California Surveyor

Fall 2012 Issue #171

The Use of Extrinsic Evidence as an Aid to the Interpretation of Deeds and their Descriptions

Article by Knud E. Hermansen, P.L.S., P.E., Ph.D., Esq. and Donald R. Richards, PLS 24

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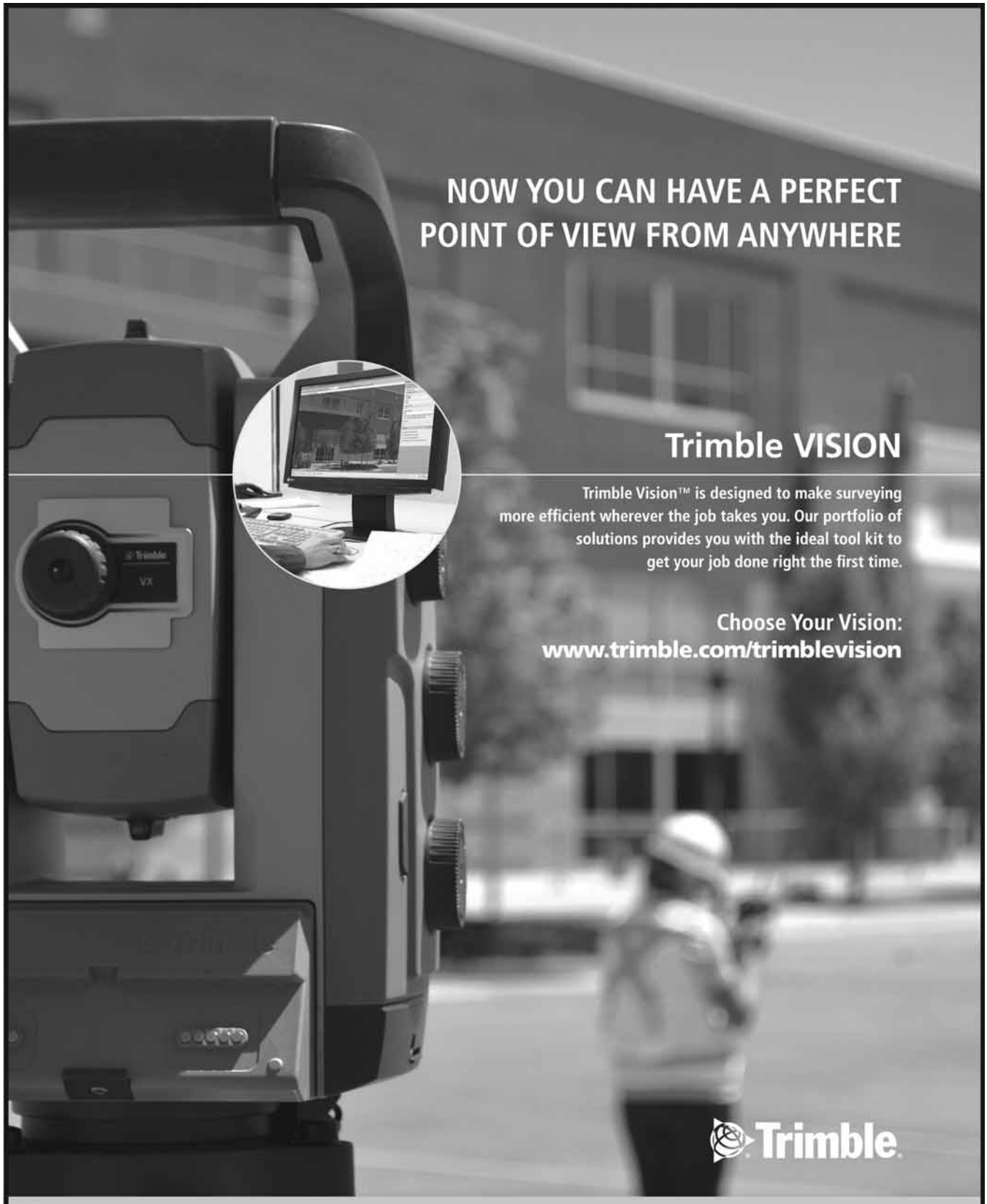

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"Recognizing that the true merit of a profession is determined by the value of its services to society, the California Land Surveyors Association does hereby dedicate itself to the promotion and protection of the profession of land surveying as a social and economic influence vital to the welfare of society, community, and state."

"The purpose of this organization is to promote the common good and welfare of its members in their activities in the profession of land surveying, to promote and maintain the highest possible standards of professional ethics and practices, to promote professional uniformity, to promote public faith and dependence in Land Surveyors and their work."

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DEADLINE DATES

Spring	February 1	Summer	May 1
Fall	August 1	Winter	November 1

Articles, reports, letters, etc., received after the above mentioned date will be considered for the next edition.

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Cover
Tim Case, PLS, of RBF. Submitted by Pat Tami, PLS

Photo by Tim Case, PLS.

By: John P. Wilusz, PLS, PE - Editor

From the Editor

Surveyors Search for John Fremont's Lost Cannon

Introductory Note: The archaeological work discussed herein is being done by the Fremont Howitzer Recovery Team under a volunteer service agreement under the direction of a professional archaeologist and is subject to the review and approval of the United States Forest Service. The artifact recovery site is within the Humboldt-Toiyabe National Forest and all recovered artifacts of an archaeological nature are the sole property of the Bridgeport Ranger District, Humboldt-Toiyabe National Forest. The found artifacts are currently on public display at the Bridgeport Ranger Station in Mono County, California.

In January 1844 John C. Fremont abandoned a bronze mountain howitzer somewhere on the east side of the Sierra Nevada. At the time Fremont was a 31-year old lieutenant in the U.S. Army Topographical Engineers and he was leading a mapping expedition to facilitate the growing western migration. Exhausted and running low on provisions, he and his men were searching for a pass over the Sierra Nevada in the dead of winter on their way to John Sutter's fort in Mexican California. For January 29, 1844 Fremont entered the following notes in his official report on the expedition:

> *…We followed a trail down a hollow where the Indians had descended . . . The principal stream still running through an impracticable canyon, we ascended a very steep hill, which proved afterwards the last and fatal obstacle to our little howitzer, which was finally abandoned at this place.*

Legends and Controversies

For the next century and a half, Fremont's lost howitzer, or cannon, has been the subject of numerous explorations, legends, and controversies. Between 1997 and 2002, a group of U.S. Forest Service volunteers, many of them licensed land surveyors from California and Nevada, discovered several iron remnants of an 1840's-era cannon carriage in a creek at the bottom of a steep and remote canyon in the Toiyabe National Forest, CA. Their discoveries were the result of many years of research and field investigations. Today these volunteers are still at it. They call themselves the Fremont Howitzer Recovery Team and they work under the direction of a professional archaeologist. Read on to learn their story.

Fremont's lost cannon has been in the public imagination for a long time, especially for the people who live in the rugged country between Bridgeport, California and Carson City, Nevada. Lost Cannon Peak, shown on the USGS quadrangle of the same name, was named by the U. S. Government Land Office surveyors who first worked in the area in the 1880's, some 40 years after Fremont abandoned the howitzer somewhere in that general vicinity. Today there is a bronze, 1840's-era American mountain howitzer on display at the Nevada State Museum in Carson City that some believe was Fremont's. Was it? Maybe, but the Recovery Team does not think so. Extensive research by team members turned up multiple mountain howitzers in the area in the 19th century. Even though their histories are to a large extent murky and conflated, the group believes the Nevada State Museum cannon was surplused by the U.S. Army in the 1860's after the closing of Fort Churchill, a way station on the Pony Express trail in present day Lyon County, Nevada.

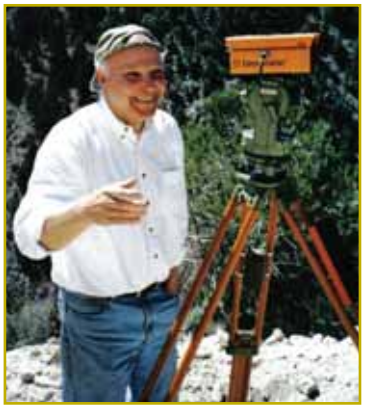
There is another reason why some researchers think the cannon at the Nevada State Museum did not belong to Fremont: It does not have dolphins. Many cannon from the black powder era had handles, also known as dolphins, cast along the top of the tube to make handling the weapon easier. Despite the obvious advantage of handles, the American mountain howitzer did not have them. However, some people believe Fremont's howitzer did. Their reasoning derives from the fact that the only known contemporary picture of Fremont's cannon, a lithograph that appears in his official report of the expedition, shows dolphins on top of the tube. For one thing, they believe the lithograph to be based on a sketch by an eye-witness to the events: expedition cartographer, Charles Preuss. For another, they argue that Fremont would not allow his artillery to be so misrepresented in the published report. Did Fremont's cannon have dolphins? Did the lithographer apply artistic license? Will we ever know for sure?

Continued on next page

Continued from previous page

A Good Hobby for Surveyors

Searching for lost cannons is a good hobby for surveyors because it has a lot in common with surveying land boundaries. Both activities start with researching historical records and each requires the reconciliation of found evidence with record information. The recovery project began in the 1980's when Bryant Sturgess, PLS, began studying Fremont's official report of the mapping expedition for clues as to the whereabouts of the abandonment site. He compared Fremont's description of the expedition's route and campsites, the topo calls if you will, with local topography and found what he believed to be a good fit. Cannon fever is contagious and by the mid-1990's others caught the bug and outings began in earnest. Other seminal members were Bill Cossitt, Esq., Paul Pace, PLS, Judge James H. Thompson and Bud Uzes, PLS; all were members of a group that in prior years searched for remnants of early surveys along the California/Nevada and California/Oregon boundaries.

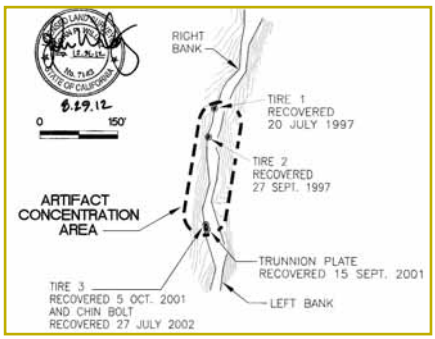


Bud Uzes surveys the site ca. 2000

More members were recruited and in the summer of 1997 the team made its first recovery: an iron rim (tire) from a carriage wheel. The tire was found in the silty bank of a mountain stream with a White metal detector. There were no wooden spokes, iron axle parts, or artifacts of any kind found with it, and the tire was more or less in perfect round. In a subsequent outing that season the team found a second iron tire in the same condition using a Schoenstadt metal locator, and again there were no spokes or axle parts. The two tires were identical and their size and composition were consistent with similar items from an 1840's-era American mountain howitzer gun carriage. Given the location and character of the recoveries, the Cannoneers had reason to be optimistic, but still the evidence was not conclusive: Gun carriages were not the only vehicles that had wheels. They continued scanning during subsequent group outings but encountered a dry spell for several seasons. One major roadblock to the work was (and still is) the presence of rocks in the search area that have a high iron content. The Cannoneers call them "hot rocks" and they have come to expect ferrous-locating equipment to return many false positives in the search area.

Gun carriage trunnion plate

Unusually heavy spring runoff in the spring of 2001 scoured the creek bed and lowered it by several feet; a lucky event that contributed to more recoveries. First, a single iron trunnion plate, and then a third tire, identical to the first two. The trunnion plate is part of a bracket that secures the cannon to its carriage. It was a critical find because only gun carriages have trunnion plates (there are two per carriage but only one was found). Like the tires, the bracket is consistent in all respects with like components from the American mountain howitzer. Both the trunnion plate and third tire were found with the White locator just below the gravelly surface of the bottom of the creek. As was the case with the tires, there was no wood. In 2002 the group found an iron "chin" bolt from the carriage's second, still-missing trunnion plate. The bolt was near the site of the third tire at the bottom of the creek and it was found using the Schoenstadt locator. Again, the group looked for but did not find evidence of wood from the carriage. The bolt would have undoubtedly been found sooner but for the hot rocks in the creek bed and banks.



These recoveries raised questions. How come the artifacts were in the creek? Where are the rest of the carriage parts and how did they get separated? How come the iron axle parts were not inside the perimeters of the tires? The wood was evidently gone when the parts came to rest, but what happened to it? And when? What kind of locating equipment would best screen out the hot rocks? And of course the biggest question of all: Where is the tube?

Historical Context Statement and Archaeological Research Design

After the discovery of the trunnion plate the U.S. Forest service required the group to work under the direction of a professional archaeologist. In 2005 James M. Allan, Ph.D., RPA, of the Institute for Western Maritime Archaeology, Orinda, California, submitted the Fremont Howitzer Recovery Project, Historical Context Statement, Archaeological Research Design and Archaeological Testing Program to the Humboldt-Toiyabe National Forest, Bridgeport Ranger District on behalf of the Fremont Howitzer Recovery Team. The Cannoneers continue to meet, dig holes, tell stories, and sing songs around the campfire site several times each season. This report was prepared with the help of my friends and fellow Cannoneers Bryant Sturgess, PLS, and Joel Tracy, PLS. All images are from the Fremont Howitzer Recovery Team. ❖

In loving memory of three Cannoneers who have crossed the mountain to the other side: Bud Uzes, PLS (pictured separately hereinabove), Judge James H. Thompson (third from right), and Isabela, my loyal little doggie at front and center. Standing in the back row from left to right are Tony Argento, Tim Case, PLS, Jackson Mueller, Judge Thompson, Matt Gingrich, PLS, and Dr. Jim Allan. Kneeling, from left to right are Tom Fee and John Wilusz, PLS.

By Annette Lockhart, PLS, GIS Chair
With assistance by Karen Koklich, PLS, GIS Committee Member

From the Guest Editor

Reaching the Summit...

When I get on a plane, I am always anxious to get a window seat. I enjoy that aerial view of all our hard work fitting together into one seamless fabric. This time I was on my way from Sacramento to San Diego to attend the Survey Summit. As the plane approached the San Diego area, the view changed from square fields full of summer crops to a complex fabric of mixed urban uses. As the landscape changed, my contemplation moved from considering the landscape as 2D parcel mapping to all of the rich 3D data waiting to be explored. That is what the Survey Summit is all about... discussions, presentations and networking to discover new ways to present survey data while retaining its original authority. One of the charges for the GIS Committee is to interact with the GIS community, to assist surveyors in the discovery of opportunities with the GIS community, and to assist the GIS community in the discovery of the unique expertise available in the Survey community. The Survey Summit is one of two scheduled conferences where the committee actively engages by manning a booth in the vendor area.

This is the part of the journey where I am joined by Karen Koklich and the remainder of this article is a mesh of our recollections of the conference. This conference is a joint effort between ESRI and ACSM. How can that be, you ask? Well, the original concept (and contract) involved these two entities. This billing continues despite the folding of ACSM into NSPS. (This circumstance highlights how a national organization for surveyors is helpful to have around and the need to resolve the status of ours in a timely manner.)

The first day (Saturday) of any Esri conference begins with a plenary session. This Plenary began with lightning talks (10 minute talks covering a variety of subjects). The talks included the following:

The National Survey Society	Curt Sumner
Supporting the Next Generation	Rich Vannozzi
Celebrating 200 Years with GLO	Don Buhler
A New Approach for New Datums	Ronnie Taylor
Land Surveys in Support of Fish and Wildlife	David Clark
GPS Day	Donny Sosa

And that was just the morning before break! After break, the presentations lengthened in time and were not short of interest. This session started with Chee Hai Teo from the International Federation of Surveyors (FIG) with a fascinating talk on "Surveyor 2.0" (Copies of slides are available at http://www.fig.net/council/teo_papers/ysc_2012_teo_welcome_ppt.pdf). This was a wonderfully delivered talk that brought home how our concerns, challenges and opportunities as surveyors are not confined by geographical and political boundaries.

Two demonstration talks were next. A demonstration by Rowland Harrison from Hawkeye UAV (www.hawkeyeuav.com) showed a demonstration project performed by his company in Australia. Following was Tom Greaves from CyArk discussing his project "Preserving the California Mission with 3D" (LiDAR, of course). The morning rounded out with a presentation by Lawrie Jordan from Esri that familiarized the audience with possibilities of new changes to ArcMap coming with 10.1 and the use of Esri Cloud. Then, we got an opportunity to rest our tired brain cells with a networking lunch. The afternoon sessions included survey businesses that have altered the way they work by implementing GIS products. First up was Mike Beavers, GIS Manager at Frontier Surveying Company, who explained the studied approach his company took. A needs assessment caused them to create a geodatabase with control and previous job information to better aid job proposals and field crews in the field. This resulted in reducing the time needed to create proposals and it also helped crews in the field have office information at their fingertips. Cleanup was the keynote presentation by Tony Lavoi from NOAA who discussed how utilizing GIS products has aided the organization in streamlining and speeding up data availability to their various stakeholders.

Sunday was filled with classes that centered on the many ways to integrate the use of GIS into your surveying business and the products that aid that process. An agenda is available at http://www.surveysummit.com/agenda/index.html. Just in case you thought it was all class and no recess, during the Survey Summit EXPO and reception on Saturday night and most of Sunday, you would have found Annette, Karen, and many of our members in attendance gathered about the CLSA booth discussing the exciting topics. We were also there to share with others about surveyors' contributions to the geospatial professional community. As with any conference, sharing and discovery were plentiful in this arena. For some interesting sharing, see the attendee profiles on the next page.

The final two days of the Summit are the first two days of the Esri conference. This year the conference was 15,000 users strong. The Monday User Conference Plenary had very interesting details for surveyors. For more details, and a new perspective, please see the article by Robert McMillan.

Takeaways from the Summit:

ArcMap now works with Microsoft Office (very interesting in action).
Using cloud technology can speed information delivery to stakeholders.
Multi-Level Linear Reference Systems are supported.
Getting started on projects is 2/3rds of the battle!

In this issue you will find several articles about the Esri conference and/or detailing projects utilizing GIS products. It is my hope that you will find something new that expands your mind and your business. ❖

Addressing the World

Survey Summit Attendee Profile:
Timothy A. Peloquin, LLS
Promised Land Surveys, New Hampshire

It is always the small details that we pay the least attention to that gives us the most. It is one of those small things that bring Tim to attention. His company works to bring good land survey principals to countries to facilitate one of our details... an address.

He started his survey adventure much like many of us, doing something else. While attending the University of Massachusetts at Lowell, he wandered his way through six majors (including meteorology) to finally land in and finish a BS in civil engineering. This gave him an opportunity to venture into surveying where the combination of math and nature hooked him.

After working for a builder and an engineering firm, 15 years ago he started his own firm. Promised Land Survey, LLC (PLS) was established. PLS is a Christian owned and operated company, for which he makes no apologies. Additionally, "Promised Land" captures a hope for many… everyone seems to want or find their little piece of the earth they can claim as their promised land, and this fits in the global emphasis of the company.

The services he offers in developing countries, he likens to the "A, B, C…" of a GIS. As with any project, this begins by establishing appropriate GPS control and coordinates relative to the country's needs, reviewing and compiling existing data (i.e. maps of records, either digital or not), and advising the "powers to be" (usually government leaders within a survey department) of efficient and logical methods of establishing their cadastral and tax map system. In addition, PLS offers advice and solutions to their regulatory process related to their GIS and survey standards. Usually, these projects take 10 to 14 days on the ground in the country, and the same amount of time back in the US (preparing for the trip via research, compiling of data, etc., and upon return, calculations/coordinating) and the final product is a written detailed report for the client or governments use.

These kinds of efforts by Tim and other surveyors around the world are giving people an opportunity to successfully define their place in the world. This is a model for the successful combination of the uses of good survey practices and GIS. ❖

One of Our Own

Survey Summit Attendee Profile:
Greg Hopkins, PLS
City of San Diego

Spotting Greg at the Summit was easy. First, I knew he was coming since we had communicated by email. Secondly, his face was lit up in the meeting by the IPAD he was taking notes on. (I was secretly jealous.) While taking a moment at the CLSA booth, we had a chance to talk. Greg is the city surveyor for San Diego. He was at the Summit to take advantage of the chance to learn new things, especially NGS discussion and LiDAR. He attends this particular conference for the convenience of its location and the opportunity it offers to continue his education in new ways. As for this year's presentation, Greg thought it was even better than last year's.

In the San Diego area, GIS in government is very cooperative. Greg's office is responsible for providing data to SanGIS. They maintain the library. There are always new ideas to implement though. Here at the Summit, one of the benefits is seeing how to implement new projects and learn new ways to master the methods of change. Greg was not the only CLSA member present. ❖

By: Robert M. McMillan, PLS, EIT

***Rob** is a Senior Transportation Surveyor in the Caltrans headquarters Office of Land Surveys. He is also the Secretary of the Sacramento CLSA Chapter, and CLSA Education Committee Chairman.*

Report on the ESRI International User Conference (IUC)

OK – I admit it… I feel like a reformed smoker who tells others how bad cigarettes are. Stop looking down your noses at the GIS people. I used to scorn GIS because it is a "non-licensed profession" whose members think they understand what we, Land Surveyors, do. My favorite GIS quip used to be "GIS means 'Get It Surveyed'." Lately. it has been "80,000 people were in San Diego this summer for Comic-Con. 16,000 of them stayed the next week for the *Esri International User Conference" (IUC.)* We pick on GIS because it makes us feel superior, and perhaps because we feel threatened. We SHOULD feel threatened. Did you pick up on the stinging truth? 16,000 people were in San Diego for the *Esri IUC.* Sixteen THOUSAND people!

Can they Survey? Well, no, but they can communicate geospatial relationships with maps to provide information to help people make decisions, and that is much of what we provide as a work product. They generally do it well. Their maps look good, and are very useful to their target audience. Their software and technology is continuously improving. And because their products look "professional," they are being accepted by others who do not know the difference. I saw a lot of great presentations. The plenary (opening) session had the feeling of a Hollywood production, featuring sharing of vision, awards, announcements of new technology, and demonstrations of how that technology has already been working for a select group of Beta Users. The rest of the conference showcased paper sessions and technical presentations, special interest group meetings, and panel discussions. Do not forget the Map Gallery. The Map Gallery had nearly 1,000 maps on display. Most were spectacular; some were amazingly innovative and simple in design.

Where were all the Land Surveyors? More of us should have been there. I am upset with myself more than the rest of you who did not attend. Maybe I am upset about GIS because we, as a profession, did not grab a hold of digital GIS technology in its infancy. I did analog GIS as an engineering aide. Why didn't we take charge of the shift? Maybe I am upset because I doubled up on the *Survey Summit and IUC* for seven straight days of GIS, and had a few too many gulps of the Kool-Aid? What is the real reason I am upset? This was my first time to the *Esri IUC*. I will not miss this opportunity again. In this era of converging technology, overlapping interests, and competition for business and resources, now is the time to learn new skills and see what others are doing. I hope to see you at the 2013 *Esri IUC*! Do you want to jump at the next opportunity? Even if you have to save up to go to one of these, do it.

November 12th - 16th, 2012
Caribbean GIS Conference, Montego Bay, Jamaica

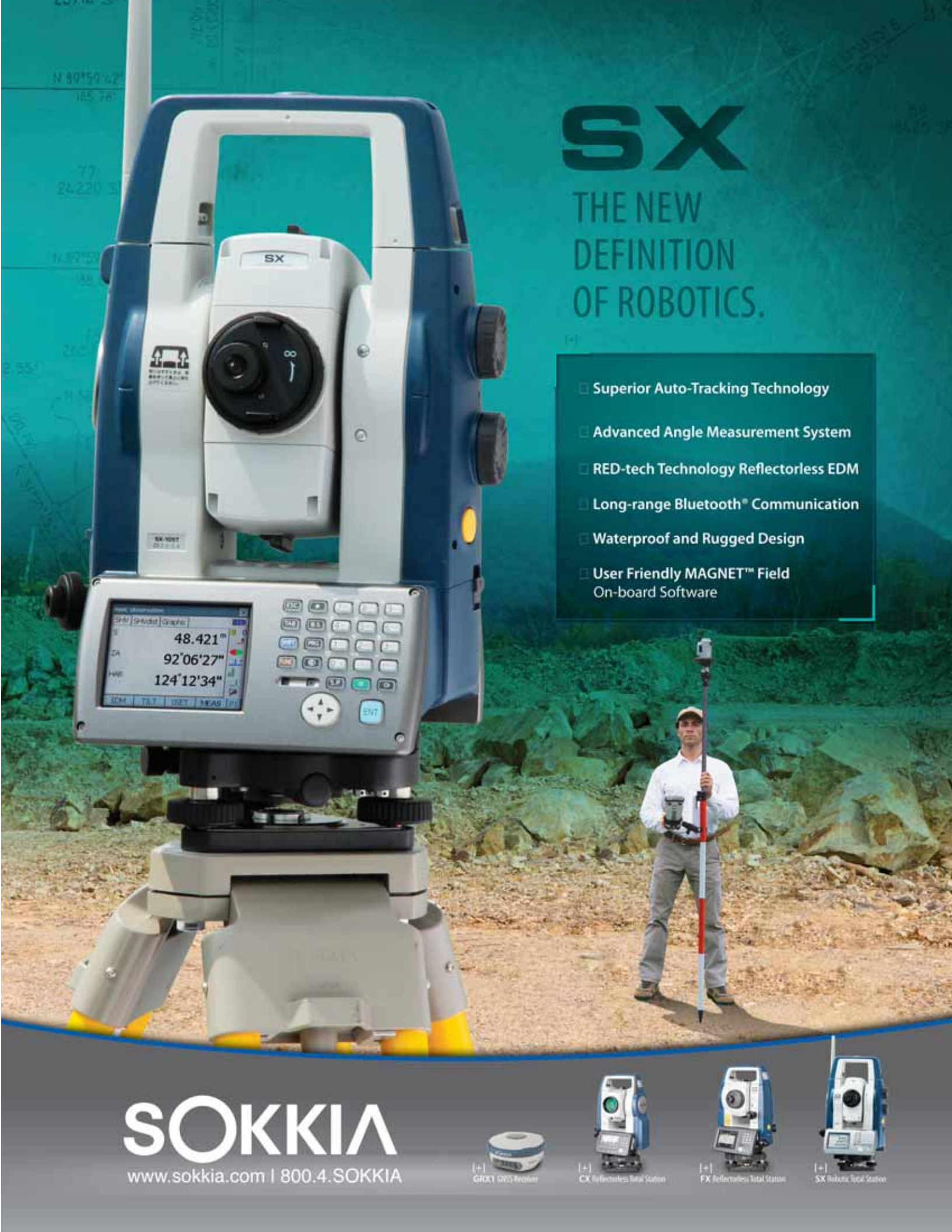
March 4th - 7th, 2013
GIS/CAMA, Albuquerque, NM

Spring 2013
CalGIS 19th Annual Conference, Long Beach, CA

July 8th – 12th, 2013
Esri International User Conference, San Diego, CA ❖

Photos by Karen Koklich, PLS,

Lower than expected turnout at the Survey Summit worked out well for those of us who attended. In order to meet their spending commitments, the organizers chose to improve the quality and quantity of the hors d' oeuvres served at the receptions. Chips and salsa became chips, salsa, guacamole, quality cheese and fruit platters, coconut shrimp, crab rangoons, prime rib and much more.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By: Frank Lehmann, PLS - President

President's Message

This past year has gone by so quickly. That is usually the case when one is busy with the activities of life, and this past year is certainly no exception. Between managing a business, donating time to various organizations, living in and through a volatile political period, and having an active teenager in high school, this year ranks right up there. The challenges of the past year and those to come are guaranteed to make for a very busy calendar for the incoming Officers and Directors of CLSA.

The unexpected resignation of President-Elect Tom Taylor in August has created a vacancy for which the CLSA Board of Directors will nominate someone to fulfill the remaining 2012 term and will then succeed directly to President in 2013. I want to thank Secretary Rolland Van de Valk and Treasurer Jay Seymour for recognizing the value of "traversing the chairs" within the elected positions of officers. Each had the opportunity to request they advance through the chairs to fill the vacancy. However, they have determined that the value of the time spent in the intervening chairs, learning more about CLSA, is worth more than the quick transition to a higher office. Regardless of whom will be sitting at the head of the organization come the first meeting of 2013, they will be looking to the membership and their duly elected Directors to be ready to participate at the quarterly Board of Directors meeting.

This past year we have spent a great deal of time discussing the roles and duties of Directors whom are elected by their local Chapter. Lengthy discussions have taken place regarding responsibility to the Chapter and concurrent fiduciary duty to the Association as a member of the Board of Directors. However, regardless of the position one may take during these discussions, the simple fact remains - CLSA is governed by state law (Non-profit Corporation Code) which mandates the fiduciary duty of a Director and their duty of loyalty to the Association. We cannot pick and choose which laws we want to obey (although I've heard from some who might like to). A Sacramento law firm, specializing in non-profit association law (Mark Alcorn & Associates), was contacted and asked to provide clarification on the law, so that the Directors would have the facts on this important issue. The Central Office has copies of this legal opinion, and is more than happy to send it to those returning and new Directors for the 2013 year. Please request a copy. I would like to think that, as a group, we would both adhere to the law once known, and aspire to work within it for the advancement of our profession and CLSA.

Directors should anticipate being prepared for the upcoming meetings and being ready to take action on behalf of CLSA. I stress this, because during recent meetings, it became apparent that some individuals were focusing on either their Chapter or segments of a Chapter only, rather than on the impact on CLSA or its membership in total. One only has to look at the current political landscape to see that all too often our federal representatives initiate bills that favor a particular interest group or political party, rather than the American public at large. I challenge the incoming Board Members to look at every Board meeting as an opportunity to participate to better the profession and CLSA.

Kudos to the CLSA Education Foundation for finalizing the Memorandum of Understanding (MOU) with Fresno State to establish an endowment that will fund a full-time professor licensed to practice surveying in California. Fundraising efforts have begun and as of September 20th $79,805 has been donated! The Lyle's Foundation will match, dollar-for-dollar all donations (up to $1million) so keep those donations coming. Every dollar counts to help ensure the CSU Fresno Geomatics program continues.

I want to take this time to thank the general membership, Directors, Committee Chairs, Officers, and Executive Director and staff for their efforts this past year. Thank you to all who have called and e-mailed me during this past year offering your support, insight, and friendship. Hopefully, the economy will strengthen, and with it, the ranks of CLSA. ❖

Letters to the Editor

Dear Editor:

I'm writing in response and correction to the article in the fall 2011 (Issue 167) California Surveyor Magazine "The more things change... By David E. Woolley, PLS." In reading David E. Woolley's article in the fall 2011 issue of California Surveyor, (Woolley), I was surprised to see his assertion that "although the record of survey is filed and available to the public, this information is not a public record."

That statement is in direct contradiction to Mr. Neil J. Cummings' conclusions in the referenced article, "Notice Afforded by Record of Survey Maps in California" Spring 1978 (Issue 50), The California Surveyor, (Cummings), but more to the point it is exactly opposite of the court's opinion in Stearns vs Title Insurance and Trust Company, 18 Cal. App. 3d, 162 (Stearns).

In reviewing the source documents referenced in Woolley, particularly the original 1978 Cummings article and the Stearns case, I noted a number of errors in editing and reporting by Mr. Woolley which led to further complicating errors in the conclusions he stated in his fall 2011 article.

I was prompted to write this response to correct those errors because I have heard other surveyors, both in personal conversation and on the CLSA discussion boards, reference the erroneous conclusion that Records of Survey are not public records. They apparently based their misunderstanding on the latest article rather than on the source documents and authorities as hereinafter set out.

It has long been a matter of discussion in the surveying community that Records of Survey do not impart "constructive notice" but it was also widely recognized by the profession and the authorities that a Record of Survey was nevertheless still a "public record." Stearns made that clear in 1971. Cummings got it correct in his 1978 article. Gurdon Wattles also made note of the Stearns ruling and its import in his textbook Writing Legal Descriptions in Conjunction with Survey Boundary Control on pages 1.7 and 2.5 among others.

I found Mr. Cummings' article to be a well researched and scholarly presentation containing copious references to statutes and cases and he also provided useful discussion on the ramifications and possible solutions to the legal issues raised in Stearns. Mr. Cummings not only was aware of the Stearns case, but he discussed it in some detail in the body of his article and specifically referenced it in four of his 39 footnotes.

In my review of the Stearns case, I note that the main body of the quote from that case given in Woolley, left out substantive material which had a direct bearing on the conclusion cited by him. In fact the paragraph immediately preceding the quote given is essential in obtaining a correct reading of the case. Furthermore, the final sentence of that quote is separated from the remainder by 23 lines of text in the original opinion, and that intervening text is essential to a proper understanding of quoted text.

The issue in Stearns was whether the title company's peculiar definition of what constituted a public record would be binding on the parties to that contract, or could the court rule that regardless of the definition in the contract would the standard legal definition of what constitutes public records prevail. It is clear from an actual reading of the Stearns case that the court was dealing with the peculiar definition as given in the title policy when the court stated that under that factual situation, and with those definitions applied, the result would be as the court stated. Nevertheless, the court also made abundantly clear that absent any peculiar contractual language, Records of Survey are public records, just as Mr. Cummings noted in his 1978 CLSA article and Mr. Wattles noted in his textbook.

As noted above, in the opinion of the Stearns court, and as discussed in Mr. Cummings's article, a Record of Survey does not, on its own, and absent any other peculiar circumstances, impart constructive notice, even though it is a "public record." Mr. Cummings notes that one of the reasons it does not generally impart constructive notice is that it does not normally show up in the chain of title, and the Stearns court made essentially the same statement.

Woolley's statement "A review of the case history indicates Stearns is still current and accurate despite the conclusions of Neil J. Cummins, Jr. as stated above" is perplexing in that Cummings nowhere in his presentation intimated that Stearns would not be "current and accurate." In the Cummings conclusion noted in Mr. Woolley's article (the second of three conclusions from the original Cummings paper), where he says "Regardless of the constructive notice afforded" he meant that it did not matter whether a Record of Survey imparted constructive notice or not for his argument to be valid, and the issue he was speaking to there was third party liability under a preliminary report which used a unqualified definition of "public records." That issue was explained in Cummings' first conclusion and expanded on in his third conclusion.

As to the un-cited statements of law in the Woolley article, I would urge a cautious approach to them in light of the egregious errors of interpretation and reporting in the preceding portion. Particularly his conclusion: "When existing encroachments are observed and not noted on a Record of Survey, there is a valid presumption by the public that no such encroachment exists on the property." I can find no basis whatsoever in the statutes, cases or authorities for such a presumption. "If existing encroachments are not shown on the Record of Survey, a host of other legal claims may be raised against the land surveyor including constructive fraud, negligent misrepresentation, collusion (with the property owner) and so on." This is offered without any cite to a legal basis for his claims. Novel claims such as those must be backed up by convincing evidence before they are accepted by the community.

Just to be clear, of course we show improvements on our Records of Survey when those improvements are the best available evidence of the original lines or if contractually obligated. Likewise, if any encroachment is delineated on a Record of Survey there may be a presumption that all such are shown. But that is clearly not what is being argued here. There is no requirement that "encroachments" be shown on a Record of Survey. I'm not an attorney, and I don't pretend to have all the answers, but without cites to relevant cases and code, that is a proper legal foundation, I am entirely skeptical of theories presented.

While "we live on the verge of litigation" to quote Walt Robillard, and can be sued at any time for just about any reason, and we will be charged with all sorts of horrible deeds by the opposing attorney, recall that the complaining party will have the burden of proof.

I believe that the original article by Neil J. Cummings Jr. was well researched and artfully presented, and remains current. I would strongly suggest that other surveyors read the original Cummings article and the Stearns case, and draw their own conclusions. Thanks to CLSA and Google, they are only a few mouse clicks away.

Statutes: www.leginfo.com
Cases: http://law.justia.com/california/
CLSA Articles: http://www.californiasurveyors.org/calsurv.html
Thank you for your time,
Sincerely,
Tom Propst, P.L.S.

By: Christopher Urkofsky, PLS

***Chris** is Branch Chief, R/W Records and GIS & R/W Research, for Caltrans District 4 in Oakland, CA.*

Caltrans Builds Right of Way Mapping System Using Google Earth

Figure 1

How do I find the Right of Way?

George Carlin used to tell a joke; "If I went to a bookstore and asked the salesperson, 'Where's the self-help section'? Wouldn't it defeat the purpose?" When entering the Caltrans District 4 Right of Way Records prior to 2010, there was often no way to quickly locate the required information. Instead of a smooth process, a confusing labyrinth of maps, deeds, and other data awaited. Frequently assistance was required for what should have been the relatively easy task of determining the State's Right of Way. This defeated the purpose of a 'Records' service. A new approach was required to move forward.

How did it become so complex?

Caltrans District 4 is comprised of the nine counties of the greater San Francisco Bay Area. Like many other regions within the state, District 4 has a diverse political and geographic environment. Our map collection features a variety of documents dating from the periods before, during, and after the principle construction of the Interstate Highway System. That means that a person who needed to visualize or understand the development of the right of way usually had to wade through a stack of maps created in different decades, which employed different coordinate systems or units of measure and often depicted intersecting or adjoining streets that had been realigned or no longer existed (Figure 1).

Like solving a puzzle.

Relating these maps to one another, to the adjoining street networks, to structures or other pertinent spatial data was a lot like solving a jigsaw puzzle. It was common to see clusters of individuals huddled around a layout table strewn with maps, deed descriptions and aerial photos as they pieced the right of way together (Figure 2). However,

Figure 2

because we lacked the means to effectively preserve the results of these puzzle solving sessions, there was minimal return on the time and effort invested. Worse still, Caltrans, like most public agencies, is disproportionately staffed with post World War II Baby Boom generation workers who are at or nearing retirement age. As these workers retire, a unique body of institutional knowledge accumulated from decades of service is lost.

How do we become more efficient?

In 2003, as part of a statewide effort, District 4's entire collection of over 7,000 Right of Way maps were scanned and the resulting images saved to compressed formats. Metadata on each map was also collected and cataloged within a database. The completed system supported digital search and retrieval of map documents based on their location (county, route, post mile), map name or other user queries of the metadata. Scanned maps held additional benefits. Within CAD programs, scanned maps can be overlaid upon aerial imagery in a digital 'mash up.' This combination of aerial imagery and scanned maps made it possible to view the right of way and other mapped elements relative to features on the ground (Figure 3). While

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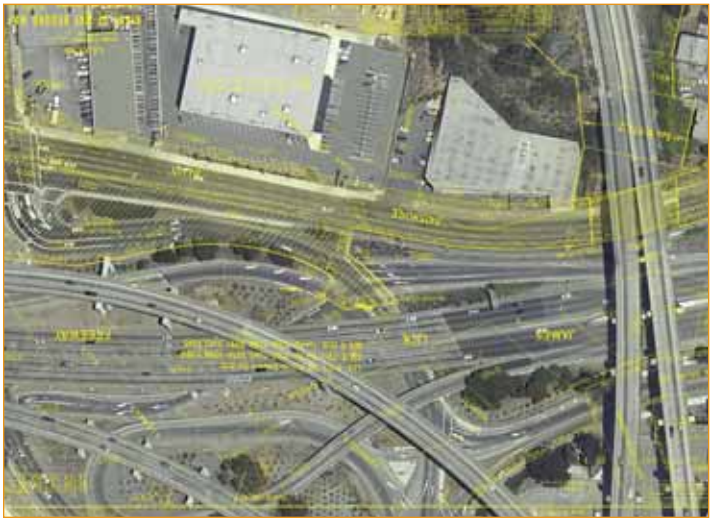
Figure 3



visually effective, these mash ups were created for one-time-use, were relatively expensive to compose (usually requiring at least one hour per scanned map) and difficult to categorize for efficient subsequent reuse.

A 'sticky' solution.

It became apparent that there was a need for a system that facilitated quicker merging of scanned right of way maps and aerial imagery. To ensure that the completed system would be attractive to the broadest possible group of customers, the software platform needed to be inexpensive and user friendly, with abundant reference resources. Most importantly, to ensure that users would return to and come to rely on the system (the 'stickiness' factor), the system would have to facilitate timely and frequent updating of the digital map content. Employing a synthesis of software applications including AutoCAD, ArcGIS, and Google Earth, the real earth locations of thousands of map images were established ('georeferenced') creating a visual fabric of District 4 Right of Way maps.

This was accomplished using several existing Caltrans resources. First, the Department has built and maintains a linear reference system (LRS). Linear referencing is a system in which the locations of features are identified by a relative measure along a linear element; in this case, a mile point along a state highway route. Employing the metadata generated during the right of way map scanning project, we were able to quickly create points corresponding to the location of the center point of each map. Other ArcGIS tools were used to convert these points to polygons which corresponded to the map foot prints (Figures 4 & 5). The next step involved the use of a feature within AutoCAD – Feature Data Objects (FDO). Using FDO, AutoCad operators can connect to an ArcGIS shape file and natively edit

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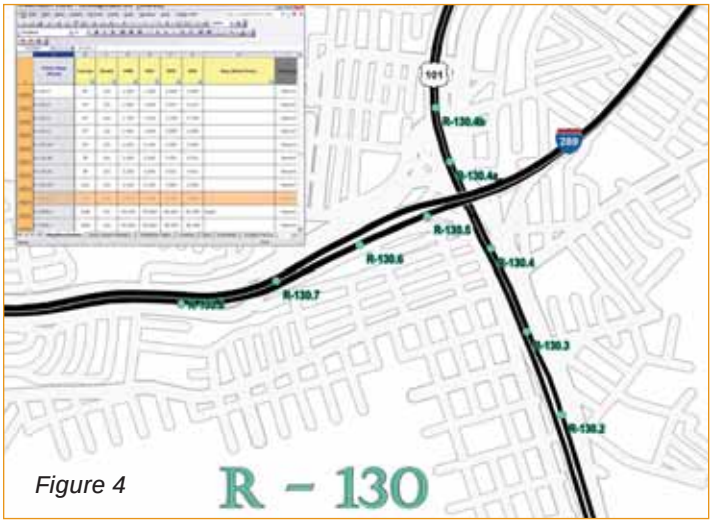

Figure 4

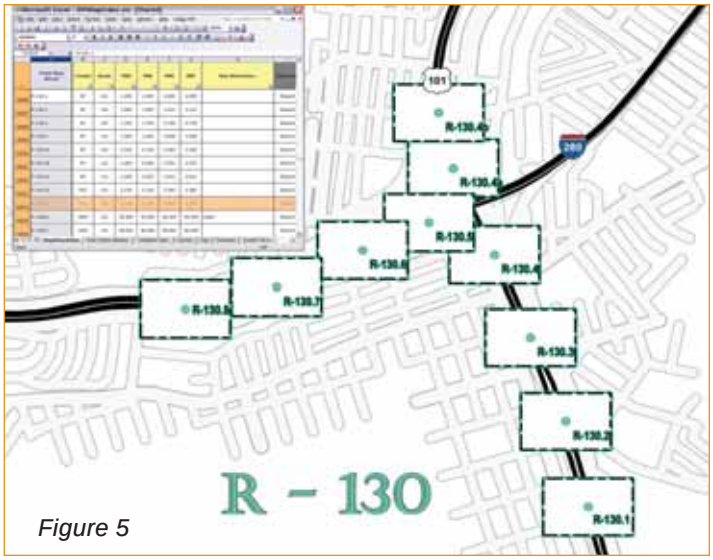

Figure 5

Figure 6

elements; in this instance, the positioning of the map foot prints (Figure 6). The stronger editing tools within AutoCAD and abundance of skilled CAD users dramatically increased map sheet processing rates. Using the vertices of the map footprint polygons, world files were automatically generated for each of the scanned maps, resulting in the rapid georeferencing of over 7,000 Right of Way map images. Lastly, the footprints were converted to ".kml" and the georeferenced map images to ".kmz" overlays, for display with Google Earth (Figure 7).

Efficient and empowering

The completed system has provided significant value to District personnel who no longer need travel to the 13th floor of the District Office to determine the State Rights of Way by piecing together paper maps stored in cumbersome 'Hanging Files.' Moreover, the efficiency of this system has not only been the basis for important gains in Right of Way Engineering productivity, it has also been the impetus for additional innovation in the depiction of State property interests, project and resource management, and improved communication and data sharing arrangements between the District and our partners in local Bay Area governments.

Building upon the Google Earth system, Records GIS personnel are nearing completion of a 'vectorized' Right of Way layer for all of District 4. While scanned raster maps are subject to the limitations of simple pixilated imagery, vector graphics are the advanced, mathematically defined elements utilized in sophisticated design and GIS software applications. The enhanced intelligence of Right of Way vector data elements has facilitated the creation and dissemination of numerous, derivate data products and systems (Figure 8). Utilizing the geometry of the R/W boundary, closed shapes depicting the locations of Maintenance, Cooperative and Freeway lease agreements within the political boundaries of the City and County of San Francisco were created with minimal additional effort (Figure 9). These shapes were then used to create a web site utilized by San Francisco and Caltrans to coordinate project and operational efforts. Similar web sites for the District's remaining eight counties are planned. ❖

Figure 7

Figure 8

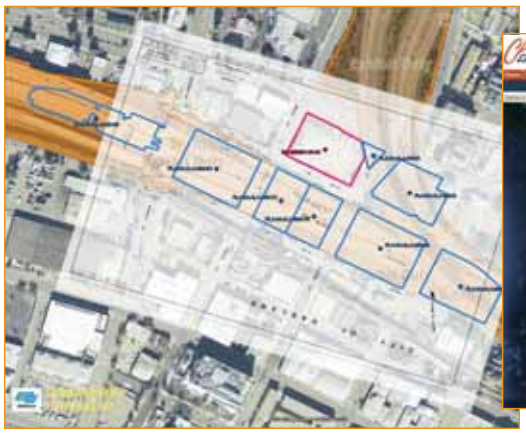

Figure 9

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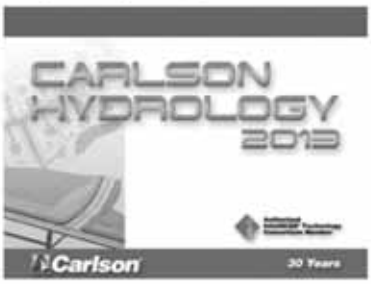

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By: Jean A. Weil, Esq.

Jean Weil *is a founding partner at Weil & Drage, APC, a law firm with offices in California, Arizona and Nevada. She has been representing design firms since 1987 and assisted the coalition of design societies and trade associations in challenging the Court of Appeal's decision in UDC. Weil & Drage also worked closely with ACEC California in drafting SB 972 and pushing it through the legislative process. She can be reached at jweil@weildrage.com*

California Places Client Defense Burden on Design Firms But New Senate Bill Helps Soften the Blow

Contract provisions—especially those that limit or transfer liability—are governed by state law. Through statutes and court interpretations of the law, states can differ significantly on how provisions are construed. In California, following the recent Court of Appeal decision in *UDC-Universal Development, LP v. CH2M Hill*, it is clear that design firms that contractually commit to indemnifying their clients may well be compelled to shoulder the cost of defending their clients even if the design firms are not at fault.

Historically, design firms have been able to protect themselves from taking on a contractual responsibility to "defend" their client from third-party claims related to a given project by either striking the defense obligation or, at a minimum, tying that defense obligation to a finding of negligence. These kinds of contractual protections also created a "safe harbor" under a design firm's insurance policy. Professional liability insurers will cover liability and damages that flow from an insured's negligent acts. However, professional liability insurers exclude from their policies coverage for liability their policyholders assume by contract, except to the extent that such liability is otherwise required by law. Thus, an insurer does not cover a contractual obligation to defend the client of a policyholder in the event of a claim.

Special Considerations Exist in California Contracts

While the contractually assumed defense obligation has been a hot topic for decades, the issue was magnified by the California Supreme Court's decision in *Crawford v. Weather Shield Manufacturing, Inc.* (2008). In *Crawford*, a subcontractor entered into a contract with broad indemnity and defense language, which had no limitation requiring a finding of negligence. The trial court found that the subcontractor had no duty to indemnify its client (since the jury found no fault on the subcontractor's part) but nonetheless allocated approximately $131,000 of the developer's defense costs to the subcontractor to pay. The Court of Appeal affirmed the trial court's ruling. In turn, the Supreme Court affirmed the Court of Appeal.

Of particular concern, the Supreme Court discussed at length *Civil Code* Section 2778, which is the statute governing interpretation of indemnity clauses. In analyzing the statute, the Supreme Court concluded that by virtue of the interplay of the provisions of Section 2778, unless the parties' agreement expressly provides otherwise, an indemnitor has the obligation, upon proper tender, to accept and assume the indemnitee's active defense against claims "embraced" by the indemnity provision.

Then came *UDC-Universal Development, LP v. CH2M Hill*. In *UDC*, the civil engineer, CH2M Hill, contractually agreed to indemnify the developer UDC from any and all claims "…to the extent they arise out of all or are in any way connected with any negligent act or omission by consultant." In the next sentence, CH2M Hill agreed, at its own expense to "… defend any suit, action or demand brought against developer…on any claim or demand covered herein."

The trial court, applying *Civil Code* Section 2778, found the defense obligation to be separate and distinct from the matters embraced by the indemnity clause (which limited indemnity to negligent acts or omissions). Thus, despite the fact that CH2M Hill was found to be not negligent at trial, the Court of Appeal affirmed the trial court's order to CH2M Hill to pay approximately $550,000 of the developer's defense costs, including the cost to prosecute the unsuccessful case against CH2M Hill.

In order to try and fix this untenable decision, multiple organizations joined to endorse an *Amicus Curiae* brief to the Supreme Court in support of CH2M Hill's Petition for Review, or in the alternative, in support of CH2M Hill's Request for Depublication of the opinion. On April 29, 2010, the Supreme Court denied the Petition for Review and denied the Request to Depublish the decision without explanation.

The California ruling could be applied retroactively to contractual indemnity provisions design firms accepted years ago as well as for any being negotiated in the future.

New Senate Bill Provides Some Relief but Only on Public Works Projects

In order to mitigate the negative impact of the *Crawford* and *UDC* decisions, ACEC California sought relief from the legislature. On September 29, 2010, California Governor Arnold Schwarzenegger signed into law Senate Bill (SB) 972 (Wolk), amending *Civil Code* Section 2782.8 - the public works projects

Continued on page 20

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indemnity statute for design professionals. **SB 972** took effect on January 1, 2011 and applies to contracts between design professionals and local public agencies signed on and after that date. **SB 972** has since been codified by way of an amendment to *Civil Code* Section 2782.8.

With Governor Schwarzenegger's signing of **SB 972** into law, design firms now have a useful tool in seeking more favorable indemnity language. Specifically, with respect to public works contracts, both the indemnity and defense obligations of the design professional are limited to claims that *"arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional."* Furthermore, all contracts and solicitation documents (i.e. RFPs) are deemed to incorporate this restriction. These express limitations are significant achievements.

The language in red, below, is the new language to the statute. While the changes seems subtle at first glance, they should put design firms in a better position to deny tenders of defense upon receipt of a claim and even possibly win summary judgment in court. By including "duty to defend" (in addition to "costs to defend"), the intent was to link any duty to pay the public agency's legal fees to the *actual* negligence, recklessness or willful misconduct of the design professional. In other words, the duty would no longer arise upfront, but rather would be deferred until actual negligence was found. Unfortunately, we will not know the true impact of the modified statute until it is brought on appeal. However, there is hope that it will damper the effects of *Crawford* and *UDC*, at least in the arena of public works.

2782.8. *(a) For all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including* ***the duty and*** *the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.* ***The duty to indemnify, including the duty and the cost to defend, is limited as provided in this section.*** *This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.*

The revised statute is by no means perfect. However, it gives lawyers a little more negotiating power in dealing with tenders of defense served on design firms by their public entity clients. The former statute did not deal with the duty to defend at all, and in

Continued on page 22

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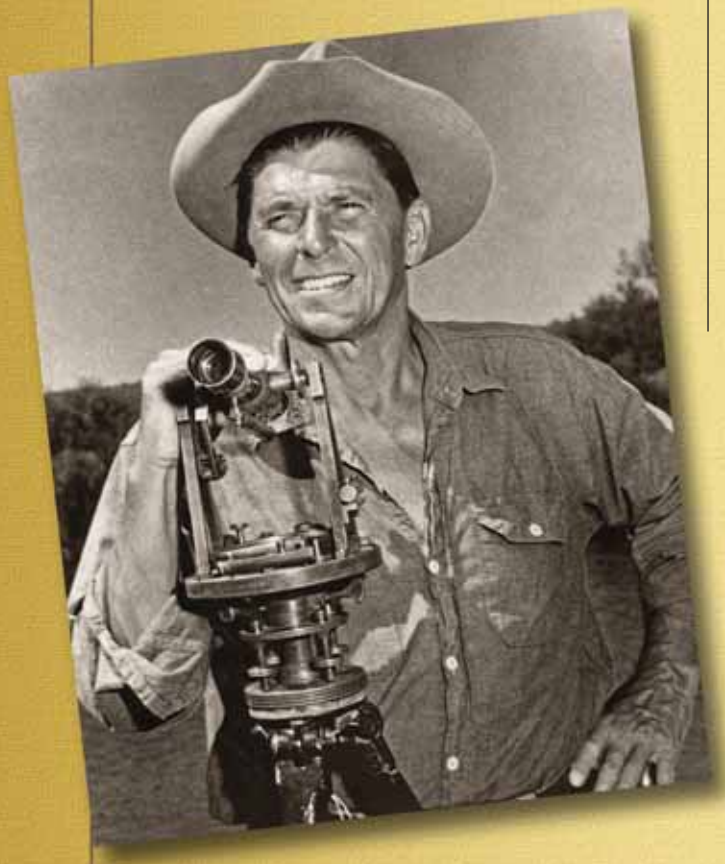

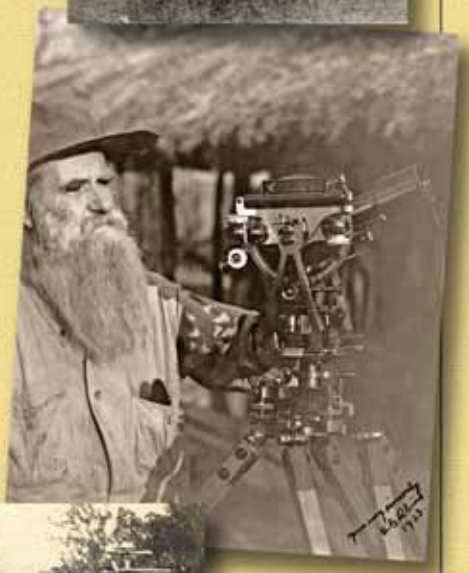

Proceeds from the sale of photos benefit California Land Surveyors Association Education Foundation (CLSA EF) and will be used to fund scholarships for land surveying students.

CLSA would like to thank Bryant Sturgess for generously donating his collection of historic images.

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light of *UDC* and *Crawford*, courts have been liberal in granting owners and developers an upfront cost of defense, at the expense of design firms. Time will be the only true indicator of the statute's effectiveness.

Indemnity Provisions Are Not "Boilerplate"

Firms must take action to protect from falling into the defense trap. Indemnity provisions should always be carefully examined and crafted to be as specific as possible. Legal counsel in the specific jurisdiction should be consulted to shape the provision to meet state law. This often means separating a duty to indemnify a client when the firm negligently performs professional services from other indemnity obligations. Design firms must specifically limit the duty to defend. Our law firm has recommended language such as the following be added to indemnity provisions to create what the California court would consider a "contrary intention" to the defense obligation:

> *Consultant shall have no upfront duty to defend the Owner, but shall reimburse defense costs of the Owner to the same extent of Consultant's indemnity obligation herein. The indemnity obligations provided under this section shall only apply to the extent such Claims are determined by a court of competent jurisdiction or arbitrator to have been caused by the negligence or willful misconduct of Consultant.*

But whether a firm has a contract construed by California law or by the law of another state, consider these following precautions:

- Do not sign a client's one-sided contract that forces you to take on risk that fails to match your economic reward.
- If possible, avoid any agreement to indemnify or defend your client.
- If you must give indemnity to your client, be sure that the indemnity is clearly tied to a finding of negligence.
- However, in California it is no longer sufficient to merely strike the word "defend" from the indemnity clause. You must show a "contrary intention" in the text of your con tract that you do not intend to defend your client and that your indemnity obligation is limited to your proportionate share of negligence.
- If you must accept the defense obligation, be sure that your intention is clear. Indicate that both the indemnity and defense obligation is limited to your proportionate share of negligence.
- If you must agree to indemnify and defend, attempt to negotiate a limitation of liability that caps your exposure to a sum certain for all damages including those associated with both indemnity and defense.
- When in doubt, consult your lawyer and/or broker for help. ❖

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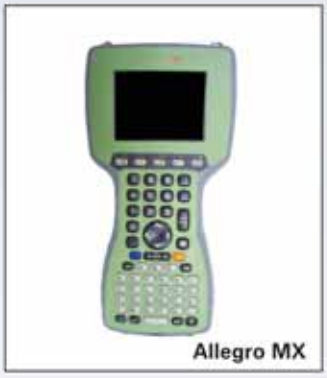

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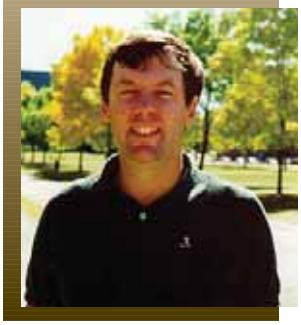

By: Knud E. Hermansen, P.L.S., P.E., Ph.D., Esq. and Donald R. Richards, PLS

Knud E. Hermansen *began his surveying career in the United States Marine Corp. over 30 years ago. After compl tion of basic training, Knud was sent to surveying school and spent the next three years with the 2nd Topographic Platoon, 8th Engineer Battalion performing control surveys throug out the world. After his release from active duty as a sergeant, Knud worked for various consulting firms providing a wide range of services involving boundary surveys, site development, and engineering. During the last several years, Knud has provided consulting services in landsurveying, civil engineering, and law. Much of Knud's present consulting activities involve boundary disputes, easements, land development, liability, title, and contract issues.*

Donald R. Richards *is a land and boundary consultant licensed in surveying and forestry practicing at Richards, Cranston & Chapman, Inc. in Rockland, Maine. He has been practicing for 30 years, specia izing in boundary retracement and the resolution of boundary di putes. He is active in the Maine Society Of Land Surveyors and has partic pated on several committees including the Alternate Dispute Resolution Committee. He has authored and co-authored several articles on the topic of surveying practice and boundary law and is a frequent speaker at meetings and seminars.*

The Use of Extrinsic Evidence as an Aid to the Interpretation of Deeds and their Descriptions

Introduction

A deed is an expression of the parties as to what real estate and rights were intended to be conveyed.[i] It should contain an accurate description of the land and appurtenances. However, persons whose services require them to scrutinize and interpret deed descriptions know that deeds and descriptions have often been drafted by unskilled and inexperienced hands. Furthermore, in spite of the care, vigilance, and caution on the part of the skilled scrivener, errors often did and continue to creep into deeds.[ii] For a deed that contains errors or ambiguities, it is well settled that it shall not be considered void if the intention of the parties to the grant can be satisfactorily determined.[iii] The object of the law is to uphold, rather than defeat such conveyances.[iv] Accordingly, there are occasions when it is appropriate to determine what was intended by utilizing information outside the deed or extrinsic evidence.[v]

Defined

Extrinsic evidence is defined as evidence outside the writings — in this case the deed. Extrinsic evidence is held to be synonymous with evidence aliunde and includes parol statements, acts by the parties, unrecorded documents, historical documents, private plans, etc. Extrinsic evidence does not include maps or other documents referred to in the deed. These documents are considered part of the deed and are merged with the deed as if copied into the deed.[vi] It does not matter if the document referred to in the deed is recorded or not.[vii]

When Extrinsic Evidence May Be Used

Generally, extrinsic evidence is used to clarify the intent of the parties and reasonably explain the import of the deed or the location and extent of the premises being conveyed. It is sometimes used in situations where the deed would otherwise be void but for the extrinsic evidence. When a deed does not sufficiently describe a tract of land to locate the boundaries, extrinsic evidence is properly admitted to furnish the information needed to clarify the location but only as much as is absolutely necessary to validate the description or supply its deficiency.[viii] Extrinsic evidence is allowed in the following situations:

Ambiguities - Extrinsic evidence can be used to resolve ambiguities.[ix] An ambiguity in a deed often arises when circumstances which are evident to the parties at the time of a conveyance may not be evident, after many years, to a subsequent owner or one who tries to interpret the deed. An ambiguity may arise when, for example, a deed calls for a monument at a corner and it is discovered that there are two monuments that fit the description, or where a deed calls for a distance easterly to a stream or highway and it is found that there are two potential locations that may meet the call.[x] In another example, a deed which conveys, "my west pasture as now fenced containing 5 acres", may, 40 years after the conveyance, require reference to the recollections of older individuals who were familiar with the property or information from aerial photos to ascertain what was actually conveyed by the description.

Verification of a Monument or the Location — Often surveyors use extrinsic evidence to identify monuments referred to in the deed. Monuments are often described poorly or partially. In some deeds monuments may need to be verified using extrinsic evidence.[xi] It also happens that the monument called for in a deed is not permanent, such as a tree or wood stake, or may have been removed by snow plowing or earth moving. The location of those monuments, even after their disappearance, is subject to proof by extrinsic evidence.[xii] An example which may require extrinsic evidence is a description that calls for a line running "northerly, passing 15 feet westerly of the Jackson sawmill" when the sawmill burned down years ago. The Jackson sawmill's proper location may be established by extrinsic evidence.

Errors, Omissions, and Conflict — When there is clearly an error, omission, or conflict between two or more parts of a deed, extrinsic evidence can often be helpful in resolving the error, omission, or conflict.[xiii] This may be particularly applicable when a scrivener's error is revealed such as in the transposition of numbers in bearings or distances, the reversal of a course, missing courses, and so on.

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Circumstances — Circumstances surrounding the conveyance have also been the topic of extrinsic evidence.[xiv] Examples include the use of tidal shores and marsh, determining a fence type, the location of utility poles, use of slope distances or magnetic bearings, and so on. An example is a deed which conveys "all that land which was the homestead farm of Caleb Daniels at the time of his death." Determining the homestead by looking at the circumstances existing at the time of Daniels' death may require extensive research into deeds, maps, tax records, ancient lines of occupation and other evidence outside the deed to determine what was intended to be conveyed by the terms.

Definitions and Terms — Often extrinsic evidence such as information from history books, technical manuals, journals, and so on must be used to clarify terms used in the deed. It is common for deeds to use terms that were familiar to the parties to the conveyance but which today may be very obscure.[xv] For example a deed which contains the wording, "beginning at a balm of gilead on the easterly side of Black Brook 25 rods north of Stones crossing..." may need to be clarified by knowledgeable witnesses or reliable documentation that a balm of gilead is a balsam poplar tree and that "Stones Crossing" was the point just above Morgan Stone's grist mill where the old county road crossed the brook. The court will utilize credible information outside the deed to define terms and give effect to the deed description.

Validate or Prove Lost Deeds — Less frequent but required from time to time is to use extrinsic evidence to validate or prove lost deeds. If sufficient evidence can be produced by unsigned copies, testimony of credible witnesses who read the deed, or other means of verifying the fact of the conveyance, the conveyance may be supported and proven.[xvi]

What May Be Used As Extrinsic Evidence

There are several sources of extrinsic evidence that have been recognized by the courts. These sources can be used to good advantage when the need arises.[xvii]

Parol — Parol evidence or verbal testimony is perhaps the most common source of extrinsic evidence. Surveyors, attorneys, and the courts, while recognizing the limitations of the recollections and statements of witnesses, make frequent use of this source when boundary locations are being retraced. It is common practice for the surveyor to talk to a landowner and the neighbors to hear their explanation of the boundary location and compare the testimony with the written descriptions in the deeds and the measurements made on the ground.

Historical Survey Plans — Surveys, both old and recent, are also a source of evidence which may shed light on circumstances surrounding the conveyance and the relative location of monuments and physical features on the ground. Surveyors may locate stone wall remnants, old wire fence remnants, physical features like brooks, old roadways, wells, foundation remains, timber cut lines, logging roads, buildings, utilities and easements. Without that information, which may verify or explain ambiguities, discrepancies, or errors in the deed, it is often difficult or impossible to properly fit the description to the ground.

Aerial Photographs — In addition to surveys and plans, aerial photos of a property may give clear evidence to the trained eye of the relative position of many physical features on the ground including buildings, roads, utility lines, streams, fences, and many other physical features.

Unrecorded Papers — Unrecorded papers and previous agreements between the parties may also, in some situations, be utilized to clarify an ambiguity or identify an obvious error in a deed.[xviii] The evidence may take the form of purchase and sale agreements, sketches, annotated drawings, or memoranda of the transaction. Because of the Doctrine of Merger, this source of information can not enlarge or diminish the grant or contradict the clear writings of the deed — it may only supply necessary information that was omitted from the deed.

Contemporaneous and Subsequent Acts — Another form of extrinsic evidence which the courts have relied on is information pertaining to the contemporaneous and subsequent acts of the parties to a deed.[xix] If the description in a deed is ambiguous the acts of the parties in recognizing a certain line by setting boundary markers, and blazing lines or making improvements such as erecting fences, building roads, placing utility poles, or landscaping may give the only evidence of the intent of the parties to the deed.[xx]

Declarations With Knowledge — Persons with some peculiar means of knowledge such as near-by-residents, surveyors, farm hands, etc. have all been used to clear up ambiguity. After the tract of land has been conveyed, the declarations of a former owner regarding his or her understanding of the boundaries and their use of the property may be admissible to clarify an ambiguous deed.[xxi]

Limitations

Extrinsic evidence is not used perfunctorily. The court has gone to great lengths to state and make clear that extrinsic evidence cannot be used to control, vary, or contradict the clear language in a deed. In other words, extrinsic evidence cannot enlarge or diminish that which is clearly described.[xxii] For example, a plan or deed not referenced or cited in a conveyance is evidence aliunde and therefore cannot control, vary or contradict the clear written description contained in a deed.[xxiii] The reasoning behind the principle is obvious. Why would people go to the trouble to clearly articulate their contract and solemnly execute a deed if those writings could be annulled by verbal contradictions or extraneous memoranda? The court has recognized that titles would be completely unsettled.[xxiv]

Exception Not A Commonplace — The use of extrinsic evidence is to be an exception or a last resort when the language of the deed is found deficient after harmonizing all the calls in the deed under the standard rules of construction[xxv]. In the interpretation of deeds, the intention of the parties must govern, and that intention is to be determined if possible from the words expressed in the deed.[xxvi] Where the words are clear, extrinsic evidence is not allowed[xxvii]. Accordingly, extrinsic evidence was inadmissible to show that in drafting a deed the scrivener erroneously inserted the words, "the north half" preceding the number of the lot to be conveyed or that instead of a certain parcel described in a deed, another tract was intended to be conveyed.[xxviii]

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No Substitution — In other cases, extrinsic evidence cannot be substituted where common sense, plain meaning, rules of construction, and logic adequately provide recourse. For example, when a deed calls for the ending point of a line to be opposite a certain and definite point on the other side of a street, the line must end at a point at right angles to the point called for.[xxix]

Cannot Vary Rules of Law or Legislature — Extrinsic evidence has not been allowed to vary rules established to protect purchasers and the sanctity of the deed[xxx]. For example, the Court did not permit a deed to be used as a security for a debt or as a mortgage or allow that the delivery of a deed was to be void on the fulfillment of a certain condition when these conditions are not cited in the deed.[xxxi] Neither can a parol reservation of fixtures, crops, manure or the like be considered valid.[xxxii] Even if the act of conveying a deed does not make sense or appears to have been unwise or absurd in what it accomplishes, if the language is clear, it is not to be altered by extrinsic or parol evidence.[xxxiii]

Conclusion

As can be seen from this discussion, extrinsic evidence, while not always the favored tool for the interpretation of deeds, is often a necessary one. Persons who must interpret, retrace, or delineate the descriptions in deeds must be familiar with the rules pertaining to these matters so that their construction will coincide with that of the court. ❖

i See e.g., *Cushing v. State of Maine*, 434 A.2d 486 (1981)

ii *Madden v. Tucker*, 46 Me. 367 (1859) and *Wing v. Burgis*, 13 Me. 111 (1836)

iii "...it is well settled law, that a deed shall not be held void for uncertainty, but shall be so construed wherever it is possible as to give effect to the intention of the parties and not defeat it; and that this may be done whenever the court placing itself in the situation of the grantor at the date of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance thus illustrated. Greenleaf's Cruise, vol. IV, p. 306; ed. of 1850, tit. XXXII, chap. XX, note to § 24. And this, even where it becomes necessary to reject parts of the description given as false and inconsistent." *Vose v. Handy*, 2 Maine, 322, 330 citing *Worthington v. Hyler*, 4 Mass. 196; *Jackson v. Clark*, 7 Johns. 217. To the same effect are *Wing v. Burgis*, 13 Maine, 111, and *Vose v. Bradstreet*, 27 Maine, 156, 171. Also see *Cilley v. Childs*, 73 Me. 130 (1882)

iv *Pelletier v. Langlois*, 130 Me. 486 (1931); *Patrick v. Grant*, 14 Me. 233 (1837); and *Wing v. Burgis*, 13 Me. 111 (1836)

v See e.g., *St. Pierre v. Grondin*, 513 A.2d 1368 (Me. 1986); *Bailey v. Look*, 432 A.2d 1271 (Me. 1981); *Perreault v. Toussaint*, 419 A.2d 1009 (Me. 1980); *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898); and *Abbott v. Abbott*, 51 Me. 575 (1863)

vi *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss* 63 Me. 287 (1873); *Thomas v. Patten* 13 Me. 329 (1836)

vii *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss*, 63 Me. 287 (1873); and *Thomas v. Patten*, 13 Me. 329 (1836)

viii *Perreault v. Toussaint*, 419 A.2d 1009 (Me. 1980) and *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898)

ix *Taylor v. Hanson*, Me. 514 A.2d 155 (Me. 1988); *Abbott v. Abbott*, 51 Me. 575 (1863); *Bonney v. Morrill*, 52 Me. 252 (1863); *Linscott v. Fernald*, 5 Me. 496 (1829); and *Linscott v. Fernald*, 5 Me. 496 (1829)

x *Tyler v. Fickett* &3 Me. 410 (1882) *Abbott v. Abbott*, 51 Me. 575 (1863); *Chadbourne v. Mason*, 48 Me. 389 (1861); *Emery v. Webster*, 42 Me. 204 (1856); and *Wing v. Burgis*, 13 Me. 111 (1836)

xi *C.f. Tyler v. Fickett*, 73 Me. 410 (1882); *Abbott v. Abbott*, 51 Me. 575 (1863);*Chadbourne v. Mason* 48 Me. 389 (1861) and *Wing v. Burgis* 13 Me. 111 (1836)

xii *Theriault v. Murray*, 588 A.2d 720 (Me. 1991); *Savage v. Renaud*, 588 A.2d 724 (Me. 1991); and *Ricci v. Godin*, 523 A.2d 589 (Me. 1987)

xiii *Wing v. Burgis*, 13 Me. 111 (1836) and *Vose v. Handy*, 2 Me. 296 (1823)

xiv *Holden v. Morgan*, 516 A.2d 955 (Me. 1986); *Cushing v. State of Maine*, 434 A.2d 486 (1981); *Gillespie v. Worcester*, 322 A.2d 93 (Me. 1974); *C Company v. Westbrook* 269 A.2d 307 (Me. 1970) ; *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Pellitier v. Langlois* 130 Me. 486 (1931); *Emery v. Webster*, 42 Me. 204 (1856); *Linscott v. Fernald*, 5 Me. 496 (1829)

xv *Emery v. Webster*, 42 Me. 204 (1856) and *Linscott v. Fernald*, 5 Me. 496 (1829)

xvi *Day v. Philbrook*, 89 Me. 462 (1897); *Moses v. Morse*, 74 Me. 472 (1883); and *Gore v. Elwell*, 22 Me. 442 (1843)

xvii *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968) and *Cilley v. Childs*, 73 Me. 130 (1882)

xviii *Company v. Westbrook*, 269 A.2d 307 (1970); *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Vumbaca v. West*, 107 Me. 130 (1910) and *Gould v. Boston Excelsior Co.*, 91 Me. 214 (1898); *Haight v. Hamor*, 83 Me. 453 (1891); and*Whitman v. Westman*, 30 Me. 285 (1849)

xix *Theriault v. Murray* 588 A.2d 720 (Me. 1991); *Bemis v. Bradley*, 126 Me. 462 (1927); *Borneman v. Milliken*, 123 Me. 488 (1924); ; *Woolen Co. v. Gas Co.*, 101 Me. 198 (1906); *Roberts v. Richards*, 84 Me. 1 (1891); *Cilley v. Childs*, 73 Me. 130 (1882); *Tyler v. Fickett*, 73 Me. 410 (1882); *Abbott v. Abbott*, 51 Me. 575 (1863)

xx *Knowles v. Toothaker*, 58 Me. 172 (1870) and *Emery v. Fowler*, 38 Me. 99 (1854)

xxi *Bradstreet v. Bradstreet*, 158 Me. 140 (1962).

xxii *Callahan v. Ganneston Park*, 245 A.2d 274 (Me. 1968); *Card v. Nickerson*, 150 Me. 89 (1954); Parkman v. Freeman, 121 Me. 341 (1922); *Bassett v. Breen*, 118 Me. 279 (1919); *May v. Labbe*, 114 Me. 374 (1895); *Neal v. Flint*, 88 Me. 72 (1895); *Ames v. Hilton*, 70 Me. 36 (1879); *Mitchell v. Smith*, 67 Me. 338 (1876); *Bartlett v. Corliss*, 63 Me. 287 (1873); *Faught v. Holway*, 50 Me. 24 (1861); Emery v. Webster, 42 Me. 204 (1856);*Wellington v. Murdough*, 41 Me. 281 (1856); *Kennebec Ferry Co. v. Bradstreet* ,28 Me. 374 (1848); *Pride v. Lunt*, 19 Me. 115 (1841); *Allen v. Allen*, 14 Me. 387 (1837); *Thomas v. Patten*, 13 Me. 329 (1836); *Lincoln v. Avery*, 10 Me. 418 (1833); and *Linscott v. Fernald*, 5 Me. 496 (1829);

xxiii *Kinney v. Central Maine Power Co.*, 403 A.2d 346 (Me. 1979); *Bradstreet v. Bradstreet*, 158 Me. 140 (1962); *Bartlett v. Corliss*, 63 Me. 287 (1873); *Talbot v. Copeland*, 38 Me. 333 (1854); and *Thomas v. Patten*, 13 Me. 329 (1836)

xxiv *Card v. Nickerson*, 150 Me. 89 (1954); *Bonney v. Morrill*, 52 Me. 252 (1863); *Madden v. Tucker*, 46 Me. 367 (1859); *Allen v. Allen*, 14 Me. 387 (1837); and *Lincoln v. Avery*, 10 Me. 418 (1833)

xxv *Taylor v. Hanson*, 514 A.2d 155 (Me. 1988); *Kinney v. Central Me. Power Co.*, 403 A.2d 346 (Me. 1979); *Wentworth v. Laporte*, 156 Me. 392 1960; *Penly v. Emmons*, 117 Me. 108 (1918); *Haight v. Hamor*, 83 Me. 453 (1891) ;*Ames v. Hilton*, 70 Me. 36 (1879); *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374 (1848) ; *Grover v. Drummond*, 25 Me. 185 (1845)

xxvi *St. Pierre v. Grondin*, 513 A.2d 1369 (Me. 1986); *Cushing v. State of Maine*, 434 A.2d 486 (1981); *Kinney v. Central Maine Power Co.*, 403 A.2d 346 (Me. 1979); *C Company v. Westbrook*, 269 A.2d 307 (Me. 1970); *Wentworth v. LaPorte*, 156 Me. 392 (1960); *Knowles v. Bean*, 87 Me. 331 (1895); *Haight v. Hamor*, 83 Me. 453 (1891); *Ames v. Hilton*, 70 Me. 36 (1879); and *Bartlett v. Corliss*, 63 Me. 287 (1873)

xxvii *Bonney v. Morrill*, 52 Me. 252 (1863); *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374 (1848); *Grover v. Drummond*, 25 Me. 185 (1845) ; *Lincoln v. Avery*, 10 Me. 418 (1833)

xxviii *Card v. Nickerson*, 150 Me. 89 (1954); *Brown v. Allen*, 43 Me. 590 (1857); and *Williams v. Spaulding*, 29 Me. 112 (1848)

xxix Bradley v. Wilson, 58 Me. 357 (1870)

xxx *Madden v. Tucker*, 46 Me. 367, 376 [1859]

xxxi *Card v. Nickerson*, 150 Me. 89 (1954); *May v. Labbe*, 114 Me. 374 (1916); and *Reed v. Reed*, 71 Me. 156 (1880)

xxxii *Card v. Nickerson*, 150 Me. 89 (1954) and Brown v. Thurston, 56 Me. 126 (1868) Warren v. Blake, 54 Me. 276 (1866) and Kennebec Ferry Co. v. Bradstreet, 28 Me. 374 (1848)

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Professional Outreach Events

Surveyors Lay Out Soccer Fields in Rancho Palos Verdes, CA

By Bill Hofferber, PLS & Dallas Sweeney, PLS

In August CLSA members of the Los Angeles and Riverside/San Bernardino Chapters, and a member of the Santiago Canyon College student chapter, joined forces to lay out soccer fields for the American Youth Soccer Association (AYSO) Region 10 in Rancho Palos Verdes, CA. We had been contacted by AYSO representative John Schmidt about two weeks earlier and sent out some emails to seek volunteers. The surveyors who came to the rescue were: Jay Seymour, Mark Price, Mark Danielson, Bruce Miller, LA Chapter; Bill and Elena Hofferber, Riverside/San Bernardino Chapter, and Tiffany Padilla, Santiago Canyon College student chapter. We thank you all for joining in on the fun.

This is our second year helping out AYSO Region 10 with the field layout, where they have about 28 fields of various sizes at 8 or 9 different locations. This year we all met at Hesse Park at about 9:00AM and then split into 3 different groups to our assigned locations. We all wrapped up this year before 3:00PM and I know that John and the other volunteers and coaches of Region 10 appreciate the efforts of CLSA. I would also like to give a special thanks to Fred Youna, owner of Colton Surveying Instruments, who generously donated over 300 spikes and stake chasers for the crews to leave at the corners, midline, and other select locations, as requested by the AYSO team. For any other soccer parents, volunteers, or soccer coaches out there interested in utilizing the services of your local land surveyors, please contact CLSA Central Office at 707-578-6016 and ask for assistance with contacting local chapter members that would be interested in helping out your region with similar efforts.

Soccer Field Layout – Note From Golden Nugget Soccer Club

We are a very rural area with limited volunteers and no limit to our kid's interests. Every year our local recreational soccer program spends countless hours preparing for the 100s of kids who want to play this global sport. Youth soccer is important in our very rural foothill area as the largest non-profit of all the sports groups, with nearly 400 kids this season.

Typically, volunteers gather with tapes, calculators, paint machines, stakes, string, and a large amount of anxiety around getting the fields measured and correctly placed. I am writing this to share our experience in relation to getting to know one of our many coaches who brought something unbelievable to the beginning of this year's season.

Dallas Sweeney has proven to bring more than coaching to Gold Nugget Soccer Club (GNSC). More than just supporting his own son's team and another team that unfortunately could not recruit a parent to guide them through the season, the contribution that inspired me to write this letter is above and beyond his coaching. I am happy to share the impact on our program from the time and expertise Dallas and his wife Trish brought to a large grass field on a mid-August Sunday evening. With just a week before Opening Day, Dallas helped survey four playing fields for three different age groups in less than three hours! This process was done without the 3 or 4 huge 300 foot tape measures, calculators, and most notably, the stressed out math dad trying to figure out how to square up the rectangular playing field. It was just Dallas and his wife and 2 board members there hoping this may actually work...well it absolutely did! The Sweeney Team had points plotted out faster than we could get paint down, and the fields are the best we've had in the 8 plus years I've been involved in the club. The professionalism Dallas obviously carries in his career is visible in the clearly perfect fields that are now the center piece to our Soccer Saturdays. Thank you again Sweeney Family for changing our field marking experience to something we really could have never imagined. We hope surveying will forever be part of GNSC! ■

Let us know about your local professional outreach events so we can share the good news. - Editor
Email us: clsa@californiasurveyors.org

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The Issue:

- California has been steadily reducing funding for educational institutions.
- The CSU Fresno Geomatics program is considered to be small and is more susceptible to cutbacks or elimination.
- Both professors that hold a professional land surveying license, are now retired

The Need:

- CSU Fresno Geomatics program was the first four year surveying degree program in the nation and the first to become ABET accredited.
- CSU Fresno Geomatics has graduated over 700 students.
- Students graduating from the CSU Fresno Geomatics program have gone on to serve in many leadership positions in the land surveying profession both in the private and public sector.

The Solution:

- The CLSA Education Foundation has worked with CSU Fresno to create an endowment that will fund a full-time professor licensed to practice land surveying in California. This will help to ensure that the CSU Fresno Geomatics program contiues.
- Lyles Foundation will match all donations, dollar-for-dollar, up to $1 million

The Benefit:

- Your donation is fully tax deductible! CLSA Education Foundation is a 501(c)3 charitable organization.Tax ID number 68-0482650
- Show your support for the surveying profession and the great program at CSU Fresno.

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Example Donation:
California Surveying & Drafting Supply donated $10,000
Lyles Foundation matched, dollar-for-dollar, with a donation for $10,000

After matching funds the Donation made by
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Make checks payable to: CLSA Education Foundation

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*Several companies and individuals made generous contributions to the Fresno GME Foundation. Their donations to the Fresno GME were used to help fund the endowment. Those donors include:

- Joseph Bell Hyde Memorial (Diamond Level)
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- Psomas (Diamond Level)
- Hennon Surveying & Mapping (Gold Level)
- Bush & Associates (Gold Level)
- KDM Meridian (Gold Level)
- Fuscoe (Gold Level)
- David Woolley (Silver Level)
- Coast Surveying (Silver Level)
- Greg Helmer (Silver Level)

Resolving Conflicting Elements in Land Descriptions Using the California Code of Civil Procedure, Section 2077

By: Tim Case, PLS

Although these rules are (or should be) generally known throughout the surveying community, many California surveyors are not aware they are actually codified in state law. Of particular interest is subsection three, which says that between measurements that are inconsistent with each other, direction prevails over area and distance prevails over all.

California Code of Civil Procedure, Section 2077

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

One — Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

Two — When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

Three — Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

Four — When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

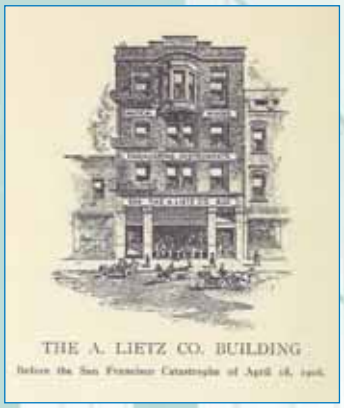
Five — When tide water is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.

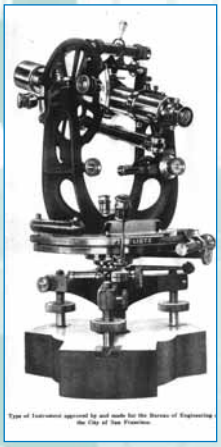
Six — When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars. ❖

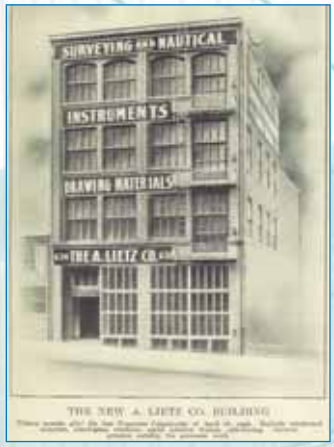
San Francisco Treats

By: Dane Ince, PLS

The story of the A. Lietz Company, local manufacturer of "Modern Surveying Instruments," is closely tied to the rebuilding of San Francisco after the 1906 earthquake and fire. Illustrations from the manufacturer's publications from that period show the factory at 632-634 Commercial Street in San Francisco before and after the tragic events of 1906. The 1908 catalogue also shows their newly rebuilt facility. A visit to the site of the old factory finds much of the 1908 building is still there with the arched windows along an upper floor and the fire escape along the right side of the structure. The 1908 and 1911 catalogues show illustrations of instruments custom made for the Bureau of Engineering of the City of San Francisco. ❖







Grant Deed Poetry

Submitted by: Scott Martin, PLS

Scott sent us this poetic grant deed from the official records of Travis County, Texas. It was recorded on January 9, 1933 in Volume 485 at Page 628:

Know All Men By These Presents

That we, Houghton Brownlee and Walter S. Benson, of said County and State,
Having heard the intention of our dear city fathers certain pavements to lay,
With gutters and curb, 'long Leander Highway;
Being publicly minded and not wishing to stand,
In the way of city progress or its free spending hand,
In consideration of that and the love and affection,
We bear for our town and its tender protection,
Have given and granted, sold and conveyed,
And do grant and convey before cement is laid,
Lot Number One in Block Number One,
As shown by map of Alta Vista Addition,
To the city of Austin, said County and State,
Relinquishing all title before it's too late,
And we forever quitclaim so that neither of us,
Our heirs or assigns, can raise any fuss as to who owns the same,
We'd like to keep this little piece of ground
For our children, so far or that may come around,
But with winter coming on and cotton five cents,
We feel we can't stand the paving expense.
So we abandon to you, Dear fathers, in power,
Said lot with its grass, vine, weed and flower.
We have no idea what you can do with this land,
Maybe a playground or park, or a hamburger stand,
Or perhaps build a roost where buzzards can molt,
Or remove there the body of Alice Ben Bolt,
But we do hereby vacate renounce and quitclaim
All title and interest and right in the same.

Witness our hands at Austin, Texas, this the 15th day of September, 1931

Houghton Brownlee Walter S. Benson

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- when it has to be **right**

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Postcards

Devil's Courthouse

Phil Danskin, PLS, who received this photo from his long-time neighbor, Ron Hensic. *This unique monument is a hilltop attraction about 30 miles southwest of Ashville, North Carolina along the Blue Ridge Parkway in the Smokey Mountains. It includes a sighting device, like a fire lookout, and makes reference to the Devil's Courthouse in the Pisgah National Forest. Nearby lies a cave where, legend has it, the devil holds court. (And I thought that was somewhere along Capitol Mall in Sacramento. The things you learn here . . .) Cherokee lore says this cave is the dancing chamber and dwelling place of the slant-eyed giant, Judaculla.(Source: Ashville Mountains Travel Guide) Submitted by: Phil Danskin, PLS.*

Welcome New CLSA Members

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STUDENT

Benjamin Iverson, Lake Elsinore
Jessica Marks, Staten Island, NY
Steven Mendoza, Buena Park

Kids Korner

Do you have a picture of a "junior surveyor" in your family that you would like to share? Send it in and we will put it in the Kids Korner.

***Chris Layton**, son of Dennis Layton, PLS, running total station. "Whenever my kids and their cousins get bored, I take them all to the office and teach them how to setup instruments, run the rod and why we do what we do for certain surveys. The walkie-talkies seem to be the biggest hit (go figure!).*

***Max Tirapelle**, son of Aundrea and Phil Tirapelle, examines a chiseled cross in the sidewalk. His mother says this about the picture: "The funny thing is I didn't point it out; he found it and looked at it all on his own."*

By: Richard Hertzberg, CPCU, ARM, Vista International Insurance Brokers

Keep Yourself Cyber Secure

Internet and network security is becoming a big issue for business computer users with the criminal, free-lance or disgruntled employee hackers out there who want to disrupt and even ruin your business. Good and faithful technology can become evil and destructive. You should know how to protect yourself with good risk management tools and insurance.

Hackers can tarnish your business identity, steal your money and data by hacking into your business account and client files, including data. An unknown virus or malware you pass on, can cause havoc in a client's computer. If altered or missing data harms your client, you can be sued.

Depending on the damages, you can look to your professional liability, general liability or cyber liability insurance policies for coverage. Read your policies to see if you have adequate coverage, particularly, crisis expense coverage and risk management help from your insurance company.

In this era, where our technology allows everything to be quick, hopefully accurate, fast and error-free, the best defense is to have someone frequently review all important data, especially final and finished client documents.

Computer Health, Network and Internet Security Suggestions:

- Have strong virus protection and run virus scans frequently
- Keep firewalls strong
- Delete redundant programs
- Control access to your network and the use data
- Protect lists, records, plans, blueprints, tax documents, intellectual property, trade secrets and client's records. With Computer Aided Design (CAD) being used more and more for client plans and electronic transmission, from your computer to your client's computer, there is much more possibility for innocent and unintended error or malicious and harmful error and theft. So always be cautious with your electronically transmitted documents.
- Limit internal and external access to your website
- Backup all your data and store it, preferably offsite
- Watch for ID theft and be careful with employee computer access. Review your password protection, especially when employees leave or are let go.
- Take the time to review your data and correct discrepancies and strange doings

Risk Management

Protect your high tech surveying equipment. Keep it locked up in your truck or office when not in use. When you're in the field always have someone keep watch when your equipment is out of your sight. Bad people often steal the robotic equipment, even if they don't know what it is, and try to sell it at flea markets or on EBay.

Insurance Rate Increases Coming

Various tracking agencies are reporting up to six percent rate increases across the board for all lines of coverage. So, if you can, increase your insurance budgets a bit and also increase the amount you put in your bids to cover the costs of your insurance. ❖

Photo of the Year

Submit Photos to CLSA@californiasurveyors.org
Deadline: December 31, 2012

The photo is of a LiDAR Quality Control check shot for per NSSDA standards on U.S. Hwy. 6 just north of Bishop, looking east. The LiDAR returns from pavement versus the stop bar paint stripe are easily identifiable and work very well to check the quality of the data. LiDAR data needs to be checked in several different types of vegetation and this one is for open terrain.

Submitted by Pat Tami, PLS

Sacramento River

Submitted by Sherrie Zimmerman, PLS

Q&A SMA Expert

By: Michael P. Durkee, ESQ

Michael P. Durkee, *represents developers, public agencies and interest groups in all aspects of land use law. Mike is the principal author of Map Act Navigator (1997-2012), and co-author of Ballot Box Navigator (Solano Press 2003), and Land-Use Initiatives and Referenda in California (Solano Press 1990, 1991).*

415.273.7455 mdurkee@allenmatkins.com

Question

I have a Vesting Tentative Map on one project, and a regular (non-vesting) Tentative Map on another project. I am interested in seeking an extension of the life (term) of each, but do not know the applicable legal standards the City will apply when considering my extension requests, and whether new conditions can be added. Can you explain the applicable rules?

Discussion

Excellent question, and very "timely" given the continuing economic situation.

Applicable Standards of Review. Government Code section 66452.6(e) is one of the pieces in the applicable puzzle:

Upon application of the subdivider filed prior to the expiration of the approved or conditionally approved tentative map, the time at which the map expires pursuant to subdivision (a) may be extended by the legislative body or by an advisory agency authorized to approve or conditionally approve tentative maps for a period or periods not exceeding a total of six years. The period of extension specified in this subdivision shall be in addition to the period of time provided in subdivision (a).

However, the applicable legal standards involve additional Map Act sections, and hinge off of the type of map involved.

Regular Tentative Maps. While vesting tentative maps are subject to certain Map Act provisions regulating their extension (*see* discussion below), the Map Act provides no express standard for city/county approval or denial of a discretionary extension request for a "regular" (non-vesting) tentative map. However, such actions are arguably subject to Code of Civil Procedure section 1094.5 (quasi-judicial), and are therefore subject to the substantial evidence test, requiring the city/county to articulate and substantiate its reasons for denial. This is an area in which the need for a legislative solution is long overdue.

Vesting Tentative Maps. Government Code section 66498.1 (regarding Vesting Tentative Maps) provides in pertinent part as follows:

(c) Notwithstanding subdivision (b) [only laws in place at application completion may be applied to project], the local agency may condition or deny a permit, approval, extension, or entitlement if it determines any of the following:

(1) A failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both.

(2) The condition or denial is required, in order to comply with state or federal law.

In other words, Government Code section 66498.1 allows the denial of an extension or the addition of new conditions of approval to an extension only if the city/county could find that either the failure to deny or condition the extension would "place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety," or that the condition or denial was "required, in order to comply with state or federal law." In some cases, even new policies and standards implemented after the completion of the tentative map may be retroactively applied as conditions for approval if the condition promotes the health and safety of the local agency's residents. *Bright Dev. v. City of Tracy*, 20 Cal. App. 4th 783 (1993).

As a further caveat, the ability to attach new conditions through the granting of a discretionary extension is suspect.

New Conditions as Part of Discretionary Extension Approval. California courts have reinterpreted the Map Act as prohibiting the unilateral imposition of a new condition by a city/county to an already-approved tentative map that the city/county agrees to extend. In *El Patio v. Permanent Rent Control Bd. of the City of Santa Monica*, an existing tentative map for a condominium conversion pre-dated a city amendment granting the Rent Control Board the authority to require permits for the removal of rent controlled units from the housing market. *El Patio v. Permanent Rent Control Bd.*, 110 Cal. App. 3d 915 (1980). When the plaintiff approached the city for an extension of the tentative map, the city agreed but attached a condition requiring compliance with the new city amendment. The plaintiff sued, claiming that the condition was not on the originally-approved tentative map and that the city could not add the condition to the tentative map extension. The court agreed with the plaintiff and held that the Map Act prohibits new conditions except those describing the length of the extension. The court reasoned that to add new conditions to an approved tentative map would defeat the purpose of Government Code section 66473, which provides that a final map must be approved by the city upon the satisfaction of conditions applicable only to the original tentative map approval, not other conditions later attached. In other words, the new intervening conditions would not be enforceable; only the original conditions would need to be satisfied to secure the final map.

Continued on next page

Continued from previous page

Some city attorneys/county counsel have argued that the language of Government Code section 66452.6(e) ("upon an application by the subdivider to extend that map, the map shall automatically be extended for 60 days or until the application for the extension is approved, conditionally approved, or denied, whichever occurs first") provided a legislative overruling of *El Patio*, and that a city/county could now impose conditions on discretionary tentative map extensions. Gov't Code § 66452.6(e). There are several problems with this argument: (i) it fails to recognize that *El Patio*'s holding hinged on Government Code section 66473 (a final map must be approved by the city upon the satisfaction of conditions applicable only to the original tentative map approval), and Government Code section 66473 was not deleted, amended or otherwise legislatively overruled by the new language of Government Code section 66452.6(e); (ii) it fails to recognize that the new language of Government Code section 66452.6(e) was added to provide subdividers with protections by providing a method of keeping tentative maps alive while their extension requests could be scheduled for hearing. It was not intended to provide new "conditioning" powers to cities/counties; and (iii) "approve, conditionally approve or deny" is boiler-plate Map Act language and must be read in light of, and harmonized with, the other provisions of the Map Act and the cases like *El Patio*, which do not allow new conditions except conditions of "time" (*i.e.*, the life of the extension itself).

If a subdivider voluntarily agrees to a new condition that the city/county imposes for an extension of the tentative map, then the subdivider is estopped from later challenging or appealing the validity of the conditions previously agreed to. *Rossco Holdings, Inc. v. State of Cal.*, 212 Cal. App. 3d 642 (1989). Basically, a subdivider waives its right to assert the invalidity of any agreed-to conditions for the purpose of an extension, and consequently the subdivider is liable for any costs of compliance required to bring their map into compliance with the building permit and new conditions. *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74 (1977). Indeed, a subdivider is free to reject such new conditions imposed by the city/county, but then the city/county has the discretion under its police power to deny the tentative map extension if the condition is related to the public's health, safety, or welfare. *McMullan v. Santa Monica Rent Control Bd.*, 168 Cal. App. 3d 960 (1985).

Finally, a city/county cannot enact local legislation limiting extensions that are otherwise allowed by the Map Act. In *Griffis v. Mono County*, the court ruled that the county could not limit the ability of the applicant to seek the maximum extension duration (currently up to 6 years) to a shorter time period than that allowed by the Map Act. *Griffis v. Mono County*, 163 Cal. App. 3d 414 (1995).

I hope this provides a little insight into the applicable rules regarding map extensions. ❖

By: Ray Mathe, PLS, BPELSG Staff Land Surveyor

The BPELSG Chronicles

That Old Client Could Cost You Your License

Beware, there is a trap that could affect your practice as a Land Surveyor! What I am talking about is Section § 8765(c) of the Professional Land Surveyors Act (PLS Act).

Do you remember that project you started three, four or maybe ten years ago, when you went out and did a preliminary survey for a land development project? I mean, let's face it, for those of us that were working in the arena where your client cared more about scope and schedule than the nice fee you were charging them…it was an incredible season where engineering and surveying companies took in record profits. Seems like a hundred years ago, doesn't it?

There are hundreds of projects that just stopped one day. Topographic maps, approved tentative maps, construction staking files, improvement plans - all sitting on the shelf collecting dust. Many times our clients are no longer there. Bankrupt, restructured or sitting somewhere under another LLP waiting to get back into the land development game.

Those projects you never completed because your client wasn't going to throw away another dime because the economy was failing under the weight of inflated home prices and predatory loans. At the time you performed those field surveys, you were not required to file a Record of Survey if your survey, disclosed any of the criteria detailed in Section § 8762(b)(1-5) of the PLS Act since Section § 8765(c) afforded an exemption as you were going to record your map in accordance with the Subdivision Map Act.

Well, not only are those documents collecting dust on your shelf, many of the tentative maps have long since expired, and there are no extensions available for them. Now it is pay day someday, your exemption under § 8765 expired with those tentative maps, and you are on the hook to file a Record of Survey or at the very least, a Corner Record for each of the defunct projects. Oh, and it doesn't matter that your client, contract, and maybe the old company you worked for, are expired too!

That's right, a contract or a client to pay the bill doesn't relive you from the responsibility to comply with the law. However, depending on the contract in place at the time, your former employer could possibly have some shared responsibility as well. Although, your relief might come from the civil courts - don't get your hopes too high, administrative law regulates our practice. If you choose to stick your head in the sand and pretend there isn't a problem, your issues could become insurmountable for your license. You could face administrative fines in the amount of $5,000 per violation or worse.

In situations where you have not met the filing requirements, the Board's primary concern is compliance. But, if there is negligence and/or incompetence as a result of too many projects, or refusal to meet your obligations, you could find yourself in the middle of the formal disciplinary action process. Administrative fines or formal discipline, either way you will be required to file your Record of Survey.

The solution for you right now is to identify your old projects that require filing and submit an acceptable record to the county surveyor. Here is the silver lining: you don't need to bring the surveys up to date. You do, however, need to clearly represent the survey you performed at the time you were working on your project. Simply put, identify on the face of your map that the survey performed represents a survey in (insert date) and represents the conditions that existed at that time. Keep in mind the PLS Act filing requirements are there so that other professionals and the public know the basis for your work and a record of the evidence you found (and left) at the time of your survey.

Now is the time to look through those old dusty files and deal with those surveys you started a long, long, time ago. Don't get caught in the denial trap, the industry and the public need good surveyors – you might as well be one of those surveyors. While it may cost you some money to complete these projects, it is always a good time to do the right thing. ❖

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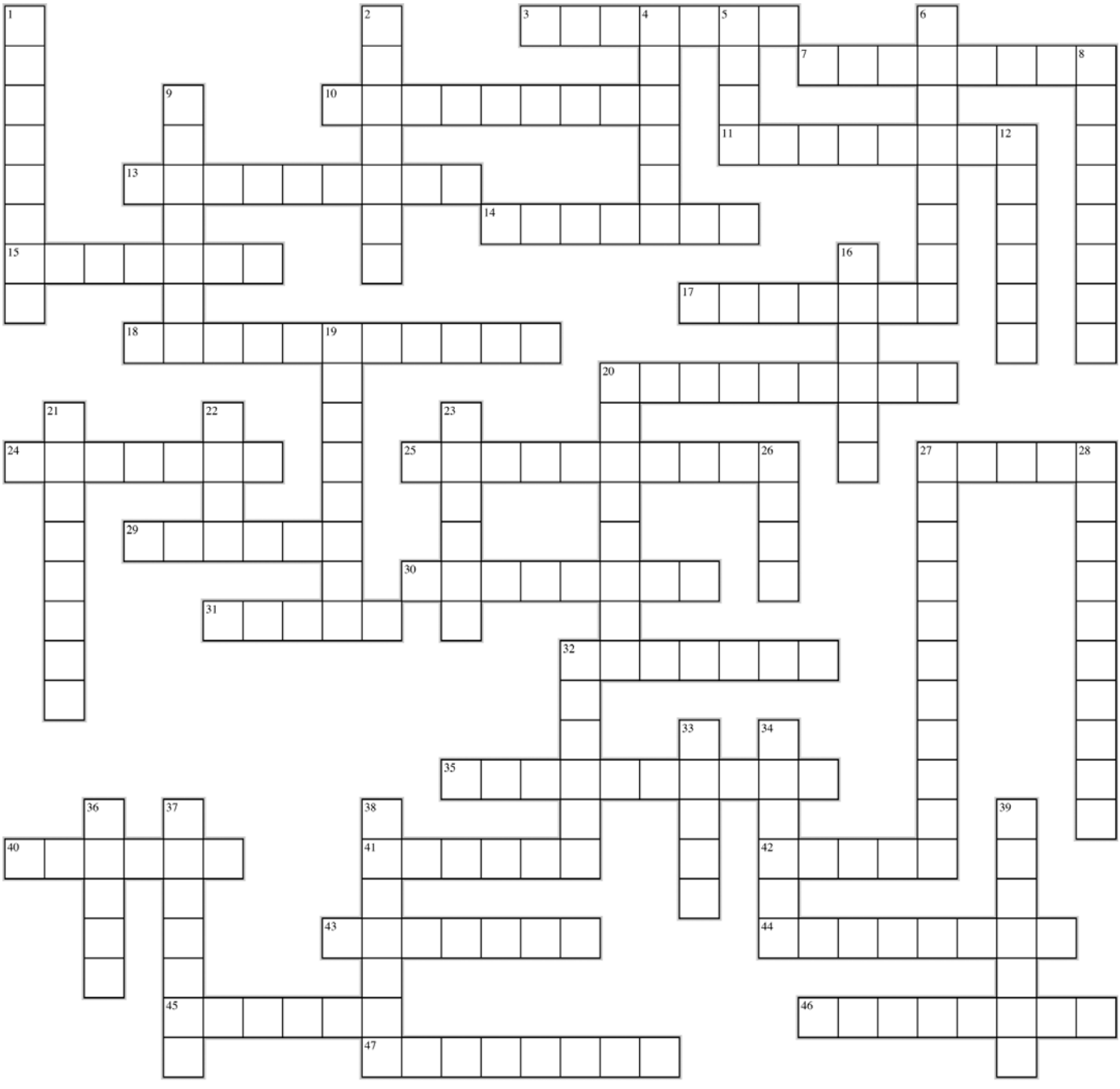
Crossword Puzzle

By: Ian Wilson, PLS

Ian Wilson, PLS *is the Director of Survey for Cardno WRG, Inc. in Roseville, CA. He started surveying in 1988 in Southern California and is now enjoying life in Northern California. Ian enjoys hearing from fellow members about the crossword puzzle and is always looking for clue ideas and input. He is licensed in California and Nevada and has specialized in boundary, topographic and Land Title surveys. His expert witness practice in boundary and easement issues is growing. Ian has been a member of CLSA since 1988.*

CLSA Crossword Puzzle #24

If you have an idea for a puzzle theme or a clue you would like to include in an upcoming puzzle, email to clsa@californiasurveyors.org



EclipseCrossword.com

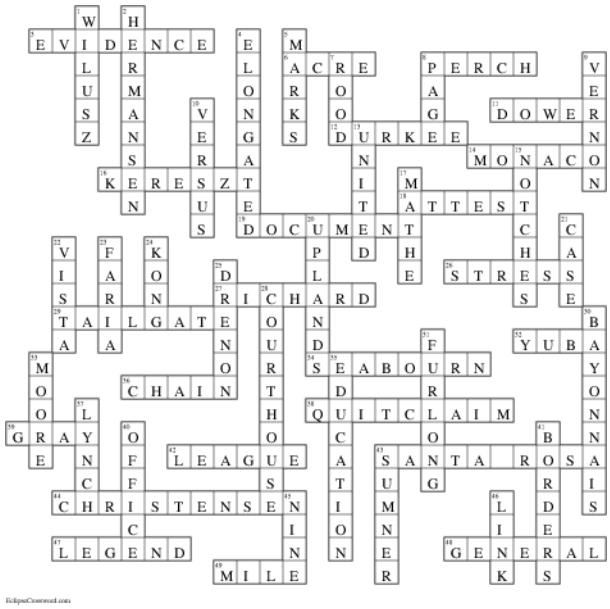
Across

3. NATURALLY DAILY
7. PROOF
10. GPS ELEVATION
11. UNLAWFUL ENTRY
13. IMPERCEPTIBLE INCREASE IN LAND
14. HUSBAND'S RIGHT
15. VERIFICATION OF RESULTS
17. CONE PROJECTION
18. WET SURVEYING TYPE
20. LATENT OR PATENT ONE
24. ABLE TO BE SEEN
25. TYPE OF SURVEY MARKER
27. SCREEN DOT
29. US QUIT CLAIM
30. DATA ABOUT DATA
31. ABOVE IN A LEGAL CASE
32. DIRECTION
35. ABNEY LEVEL
40. SPACE BETWEEN AN ARC AND TWO LINES
41. FAILURE TO DO SOMETHING
42. FORMED BY TWO INTERSECTING LINES
43. RIGHT TO ENTER
44. CUT ACROSS
45. ROTATED CIRCLE
46. DOCUMENTARY EVIDENCE OF TITLE
47. WATER BOUNDARY

Down

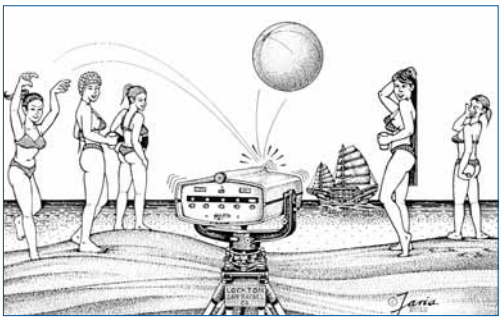
1. REQUIREMENT OF PLS ACT §8759
2. BLM DISTANCE RIGHT OR LEFT
4. HALF D
5. JOINED
6. NEAR
8. INTEREST IN LAND
9. PUBLIC DITCH
12. DOUBLE CURVE CUTTER
16. AN ESTATE FOR LIFE
19. TUBE PROJECTION
20. DO AWAY WITH
21. PERTAINING TO THE COAST
22. MAP
23. SMALL STREAM
26. WRITTEN CONVEYANCE DOCUMENT
27. NEXT TO LAST
28. TYPE OF DAMAGES
32. LIMIT EXTERNALLY
33. EMBANKMENT
34. TEMPORARY USER
36. TREE MARK
37. SCIENCE OF THE EARTH'S SHAPE
38. MISTAKE
39. V-SHAPE GROVES

Key to CLSA puzzle #23 (Surveyor Issue # 169)



Sustaining Members

Top Captions for issue #170 Cartoon



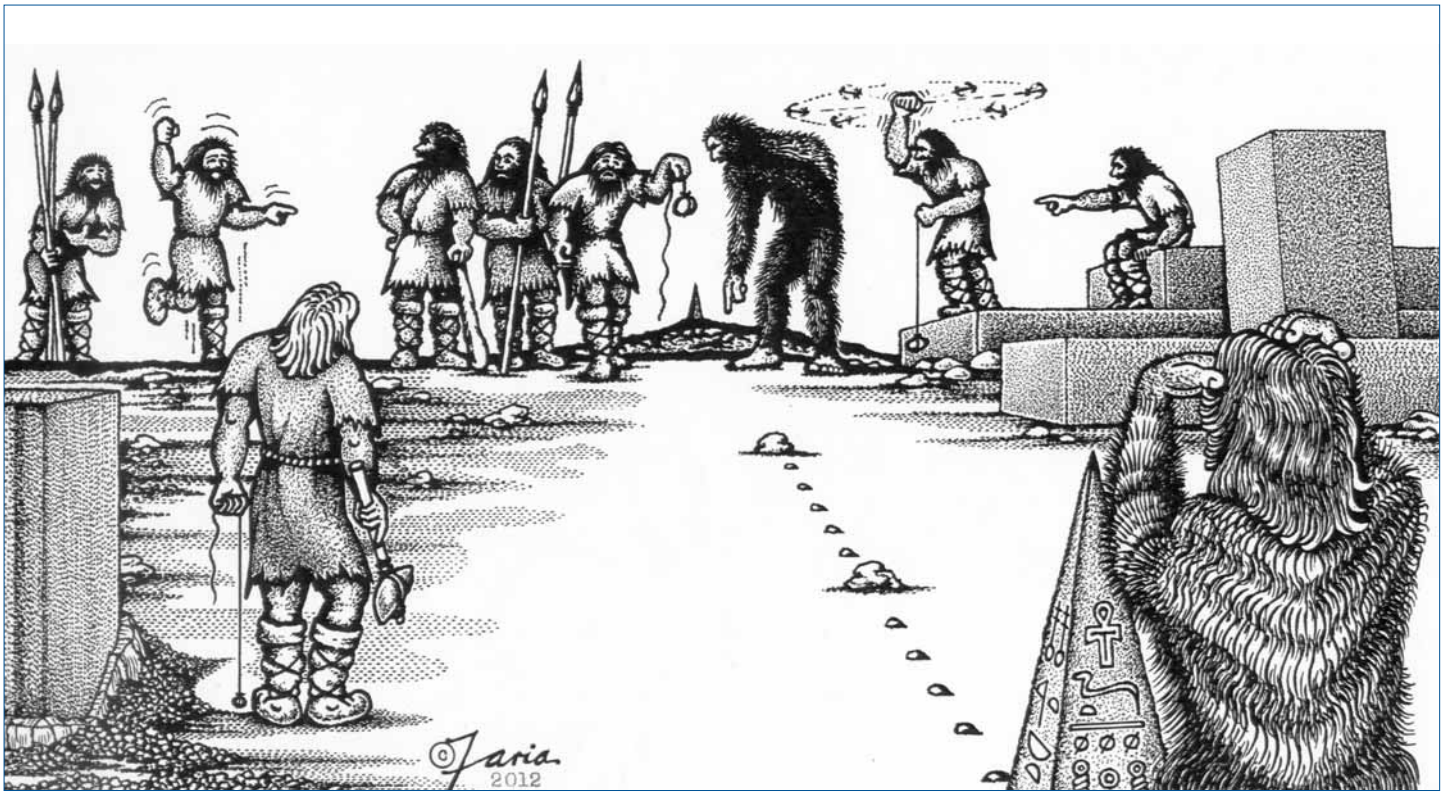
"If I pretend to be shooting a distance to that ship, I can so fit all these bikini-clad women in this picture." – Annette Lockhart, PLS

"Are you going to look at the Spanish galleon with your survey thingie or play ball with us? Ka-thump "Pleeeaaasseeee" – BJ Tucker PE, LS

From our setup on the hill top We will see across the bay Just as soon as Faria's robots – Phil Danskin, PLS

"Staking out curves." "The beach scene measures up!" – Glen Medina, PLS

Submit your caption for the cartoon below to clsa@californiasurveyors.org by December 1st. Our favorite captions will be published in the next issue of the California Surveyor.



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