPS: Overlaps are much more common and they are frequently more complicated than gaps. When defects in title or possession give rise to overlapping claims, a surveyor is in a particularly uncomfortable situation. Overlaps can occur as a defect in title, or they may present themselves as a discrepancy between title and possession lines.

According to *The Casebook*, some of the elements that must be considered in dealing with overlaps are:

1) What is the evidence of location of the first (senior) survey? Is the evidence conclusive as to the location of the senior line? Do the monuments exist?

2) What is the evidence of location of the second (junior) survey? Is its location conclusive?

3) Was the junior survey executed and platted in a manner with its boundaries being expressly limited by the senior survey? Did the junior survey close against the senior survey (closing corners)? Did the junior survey adopt the senior corners (random and true line principle)?

4) Is the difference in location of the junior survey materially different from that of senior survey, or is the conflict merely a technical difference caused by slight errors in executing the second survey.

5) What is the ownership status?

a) Is all of the land in the public domain?

b) If partially patented, when was entry first made and when was patent issued? On what survey plat was the patent based?

c) What is the sequence of patents in the area of conflict? Was patent issued to lands based on the junior survey prior to a patent (in conflict) based on the senior survey?

d) Is a patent based on the junior survey only in conflict with public lands as marked or determined by the senior survey?

6) Was the junior survey executed at a time when all of the lands in both townships were vacant public land, and if so did the junior survey supersede the senior survey?

7) Was the junior survey a dependent resurvey and therefore expressly limited by the boundaries of the senior survey?

A few common concepts have arisen from case law. For example:

- Adams v. C.A Smith Timber Company, the courts considered the conflict between patented rights which had both been surveyed and monumented. It was discovered later that the original survey had been made in error and was "mostly fictitious" (*The Casebook*). This led the court to rule in favor of the senior patent. This is a recurring theme in many cases involving overlapping patents of federal land.
- Lindsey v. Hawes. In this case, an overlap in title existed where Lindsey paid cash for the land on a cash entry. Lindsey later died and his heirs did not make application for patent. Some years later, Hawes made entry for the same parcel. The Land Office set aside Lindsey's entry without a hearing and Hawes was granted a patent. Lindsey's heirs later successfully sued for recovery of the land. This ruling fixes the date of entry for the basis of determining junior-senior rights over the date of the patent (*The Casebook*).
- Wirth v. Branson, a case in which patent was issued for a NE quarter-section but there was confusion on the part of the grantee as to which quarter-section was conveyed to him. In short, the Land Office allowed the grantee to choose another quarter-section, which his assignees did do. However, the original patent was never vacated, leaving the grantee as the owner of the original erroneous patent, as well as the newly selected quarter-section. The Land Office later patented the NE quarter-section to another grantee. The original grantees' successor in title successfully claimed rights to the original NE quarter-section that was patented. The courts ruled that the government could not issue another patent without first cancelling the original patent and could not have reclaimed the original quarter-section against its own patent. "First in Time, First in Right."
- Lawson v. Winemiller. This case is significant because it involves allegations of surveyor negligence in dealing with an overlap. In this case, Lawson sued the surveyor, Winemiller, for

(CONTINUED ON PAGE 18)

CENTENNIAL ACRE REVISITATION

Anita M. Morris, P.L.S. and R.L. "Rick" Hudson, P.L.S.

RECALL

Who among us remembers the Wyoming Centennial Acre? Who still has the deed and plat for their square foot of that historic tract? How many of us have actually set foot upon this unique site?

THE BACK STORY

According to "A History" by Herbert W. Stoughton, PLSW Historian, Professional Land Surveyors of Wyoming involvement with what became the Wyoming Centennial Acre at Independence Rock began with Past President John Steil's mention of the Montana Centennial Acre at the Board of Directors' meeting in Casper on 22 May 1987. Interest was generated and John's presentation at the annual state meeting in Cheyenne on 4 February 1988 convinced the BOD to authorize funding for brass markers at its March meeting.

A suitable location near the Independence Rock State Historic Site was agreed upon and surveyed in April 1988, followed by drafting of the plat. The Certificate of Surveyor was signed and sealed by John A. Steil, then signed by Larry T. Perry, Tim K. Merrill, and Paul A. Reid. The Dedication was signed by Governor Mike Sullivan and others on behalf of the State of Wyoming, and by President Stanton J. Abell, Jr., and Secretary Becky J. Braman on behalf of PLSW. The plat was recorded on 14 July 1988, by John Tobin, Natrona County Clerk, with reception number 447147, at the county courthouse in Casper.

The on-site dedication ceremony was held on 10 July 1988, with Kathy Karpan, Secretary of State, delivering the keynote address.

The primary purpose of the project was to generate funds, through the Wyoming Centennial Commission, for the celebration of Wyoming's admission to statehood on July 10, 1890. PLSW provided the distinctively monumented original survey and artistically embellished official plat of the one-acre tract of land - and encouraged members to join the general public by purchasing symbolic deeds for one square foot of the site priced at only ten dollars.

Advertisements appeared in our recently created newsletter Lines & Points, Volume 2, Numbers 1, 2, and 3, during 1990. John reported a total of 1,600 "lots" had been sold by February 1989, increasing to 7,500 by January 1991, indicating substantial public support of the project.

THE ORIGINAL SURVEY

The site is situate to the west of Independence Rock, in the N½NE¼ of Section 16, Township 29 North, Range 86 West of the Sixth Principal Meridian, Natrona County, Wyoming, a few tens of feet north of the left bank of the Sweetwater River. The north line coincides with the section line, the northeast corner falling a little less than one-quarter mile from the witnessed section corner which is on the southwest portion of the prominent granite landmark.

By state statute the parcel must contain one acre and be symbolically subdivided into one square foot lots. Obviously a square, containing 43,560 square feet, and measuring 208.71 feet on each side, would result in linear and area shortages; and proportioning each lot to 0.9986 foot and 0.9972 square foot would have been justifiably subject to public hue and cry of "Fraudulent Survey!"

Applying 'veyor logic to the task resulted in quantifying the area as ten square chains, a chain being 66 lineal feet. Using three chains,

WYOMING

Centennial Acre Deed

Acre 1: Independence Rock

The State of Wyoming, through its Wyoming Statehood Centennial Office presents this deed prepared especially for

R.L. Hudson

In consideration of an investment in A Lasting Legacy of what is best in America, a piece of Wyoming, this deed symbolizes interest in one square foot number 1186 located in Natrona County, according to the Centennial Plat, recorded with the Natrona County Clerk on the 14 th day of July, 1988.

The holder of this deed is entitled to the general enjoyment of the proud heritage and glorious future of the Equality State in recognition of the one-hundredth anniversary of Wyoming's admission to statehood on July 10, 1890.

Governor Mike Sullivan

Richard M. Hartman, Chairman
Wyoming Centennial Commission

Howard M. Johansen, Commissioner
Department of Public Lands

R.D. "Max" Maxfield, Director
Wyoming Recreation Commission

Title to the land described in this deed is subject to the provisions of W. S. 9-2-1608 and 9-9-1609. Such title is limited by right of the state of Wyoming to manage the land for the benefit of the general public and the deed holders' enjoyment of the land. Ownership as evidenced by this deed, does not entitle the holder to any right of use of the land different than that of the general public, nor does it obligate the holder to pay property taxes, assessments or any other fees or levies customarily incident to title.

Land Description

Wyoming Centen

at

Independence

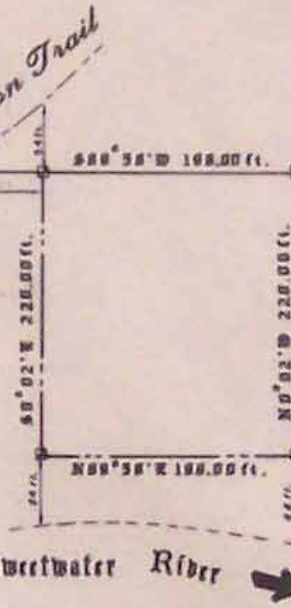
A tract of land situate in the N.E. 1/4 of Section 18, T.28 N., R.68 W. of the 6th P.M., Natrona County, Wyoming, being more particularly described as follows:

Commencing at the N.E. corner of said Section 18; thence, S 89°58' W along the North line of said Section 18 a distance of 1282.32 feet to the Point of Beginning of the parcel to be described; thence, continuing S 89°58' W along said North line a distance of 198.00feet; thence, S0°02'E a distance of 220.00 feet; thence, N89°58' E a distance of 198.00 feet; thence, N0°02' W a distance of 220.00 feet to the Point of Beginning.

The above described parcel contains 1.00 Acre more or less and is subject to the provisions as set forth in U.S.C. 9-2-1808 and U.S.C. 9-2-1809.

Col. William F. (Buffalo Bill) Cody

1/4 9/16



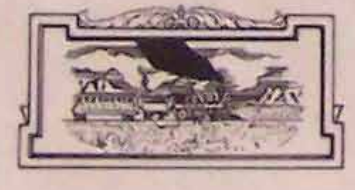
Certificate of Surveyor

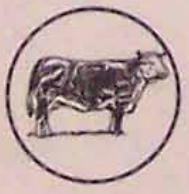
United States of America
State of Wyoming } ss

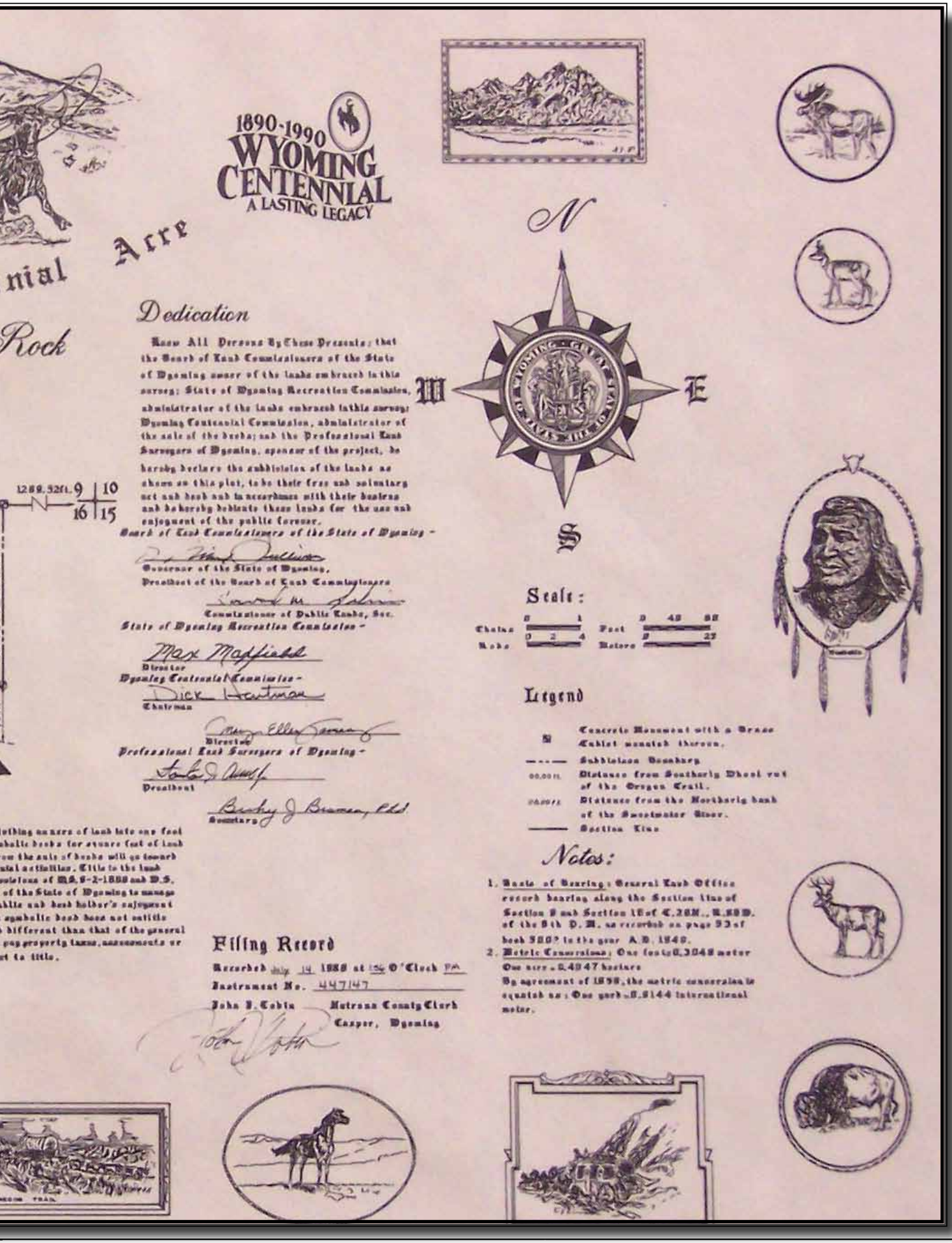
I, John A. Steil, a registered Land Surveyor in the State of Wyoming do hereby certify that this plat of Wyoming Centennial Acre has been prepared under my direct supervision from field notes of a survey made during the month of April A.D.1988, by the following members of the Professional Land Surveyors of Wyoming, whose work I have reviewed and accepted, all in fact exist in the preparation of this survey.

Reg. L.S.2500

Name	Wyoming Reg. No.
Larry T. Perry	LS 3047
[illegible]	LS 2767






1890-1990
WYOMING
CENTENNIAL
A LASTING LEGACY
nial
Acre
Rock
Dedication
Know All Persons By These Presents: that the Board of Land Commissioners of the State of Wyoming owner of the lands embraced in this survey; State of Wyoming Recreation Commission, administrator of the lands embraced in this survey; Wyoming Centennial Commission, administrator of the sale of the deeds; and the Professional Land Surveyors of Wyoming, sponsor of the project, do hereby declare the subdivision of the lands as shown on this plat, to be their free and voluntary act and deed and in accordance with their desires and do hereby dedicate these lands for the use and enjoyment of the public forever.
Board of Land Commissioners of the State of Wyoming -
Governor of the State of Wyoming,
President of the Board of Land Commissioners
Commissioner of Public Lands, Sec.
State of Wyoming Recreation Commission -
Max Maddifield
Director
Wyoming Centennial Commission -
Dick Hartman
Chairman
Director
Professional Land Surveyors of Wyoming -
President
Secretary
N
W
E
S
Scale:
Chains
Rods
Feet
Meters
Legend
Concrete Monument with a Brass Tablet mounted thereon.
Subdivision Boundary
Distance from Southerly Bheal rut of the Oregon Trail.
Distance from the Northerly bank of the Sweetwater River.
Section Line
Notes:
1. Basis of Bearing: General Land Office record bearing along the Section line of Section 9 and Section 16 of T.28N., R.88W. of the 6th P. M. as recorded on page 93 of book 3807 in the year A.D. 1940.
2. Metric Conversions: One foot=0.3048 meter
One acre = 0.4047 hectare
By agreement of 1893, the metric conversion is equated as: One yard = 0.9144 International meter.
Filing Record
Recorded July 14 1988 at 154 O'Clock PM
Instrument No. 447147
John D. Cubin Natrona County Clerk
Casper, Wyoming

198.00 feet, for opposite sides of a rectangle, and 3 1/3 chains, 220.00 feet, for the adjacent sides yielded one acre, the required 43,560 square feet, and insured each purchaser receipt of an equal aliquot part precisely containing one square foot.

Retracement of the section line, measurement of the parcel boundary, ties to nearby features, and setting of monuments and accessories at each of the four corners was performed by John Steil in April 1988.

The plat, drafted by Larry Perry and Tim Merrill, not only serves as a legal document but also as a splendid example of historic cartographic style. Adorned by Larry's pen and ink depictions of Wyoming life, compass rose, and calligraphy, it was recorded in July 1988.

VENTURING FORTH

We decided to venture forth and chose Saturday, June 11, 2016, for the revisitation; intentionally to coincide with the 160th anniversary of the Sixth P.M. initial point commemoration. Leaving Encampment at 8:00 a.m. we arrived at our destination within two hours under sunny skies, a light breeze and warm, later hot, temperature.

Preliminary research sources included the USGS for quadrangle "Independence Rock", the NGS for data sheet stations K 31 and S 332, and the BLM for GLO resurvey field notes and survey plat, all available via the internet. The Natrona County website was not queried initially, as would have been routine for more typical corner recovery or retracement surveys.

Upon arrival we loaded waypoints into two hand held GPS receivers and commenced the search and recovery phase of our adventure.

CORNER RECOVERY AND REPORTING

Due to equipment problems, we resorted to navigation-grade GPS (WAAS) positioning methodology with Rick observing in NAD 83 state plane coordinates and Anita observing in latitudes and longitudes. Admittedly, we both could have been mistaken for geocachers – were it not for our attire, the note keeping, close-up photography, and reverence of the excellent monumentation.

Although we failed to recover station S 332, we did recover K 31 and all four corner monuments and accessories of the Centennial Acre. As depicted in Anita's photographs, the corners are marked by distinctive disks set in concrete monuments with capped iron pipe witness posts alongside; all recovered in excellent condition.

After lunch, eaten at one of the rest stop's covered tables, we began our search for the witness corner to the section corner near the base of Independence Rock. It was right beside the foot path but camouflaged by tall grass. We could have walked past it; were it not for the GPS waypoints, the uncanny ability of 'veyors to "sniff out" corners, and the 2006 remonumentation.

Our last corner search was for the section corner marks chiseled during the 1940 dependent resurvey into the sloping top of the southwest flank of Independence Rock. In the sunlit, lichen-encrusted granite surface, we first spotted the

cross, then the township, range, sections and date scribing. All were beautifully scripted and in good condition, albeit less than plainly visible.

With the successful recovery of all four Centennial Acre corner monuments and the PLSS monumentation, the need for more precise surveying was deemed unnecessary, perhaps even inappropriate. A State of Wyoming Corner Record, cross-index no. J-12-13, 29-86, titled "Northeast Corner of the Wyoming Centennial Acre", has been prepared by Rick. It is now on file at the office of the Natrona County Clerk and Ex-Officio Register of Deeds, thus providing the "official" report in the publicly accessible land records of that county. A copy of the front page accompanies this article.

Having completed our mission by mid-afternoon, we elected to continue our adventure by taking the Buzzard Road to Lamont and then returning to Encampment via the highway and interstate. The wide county road through Natrona County and into Carbon County eventually became little more than a two-track (but with cattle guards) and traversed several miles through the sand dunes to Ferris before widening into two lanes of graded county road. We were quite pleased to have set foot upon the Wyoming Centennial Acre which is certainly a legacy site for past, present and future Wyomingites.

PERPETUATION

Over the nearly two score years (since 1980) of our existence, PLSW has been involved in numerous projects benefiting the welfare of the public, of which the Wyoming Centennial Acre is a classic example. As older members are replaced by newer licensees and interns, memories of predecessors and colleagues begin to fade. Following their footsteps is a time-honored tradition of our profession, be it through corner recovery and retracement, or through records research and documentation. While some old soldiers perhaps tell war stories; nearly all old land surveyors do tell 'veyor tales – both raconteurs relying upon embellished versions of fading memories of people, places and events.

Stranger to the Deed

by Knud E. Hermansen †
P.L.S., P.E., Ph.D., Esq.

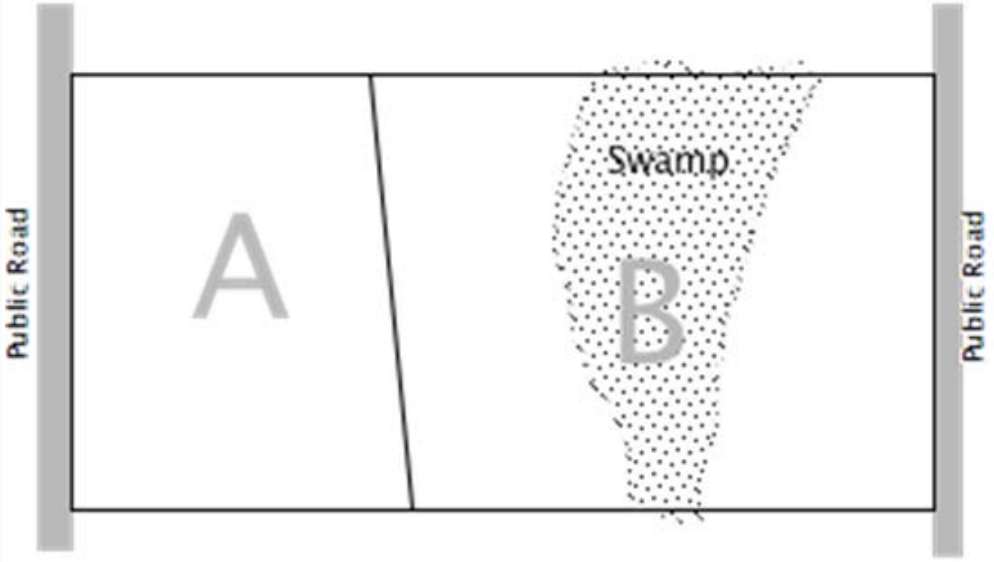
A surveyor queried me in regard to a conversation he had with a neighbor's attorney. The neighbor's attorney claimed that the surveyor's client did not have a right of way across the property belonging to the attorney's client.

The surveyor pointed out as proof positive that his client's easement was expressly mentioned within the deed of the attorney's client. How can the neighbor deny an easement does not exist when the easement is described in his deed?

Background

Here are the facts with the names omitted.

The owner of parcel B (surveyor's client) has wanted an easement for many years across parcel A (neighboring property) in order to access that portion of parcel B that could not be accessed without crossing a swamp. The owner of parcel A had always put off the request for an easement for parcel B by promising to convey an easement to the owner of parcel B at the time the owner of parcel A conveys his property. He was attempting to sell parcel A.



The owner of Parcel A, the neighboring property, entered a purchase-and-sales contract to sell his property. When the owner of parcel A conveyed his parcel, he inserted the following in his deed:

"Excepting and reserving from this conveyance a 20 foot wide easement along the northerly boundary of the above described conveyance for [the owner of parcel B], his heirs and assigns to access his property."

Upon learning of this clause in the neighbor's deed, the owner of parcel B obtained a survey locating the easement and planned to build a road across the neighboring property (parcel A). The new owner of parcel A objected to both the survey and the contemplated road to be constructed. A dispute ensued.

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Unfortunately for the surveyor's client (the owner of parcel B) the creation of the easement in the conveyance of parcel A was ineffective under the Stranger to the Deed Doctrine.

FOUNDATIONS FOR THE STRANGER TO THE DEED DOCTRINE

Under the Stranger to the Deed Doctrine the law will not permit the owner of land to convey the land to one person and in the same deed to establish an easement in favor of another. In some jurisdictions, the stranger to the deed applies to all interests in property, not just an easement.

Under the Stranger to the Deed Doctrine the creation of an easement to an individual not a party to the deed is not a valid conveyance. There are several reasons for voiding a third party transfer.

First, there can be no presumption of acceptance on behalf of a third party when the grantee to the deed accepts the deed conveying title to the property. There is no meeting of the minds. The easement to a third party is not a culmination of negotiations.

Imagine the havoc to title that could result if the acceptance of a grantee will bind a third party. Consider the situation where the owner of a parcel is burdened by an easement of necessity crossing the middle of his property. Every attempt to persuade the owner of the appurtenant property to move the location of the road in the easement has failed. Without a requirement for a third party in a deed to accept the conveyance, the owner of the burdened property could sell the property to his spouse reserving an easement to the neighbor in a different location much more favorable to the burdened property and much less favorable to the appurtenant property. Without the Stranger to the Deed Doctrine to protect the owner of the appurtenant property, the establishment of an easement in this situation means that the "easement by necessity" no longer exists and its former location is extinguished.

A second reason for an easement granted to a third party to be void is that there was no consideration for the interest created in favor of the third party to the deed. Since there was no consideration for the interest conveyed to the third party (at least stated in the deed), the interest is not protected by the recording statutes.

A third reason for an easement granted to a third party to be void is that the easement conveyed will not be indexed and not found during a typical title search.

Consider the following ramification if the stranger to the deed doctrine did not exist.

If the creation of an easement to a third party in a deed of conveyance were permitted, the result would thwart notice of the easement during a title examination of the appurtenant property. Referring to the first scenario, the examination of the title to parcel B would never reveal the existence of the easement. A title search of parcel B's title documents would never reveal a conveyance from the owner of parcel A to parcel B. Even if an abstractor, searching parcel B's title were to look in the grantor/grantee index for title documents involving the owners of parcel A, the abstractor would never see a listing in the index where the owner of parcel A conveyed an easement to an owner of parcel B. It is not a reasonable and typical procedure for a title search of parcel B's title documents to also examine each and every title document for the surrounding properties.

The fatality arising under the Stranger to the Deed doctrine could have been avoided if the grantor had first made a conveyance of the easement to the owner of parcel B by deed, followed immediately (if so chosen) with the conveyance of parcel A.

Some jurisdictions have abandoned or modified the Stranger to the Deed doctrine. Why shouldn't the grantor be allowed to accomplish in one deed what can legally be accomplished in two? Is it much different from what the law has long permitted, for the grantor to convey, using just one deed, a life estate to one person and a remainder to another person?

Unfortunately for the surveyor who made the query that started this discussion, the jurisdiction where the properties reside continue to recognize the Stranger to the Deed doctrine. Even though the easement is cited in the neighbor's deed, the neighbor is under no obligation to recognize the easement.

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negligence in not reporting an overlap of 15 feet between Lawson's property and the neighbor, and other issues related to the survey. Winemiller correctly reported that although there were defects in the description to Lawson's property, there was no overlap since Lawson's was the senior deed in this case. Based on the fundamentals of boundary law, the adjoiners cannot make claim to an overlap when they clearly hold junior rights to the property. The Court of Appeals sided with Winemiller and confirmed the Trial Court's ruling that Winemiller was not negligent in conducting the survey.

Since the author is currently employed in New Mexico, case law from that state is of particular interest. One such case is Platt v. Martinez. In this case, there was no defect in title; the overlap was purely in possession. Martinez built a fence that incorporated part of Platt's land and held it for an undisclosed period of time. Platt sued alleging Martinez had encroached upon her lands and Martinez counterclaimed asking that the disputed land be quieted to him on grounds of adverse possession or acquiescence (Platt v. Martinez). The Trial Court ruled in favor of Martinez and the Supreme Court reversed. The case against adverse possession was decided simply on the fact that New Mexico statutory law requires that the claimant pay taxes for a statutory period of 10 years. Martinez did not pay taxes on the property and had no claim of title. Therefore, the claim of adverse possession was not supported. The case against acquiescence is where this really gets interesting though. In this case, the lands near the boundary on Platt's side were heavily wooded and rough terrain. The fence constructed by Martinez, although it enclosed part of Platt's land, was not visible from Platt's property. The court cited Sachs v. Board of Trustees of the Town of Cebolleta Land Grant to in stating:

> ''It is well established in the law of this State and generally that if adjoining landowners occupy their respective tracts up to a clear and certain line (such as a fence), which they mutually recognize and accept as the dividing line between their properties for a long period of time, neither may thereafter claim that the boundary thus recognized is not the true boundary (Platt v. Martinez),"

In this case, although there is no question that Martinez had occupied the land for at least ten years, since Platt could not see the fence from her side of the property, she could not have acquiesced to the location of the fence as the boundary line.

We have reviewed several examples of case law as it relates to gaps and overlaps. Although case law is extensive on the topic; research for this paper indicates that the courts have been fairly consistent in rulings on the matter. Further research is expected to yield similar results.

Analysis

With the consistency in rulings from courts on the topic, analysis of the case law is fairly simple.

1) In United States v. Weyerhaeuser Company, the basis for ruling in favor of the United State is simple. The fact that Weyerhaeuser was in possession of all lands that had been granted to them, there was no basis for their claim to the gap between Township 27 and 28 South. The courts rightly affirmed here that in this case, the original grantor retained title to the "gap", also confirming that a gap did not actually exist, only a portion of property which the government had not yet disposed of.

2) Overlaps are, in general, more complicated than gaps. In Adams v. CA. Smith Timber Company, a case where an erroneous original survey led to an overlap in title, the courts found that the senior deed must be honored. This ruling should lead surveyors to carefully consider the chain of title when overlaps appear and to evaluate which side of the overlap holds senior title.

3) In Lindsey v. Hawes, the court fixes the date of entry as the basis for senior rights, rather than the date of patent. This creates a bit of an issue for surveyors on the research side. Patent records are easily researched but determining the date of entry is considerably more difficult. Surveyors would do well to exercise caution if determining senior rights on a boundary line requires consideration of title all the way back to patent.

4) The case Wirth v. Branson gives us a clear

indication that "First in Time, First in Right" should be applied in cases of overlapping title. Although this case is very complicated, it can help surveyors to understand the concept that the first entry to title will hold superior rights to any succeeding entries. Similar to the idea that the date of entry will apply over the date of patent, but the "First in Time, First in Right" concept is more easily applied to lands not under federal jurisdiction.

5) Lawson v. Winemiller is not strictly a gap/overlap case and does not actually provide a ruling on the issue. It does however; give great insight into the conduct accepted from a surveyor in dealing with overlaps in conducting a retracement survey where an overlap in title appeared. Winemiller, as the surveyor, determined that since Lawson had senior title, all boundary disputes must be resolved in light of the senior deed and therefore, an overlap does not exist. After a dispute with adjoiners arose, Lawson sued Winemiller claiming negligence but the court affirmed that Winemiller was not negligent in his conduct of the survey. This case should give some level of comfort to a surveyor in dealing with an overlap. If he is certain of senior title, he can safely (without fear of being negligent) offer an opinion as to the location of boundry lines without showing a discrepancy on the survey.

6) In Platt v. Martinez, an overlap in possession was reviewed to quiet title to on grounds of adverse possession or acquiescence. The courts denied the claim but under a different set of circumstances, the outcome could have been opposite. Case law here supports the conclusion that overlaps in possession where no overlap in title exists are more appropriately considered as a title issue of adverse possession or acquiescence rather than a problem falling within the surveyor's area of expertise.

7) Although Platt v. Martinez indicates that a surveyor should consider junior-senior rights in resolving an apparent overlap, Curtis Brown encourages surveyors to also consider unwritten rights. In his article *Land Surveyor's Liability to Unwritten Rights*, Brown implies that "nothing in the law" prevents a surveyor from monumenting unwritten rights based on possession that, in his opinion, have ripened. He further encourages

surveyors to mark the area of concern on the survey to make all aware of the issue. Although the author sees this as "passing the buck"; this course of action is probably safer for the surveyor than taking upon himself the legal decision as to whether unwritten rights actually exist. In general terms however, the surveyor is taking on legal questions that are outside the land surveyor's jurisdiction in even attempting to determine the validity of any sort of unwritten rights.

Conclusion

Case law on this topic is extensive and the courts have shown consistency in rulings throughout the years. This consistency, combined with the frequency of occurrence, particularly with overlaps, makes this one of the most important issues a surveyor should be familiar with. Based on the author's experience, the majority of surveyors are not approaching this issue correctly. Lucas shares this agreement in *The Pincushion Effect*, stating that "a very 'large segment of the land surveying profession, perhaps a majority, will insists (sic) that any survey of the property must show both lines, and the overlapping area shown as "hatched" and labeled as "area of conflict" or "area of confusion" (Lucas 93). Lucas 2011 later tells us that when surveyors take this approach to simply "reporting facts", but report facts that are not based on reality, then they are perpetuating fraud, not reporting facts. Lucas is in contrast with Curtis Brown in that Brown seems to encourage this practice of showing both lines and labeling the area. Brown is suggesting that the surveyor is better served allowing the courts to resolve the legal issue of unwritten rights by showing the area of concern, where Lucas seems to imply that surveyors should survey/monument only the property lines to which the title runs, leaving unwritten rights undisclosed and completely in the jurisdiction of law.

The conclusion reached from this research is that gaps and overlaps are a common problem that surveyors encounter. They are however, not a survey issue. They arise from defects in title, adverse possession, or acquiescence. In any case, a surveyor is generally equipped to deal with overlaps in title. Case law and common sense coincide here enough to give the surveyor confidence that title to an overlap rightly belongs with the senior deed holder.

Practices for handling gaps are not as well-defined as overlaps but the courts have been consistent here as well. If the intention was to convey a remainder of an estate, then the gap goes to the junior deed holder. If the intention is not clear, and the gap is of substantial size, then title to the gap should remain with the grantor. In either case, resolution for a surveyor is not a complicated matter and should not present an issue that would require passing the buck on to the court system.

If one of the land holders were inclined to assert a claim of unwritten rights to a gap, or claim that possession rights exist beyond what his deed entitles him to, that would not be an issue for a surveyor to resolve and the landowner should pursue his claim in the legal system. We have

studied adverse possession and acquiescence as it relates to overlaps and found that in general, an overlap that is in dispute is not actually a dispute over where the title lines are located, but rather a dispute over whether the claimant of the lappage has unwritten rights that have matured, either through acquiescence or adverse possession.

Knowledge gained from this research will be applied in surveying practice by the author to resolve gaps and overlaps that appear. Case law seems to indicate that the surveyor, when conducting boundry surveys, would be best served to survey actual property lines, which may appear to indicate gaps or overlaps. in light of junior-senior rights, and resolve them accordingly so that no rights that the surveyor should concern himself with are in dispute.

An exception, and a case in which Brown seems to have the right approach, is forensic surveying. If a dispute over unwritten rights exists, and a surveyor is engaged for the purpose of mapping the area of dispute, then Brown's directions are appropriate. Survey the area of dispute and show it accordingly on the survey, but not as overlapping property lines. The property lines will exist in the proper place until title is gained to unwritten rights.

Nothing in this research would indicate that the surveyor should fail to warn clients that unwritten rights, either against their holding, or in their favor over another's land, may exist. It seems clear from study that this is not a boundry surveying issue. A formal letter to the client, stating the surveyor's opinion that unwritten rights may exist and encouragement to seek legal assistance would be the most appropriate way to approach the issue.

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