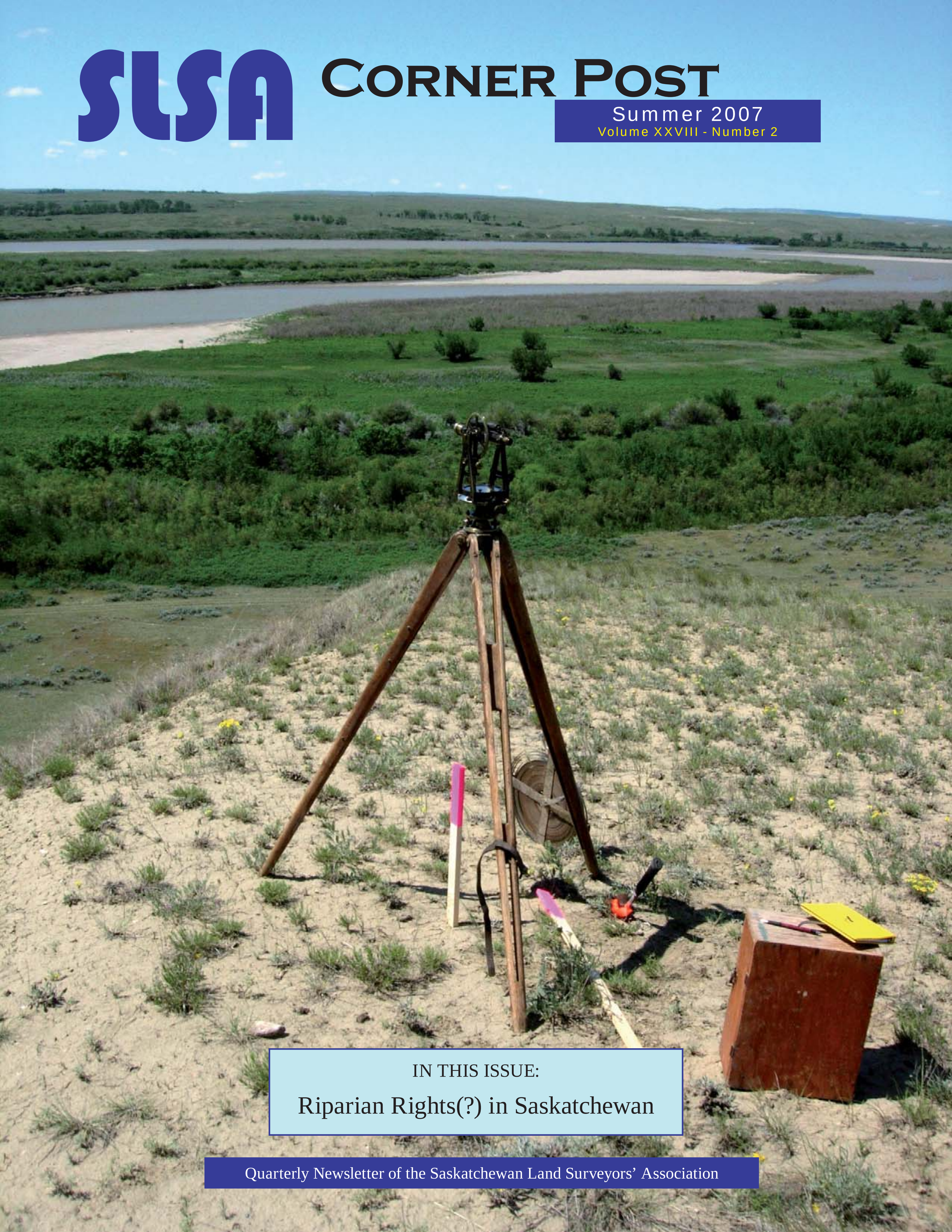
SLSA

CORNER POST

Summer 2007

Volume XXVIII - Number 2



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Riparian Rights(?) in Saskatchewan

Quarterly Newsletter of the Saskatchewan Land Surveyors' Association


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Summer 2007
Volume XXVIII, Number 2

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The opinions of the contributing writers may not be consistent with those of the Council of the Saskatchewan Land Surveyors' Association. Articles may be reprinted with appropriate credit given to the authors, unless it is under copyright.

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on all regular business days.

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Cover Story

The cover photo was one of a series submitted by Stu Hayward in the fall of 2006. He had originally set up the shots as potential subject matter for local artist "Laurie Besplug" who is doing a project related to the oil and gas industry. Her work is to be used in a book that shows the chronological 'life' of an oil well from the time it is started until it is finished. Surveying is to be one of twelve parts in her project.

This photo is particularly apropos for this edition of the Corner Post in which several pages have been devoted to articles on riparian rights. The photo captures a time when surveyors were laying out the Western Township System across the thousands of water bodies in Western Canada. It was also a time when nineteenth century law makers were writing the rules by which property boundaries were to be established. Their words have been examined for decades since in an attempt to interpret their original intentions as it relates to the laws of accretion and dereliction adjacent to bodies of water in Saskatchewan. There is a growing consensus that the time has come for clarification - once and for all.

President's Message

R. Dale Rosnes
SLS, P. Surv.
President

Upcoming Events

Sep. 19 - 21	AMLS AGM Winnipeg, MB
Oct 11 - 13	ANSLS AGM, Ingonish, NS
Feb 28 - 29	ABCLS AGM Kelowna, BC
Apr 24 - 26	ALSA AGM Lake Louise, AB

I would like to thank the members of the Association for giving me the opportunity to serve you. It is seen to be an honour to be working on your behalf for the next year. I am really looking forward to working with Council and the committees for the next year, and I look forward to meeting with the members of our sister associations across Canada.

The 97th AGM took place at the Manitou Springs Mineral Spa and we saw a good turnout of members and delegates. The Manitou Beach Resort provided a relaxed atmosphere for the meeting and gave us a quiet place away from the hustle and bustle of the city. The mineral spa lived up to its name as I noticed one could float on their back and read a book in an effortless manner. The Camp Easter Seal resort with its many buildings built from field stones provided an interesting afternoon tour. Danceland - with the world famous dance floor built on horsehair - and the band, had everybody up on the dance floor.

Now that the convention is over, Council has been working on the TILMA and Riparian Rights issues. Interestingly, the level of the lake at Manitou Beach was at the highest level in the past 60 years. Several pages of this edition of Corner Post have been devoted to the Riparian Rights issue.

A letter was sent to the Saskatchewan government indicating the membership support the overall objectives set out in the TILMA. Dave Gurnsey has accepted a request from council appointing him to work with the ALSA and ABCLS on the associations' responses to the requirements of TILMA. The Saskatchewan Party Leader, Brad Wall stunned more than a few observers when he indicated a Sask. Party government would not join the agreement. An all-party government committee heard 81 representations from 47 organizations over nine days of hearings. Most opposed TILMA, although most business groups, including the Agricultural Producers Association of Saskatchewan, Saskatchewan Chamber of Commerce, Canadian Federation of Independent Business, Credit Unions, Land Surveyors and the Saskatchewan Construction Association supported the agreement. The NDP party has indicated they will likely be making a decision on the TILMA by the end of August.

I attended the 23rd ACLS AGM June 19 – 22, in Quebec City - a very beautiful city with many fine examples of 17th century architecture. The very well organized AGM consisted of three days of seminars and a one day of business meeting. The golf tournament took place on Thursday afternoon at Ile's Orlean and was a beautiful setting for the evening supper. The ACLS commissioned 17 new members this year.

We experienced some unique Quebec hospitality on Saturday night. As we were about to leave on our drive to Montreal we discovered that the hotel at which we had been staying was surrounded by a quarter million people celebrating Independence Day, with several bands playing and fireworks being set off.

My next trip will be to Winnipeg, Manitoba for their AGM September 19 at the Holiday Inn Airport West.

Enjoy the summer season and take some time out to enjoy the sights when you can. ✷

2007 AGM HIGHLIGHTS

Incoming president Dale Rosnes accepts the (Gunter's) chain-of-office from past-president Bob Webster

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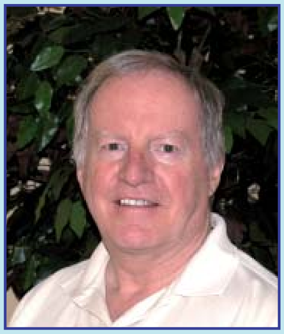
Council Highlights



Carl Shiels, M. Sc., P. Eng.
Executive Director

2006-07 Meeting #6 April 16, 2007

- Based on the latest confirmations of out of province funding, approval was given to sign a contract with **eclecthink international** - the consultant who would be developing the surveyor's crate educational kit. The consultant was to proceed with the development of the generic 'blue-print' of the kit. Letters of thanks were to be prepared and sent to all those who contributed to the project.
- With P.F. Unger's imminent departure from Council, it was agreed that administration of the Surveyor's Crate project would continue to be his responsibility but now as a member of the Public Relations Committee.
- Council approved a number of amendments to the administrative bylaws, notice of which were to be published in the Committee Reports for the 2007 AGM.
- A set of recommended guidelines were approved for President's travel. These were intended to provide better guidance for future presidents to decide what expenses they might reasonably incur while representing the SLSA at other association AGM's.
- A number of changes were being made in the curriculum of the Geomatics Technology program at SIAST. Further details were to be obtained.
- A submission was received suggesting that a consultant be retained to develop a position paper on the various legal questions that were arising regarding water boundaries and crown ownership of water beds. This matter would be raised during the 'bear-pit' session at the AGM.
- W.L. Jamieson and A.C. Shiels would be participating in an industry at SIAST. The panel would be making presentations to a group of high school career councillors.
- A resolution was approved for presentation to the AGM which would amend the regulatory bylaws. All of the amendments were of a house-keeping nature .
- Responsibility of approving applications for admission as Student Land Surveyors and Land Surveyors in Training under the Mutual Recognition Agreement was delegated to the Executive Director. Any such applications can only be rejected if the applicant does not provide the necessary proof of compliance with the Act and bylaws.
- Centennial Project Committee members D. Babiuk and D.A. Bouck had met with representative of the Association of Professional Engineers and Geoscientists of Saskatchewan to learn more about their approach to preparing a book for the provincial centennial. The APEGS book could represent a suitable model for the SLSA centennial book.

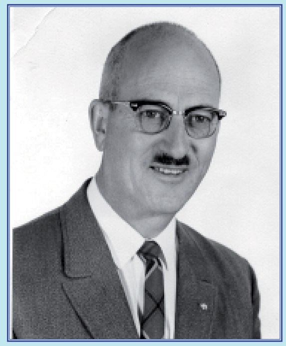
2006-07 Meeting #7 May 23, 2007

- The president reported on his attendance at the ALSA AGM meeting in Lake Louise.
- Confirmation had been received that both the ANBLS and the ACLS representatives to the AGM would be presenting cheques for their contribution to the Surveyor's Crate project. Part of the ANBLS contribution would also be 'in kind' since they had agreed to translate the blue-print of the crate into French.
- The 2007 CCLS AGM had been scheduled to coincide with the OAGQ AGM in Quebec City.
- The results of the National Future Forum of the CCLS were reviewed. It was noted that the SLSA is in reasonably good compliance with the expectations of the forum but there are some issues that still needed to be addressed. In partial response, council established an ad hoc SLSA committee, chaired by G.D. Craig, to deal with CCLS related matters, at the provincial level.
- The question of whether the SLSA should encourage the province to become part of TILMA was to be raised at the annual meeting. The president's of the ALSA and ABCLS were being invited to talk about the responses of their associations to the implementation of TILMA

and the members would be encouraged to reach a consensus on the position to be taken by the SLSA, during the business portion of the meeting.

- Three new student land surveyors were admitted to the association. They were Calvin Bourassa and Jamie Lehmkuhl (Wilf Peters, supervisor); and Prakhar Shrivastava (Wayne Stockton, supervisor).
- A land surveyor in training agreement between T.W. Sansom, SLS and Trevor Luddington was approved.
- A submission was received from L.N. Nicholson (SLS, Life Member) requesting council petition the Attorney General for a position on riparian rights as it relates to accretion and dereliction. This issue was to be raised under New Business at the AGM.
- Council granted commission #'s 291 and 292 to Brian Burridge and Robert King, both of who had met all of the requirements for becoming Saskatchewan Land Surveyors.
- A submission had been received from S.I. Hayward, SLS recommending that the association press the provincial government for funding of projects to correct surveys, carried out by deceased or former members, in which errors were subsequently identified. This matter was also expected to be discussed at the AGM.

In Memorium



W.E. "Skinny Bright, ALS, SLS
(1912 - 2007)

It is with regret that we report the passing of Walter E. "Skinny" Bright, ALS, SLS, on July 4, 2007.

After having served with the armed forces for 12 years, Skinny entered the field of private practice with the firm of Strong, Lamb & Nelson in Calgary. He then devoted his spare time to studies, which in three years resulted in his being commissioned as an Alberta Land Surveyor on November 15, 1957. The following year saw Skinny receiving commission #147 as a Saskatchewan Land Surveyor. In 1965, he was president of the Alberta Land Surveyors' Association and received the Professional Recognition Award in 1982-1983.

Additional biographical information about Walter E. "Skinny" Bright can be found at the ALSA history web site at:

www.landsurveyinghistory.ab.ca/Characters/Bright_WE.htm

2007 AGM HIGHLIGHTS

U.N.B. grad. Brian Burridge receives congratulations from ANBLS President Jim Martin while retiring Board of Examiners chairman Dave Gurnsey and U.N.B. grad Jill Cheverie (Brian's study partner and fiance) share the moment.

Councillor's Corner

Conrad Swenson
SLS, P. Surv.
Councillor, Year 1

"Real Estate Boom in the North"

I've spent the last few days in Northern Saskatchewan around Delaronde Lake. Even with the closing of the lumber mill at Bodwin, there still appears to be a lot of activity around the Big River area.

I purchased a lot in the Pickerel Point Subdivision, Plan 82B12420 (170 lots +/-). The subdivision is completely sold out now, but many of these lots only sold within the last two years.

When I first started going up to Delaronde, three years ago, the lake level was way down. You could quad out 300 – 400 feet in many areas from the nature shores. Many boat owners were damaging their boats hitting rocks in the narrows going into the north end. With record rain and snow falls the last two years the water level has come up more than three feet and the lake waters now came back - banks as shown on the subdivision plan by Jack Webb in 1982.

Locals say the land prices around Big River are soaring, driven by Albertans moving back looking for recreational property. I talked to one person who had just purchased a lot on the south end of Delaronde and paid $129,000 for a lot on the lake. He said most of the lots are sold and the remaining lake shore lots were $130,000 - $180,000.

Going one half hour south to my home town of Shellbrook, again there is lots of activity. Jack Redding of Tri-City Surveys recently surveyed 30 new lots and has an application in for another 30. When I left Shellbrook in 1988 there were approximately 75 properties for sale in and around the area.

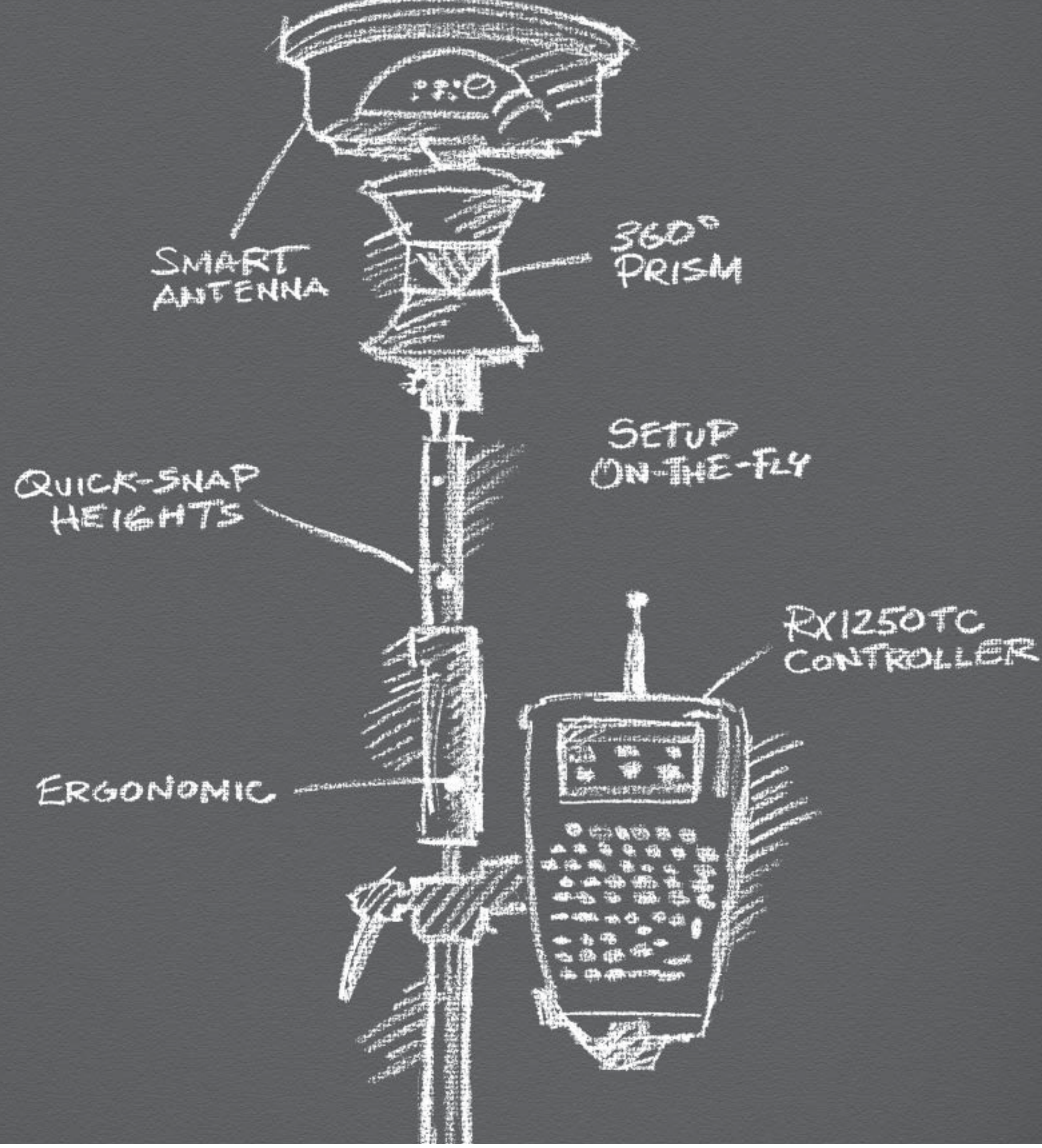
It's good to see a resurgence in northern Saskatchewan and hope it continues for a number of years.

Regards from Conrad at Delaronde Lake.

2007 AGM Highlights

Newly elected president Dale Rosnes' first challenge - how to fasten the chain on the SLSA pendant to be worn during the next year by partner Halia Sushko. Two-time travelling partner Maureen Webster is eager to lend a hand while past-president and (past x 9)-president Bob Webster looks on knowingly.

What makes one pole smarter than another?



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Book Review

"Saskatchewan and it's People" by John Hawkes, 1924

By J.H. "Jack" Webb, SLS (Life Member), ALS, MLS, CLS

In Chapter LX of the book "*Saskatchewan and it's People*" by John Hawkes, published in 1924, the author talks about the diary years - 1879 and 1880 - of John F. Clark. The book is in three volumes with volume one outlining stories of many early pioneers in the West.

In his diaries, Mr. Clark mentions the astronomical party under Mr. W.F. King, Dominion Land Surveyor. He noted that Mr. King was "a big little man in every way and a splendid companion".

Mr. King was to establish the latitude and longitude at various places in the west so that base-line surveyors, who were to follow, could tie down these monuments and test their own work. The job was immense since it involved many areas across the West including Fort Qu'Appelle, Prince Albert, Swan River, Fort McLeod, Calgary and Edmonton to name just a few. Along with the above, the survey party was required to run micrometric traverses of any trails they were on and record the physical features of any lakes and rivers they encountered.

Mr. Clark became an assistant, to Mr. W.F. King, Dominion Land Surveyor after knowing each other in Ontario. Clark was a pioneer who was not a land surveyor but was interested enough to work with surveyors and preserved their work in words for future historians.

The old "Clark's Crossing", north of Saskatoon, is named after Mr. Clark and a ferry crossing still operates near the original site.

The King party came west via St. Paul and Chicago into Emerson, Manitoba and thence to Winnipeg. The population of Winnipeg in 1879 was around 750 people and the entire area was a veritable sea of mud.

The King party travelled west from Winnipeg, on the steamer "Northcote", via the Assiniboine River. On board with the King party was a mixture of land surveyors. Two French Dominion Land Surveyors were going West to do some base line surveys. Also on board was the well-known Professor Macoun who was to collect data and specimens of various grasses, flowers and trees of the country to be explored. A Mr. Evert was also on the boat with his party and they were to search for a pass for the railway west of Edmonton through the Rocky Mountains.

The King party arrived at Fort Ellis to begin their four thousand mile trip throughout the West with their horses and horse drawn carts. The first station to be surveyed was on the second meridian. The group travelled over many of the famous western trails such as the Qu'appelle, Upper Crossing, Touchwood, Fort Ellice and Quill Lake. Crossing various rivers and creeks took up much of their travel time. The White Sand River, which was ninety feet wide, deep and swift, had to be crossed 39 times while hauling their supplies and horses over at one at a time.

Mr. Clark's description of the country between Fort Qu'Appelle and the Elbow River is

> *"... over a worthless country which would not support one goose to the acre. For three long days we had to carry wood and the weather was very hot. The thermometer at 90 degrees in the shade and one day at noon it registered 118 degrees in the sun."*

The area referred to is now productive farmland.

Mr. Clark described various fort settlements in his diary. He describes Fort Pelly as being situated on high ground above the Assiniboine River surrounded by a palisade 14 feet high with galleries at the corners. Evidently the view from the gallery extended for many miles in all directions.

He was very critical of Fort McLeod;

> *"I was told by a gentleman who ought to know that the Government buildings at Fort McLeod cost $60,000, although they are built of logs and only one story at that. I could make money by erecting better buildings at one-tenth of the amount. The Mounted Police at this post are a fraud of the worst description and their drill consists entirely of devising means to swindle the Government, steal whiskey from civilians or seduce squaws. The conduct of the officers and men has been such that any honest man would blush to be called a Mounted Policeman. The force out here are properly called the Mounted Inebriate Asylum*

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Looking Back - 1955

By: W. W. (Wayne) Stockton, S.L.S., P. Surv, C.L.S.

I was having coffee with an engineering friend the other day and he said something that reminded me of an old survey story so here goes.

In the fall of 1955 I was working for Saskatchewan Highways & Transportation on the location of No. 38 Highway south of Greenwater Lake. We had two survey crews staying at Porcupine Plain. The Department of Agriculture C & D Branch also had a survey crew working in the area so we were quite a rowdy group. At the time Porcupine was in the centre of home brew country. When a supply of the brew was needed we would see a local farmer. After the money changed hands he would give us directions to the cache. He would say something like, "Go east one mile to the intersection. Look in the south side of the culvert." The man must have had a photographic memory as he never sent us to the same place twice. The C & D crew had one amazing member by the name of Danny. The brew was about 190 proof but Danny could tip up the bottle and glug it down like soda pop. I wonder if he is still alive.

Greenwater Lake (From Expedia.com)

Our project supervisor was a fellow by the name of Art Bergan. Art later became a Professor of Engineering at the University of Saskatchewan. His invention of a scale for weighing vehicles in motion also earned him a place in the Saskatchewan Transportation Hall of Fame. The District Engineer was Wally McLaughlin. At the time Wally was best known for the raucous stories he loved to tell about his misspent youth. I could fill a book with these stories but most of them would be unprintable. The casual observer wouldn't think Wally had a brain in his head, however, he ended his career as Dean of Engineering at Waterloo.

The first three or four miles of the survey were cross-country in a southwesterly direction through bush and hills. We were pushing line and had a caterpillar tractor clearing bush ahead of us. At the southern end of the cross-country section we tied into a north-south road allowance. There had been a constructed road on this section but it had long since grown up to bush and was under water in a couple of places. When we came to water, the cat cleared a path around and smoothed a trail for our vehicle. Those were the days before four-wheel drives became common. Our vehicle was a 1955 Ford sedan.

After a couple of miles heading south we finally came out into the open and upon a graded road that was currently in use. On the east side of the road was a small log cabin. When we stopped the car to get out and look around, a grizzled old timer came out of the cabin and approached us scratching his head. He was the perfect picture of the old prospector you often see on TV or in the movies. When he got up to the car he said, "Boys, that's the first car I have seen come down that road since 1937." He went on to say that the municipality had built the road in the early 1930's. It was used for a few years and then they had a lot of rain in 1938. The road went under water and had not been used since.

As we turned the car around to head back, the old timer and the log cabin left an indelible picture on my mind. It was the picture of a country not yet tamed and a time that would soon change and fade into memory. ✷

48 - " Book Review"

and it's a matter of common occurrence for men and officers to confiscate whiskey, take it to their rooms and drink it; hence the standing joke that the M. P. were sent out here to put down whiskey, which they do in the most astonishing manner; and when that beverage can't be had they tackle Jamaica ginger or rather alcohol with a little ginger in it, Pain Killer or Bay Rum or anything they can get holt of. A two-ounce bottle of Jamaica ginger is sold for a dollar although it only costs wholesale delivered at McLeod 16½ cents. One surveyor was known to have bought 37 bottles in one night to get an Indian Lodge and himself tight, which he succeeded in doing and he stripped naked and put on a breech cloth and danced a war dance, which would soon have been a fight in earnest had not some whites taken him by main force from the Lodge."

The entire chapter LX, in the book, by John Hawkes is of interest as to the early life of surveyors in the West. One could write about many other adventures and hardships that the W.F. King survey party endured. ✷

An Open Letter to the Attorney General of Saskatchewan

June 11, 2007

Minister of Justice and Attorney General of Saskatchewan
Room 355, Legislative Building
2405 Legislative Drive
REGINA, SK S4S 0B3

Attention: Hon. Frank Quennell, QC, Attorney General

Dear Sir:

RE: The Need for Clarification of the Riparian Rights of Property Owners in Saskatchewan

I wish to convey to you a resolution that was passed unanimously by the licensed land surveyors present at the 2007 Annual General Meeting of the Saskatchewan Land Surveyors Association. The resolution states as follows:

> ***Whereas there is concern that the landowners of Saskatchewan are being denied their riparian rights,***
>
> ***Be it resolved that the Saskatchewan Land Surveyors' Association petition the Attorney General of Saskatchewan asking him to make a clear statement as to the riparian rights of land owners as it relates to accretion and derelictions that may attach to their land from time to time.***

Background

From time to time, licensed Saskatchewan Land Surveyors are asked to provide opinions on the limits of property when one or more of those limits are defined by a body of water and the course or bed of that body of water has changed over time giving rise to accretion or dereliction. While the principals of common law appear to be quite clear regarding the riparian rights of property owners in such cases, the position taken by some government departments – most notably that of the Department of Food and Agriculture – contradicts those principals but without any apparent legislative or regulatory authority. This places our licensed members in the untenable position of providing an opinion which is consistent with the well established principals of common law, only to have that opinion 'overturned' by provincial officials without any apparent reference to legislation or regulations to support the province's position. Whenever such contradictions are challenged, with a significant probability that they will be tested in the courts, the provincial position invariably 'softens' resulting in a negotiated settlement.

By contrast, the Departments of the Attorney General in our neighbouring provinces of Manitoba and Alberta have both made clear statements (copies attached) regarding the riparian rights of land owners in those provinces. Both of those statements confirm that, subject to certain limitations, the common law regarding accretion and dereliction continues to be applicable.

Request

On behalf of the members of the Saskatchewan Land Surveyors' Association, and more importantly on behalf of all riparian land owners in Saskatchewan, we ask that you provide a clear statement regarding the riparian rights, particularly as it relates to accretion and dereliction, of land owners in this province. To assist you in that regard, we enclose a copy of a document published in May 1959 by the Canada Department of Agriculture entitled "Survey of the Law of Water in Alberta, Saskatchewan and Manitoba".

I and representatives of this association would be pleased to meet with you or your officials to discuss this matter further if you feel it would assist you in your deliberations. Any arrangements in that regard can be made by contacting our executive director, Carl Shiels.

I look forward to your early response.

Sincerely,

R. D. (Dale) Rosnes, SLS, P. Surv.
President

c.c. Ed Desnoyers, Controller of Surveys

The Denial of Rights of Riparian Owners by The Department of Agriculture and Food In Saskatchewan

By L.N. Nicholson, SLS (Life Member)

Executive Director's Note:

This article was the body of a submission made by Neil Nicholson, to the SLSA council, which went on to form the basis for the unanimous resolution by the members at the 2007 Annual General Meeting (see "An Open Letter to the Attorney General of Saskatchewan" on page 50.)

After experiencing considerable difficulty in getting the Dept. of Ag. and Food to relinquish their claim to 55 plus acres of land owned by my friends (names omitted), I felt it was time that somebody put an end to these illegal practices. I at first thought I should approach or petition the Provincial Attorney General requesting that he make a clear statement as to the law in this matter, that a riparian land owner becomes the equitable owner of any accretions attaching to his land, similar to those statements made by the Attorneys General of Manitoba and Alberta.

At the last (2006) Annual Meeting of our Association I asked my fellow past-presidents if they were supportive of such an initiative and I believe their agreement was unanimous. On reflection I have decided that such a request would probably be more successful if it came directly from the Association. I therefore respectfully request that you give serious consideration to initiating this enterprise.

As I see it, the root cause of the past abuses can be attributed to the opinions expressed by A.J. le Blanc in a paper written in 1963.[1] In it he puts forth several specious arguments to buttress his opinion that riparian owners have no special rights or should not have special rights to accretions or derelictions attaching to their lands. If this were the law, it would create a situation patently unfair in which an owner could suffer a loss due to erosion or inundation but would be denied any gain resulting from accretion or dereliction.

In writing this letter, my first intention was to rebut all of the arguments put forth by le Blanc, however after reading the paper published in 1959 by the Canadian Department of Agriculture and the opinions emanating from the Departments of the Attorneys General of Manitoba and Alberta, you will see that this has already been ably accomplished.[2] But there are some of his points that I wish to address in particular.

Firstly under the heading "The Problem" all that Mr. le Blanc has said in paragraphs (a) and (b) is defeated by what is stated in clause 205 of the Manual of Instructions for the Survey of Dominion Lands which reads as follows:

> *"On non-tidal waters, the object of the traverse being to measure the contents of land not covered by water, and not to locate boundaries, the line to be traversed in all cases is the bank, even though the parcels may include part or the whole of the bed."*

One can only conclude from this, is that the bank is considered to be an ambulatory boundary and is to be found from time to time at where it exists. Therefore the plan does not define the boundary which, in this case, is the bank. Similarly straight-line boundaries are governed by the monuments planted in the ground and not by the plan.

Under the heading "Statutory Provisions" all of his arguments appear to be a reflection of the arguments set forth by the learned Judges of Supreme Court of Canada in the 1932 case of the King v. Fares et al. This case dealt strictly with the ownership of the bed of lakes and rivers under the rule ad medium filum aquae and does not have any bearing on the rights of riparian owners to any accretions or derelictions that their land may attract from time to time. This point is also made very clear in the paper from the Manitoba Department of the Attorney General in March of 1975[1]. Also in this section le Blanc neglects to mention clause 197 of the 10th Edition of the Manual of Instructions. I note that clause 135 of the 1905 Manual is identical to clause 197. You will no doubt note that in the paper published in February 1959 under the name of the Deputy Attorney General of Alberta [2], clause 197 is referred to and is heavily underlined.

In the section headed "Policies and Procedures" a reference is made to the 8th Edition of the Manual stating that

1 See full text of that paper on page 54.

2 Both of these articles have been posted in the 'Members Only' area of the SLSA web site. Non-members can contact the SLSA office for copies by e-mail.

the riparian rule may be excluded in certain cases. I do not have a copy of the 8th Edition but I must assume that this is in reference to what is stated in clause 199 of the 10th Edition which deals with the rule of *ad medium filum aquae* which in turn deals with ownership of the beds of rivers and lakes. You will see, in reading the papers from Alberta and Manitoba, that it is quite evident that ownership of the bed has no bearing on the ownership of accretions, this fact is also made explicit in the Supreme Court decisions in the case of Clarke vs. the City of Edmonton in 1929 and the case of Chuckry vs. H.M. the Queen in 1973.

In the section titled "Supreme Court Study" A.J. le Blanc acknowledges the fact that the decisions made in the case of the King vs. Fares et al only ruled on the inapplicability of the rule of ownership to the middle thread of a stream or lake but goes on to say that the observations of the learned Judges could equally apply to the rule of accretion. In an attempt to buttress this he offers a quotation made by the Hon. Justice Lamont in the decision by the court. The relevance of his statement totally escapes me when I compare it with what the same Hon. Justice Lamont said in his decision in Clarke vs. Edmonton, which is as follows.

> *"It was also urged that if the court held that the ad medium filum presumption of the common law was not, applicable to fresh water conditions in the Territories, then, inasmuch as that presumption and the rule as to accretions had both been adopted from the civil law, the court should, hold the rule as to accretions also inapplicable. This contention is untenable. In enacting s. 11 Parliament was adopting the law of England, as it actually existed, irrespective of the sources from which it had been derived, the only limitation placed on the adoption of that law was as to its applicability. In my opinion the English law as to accretions was applicable and became the law of the Territories."*

Under the heading "Summary and Proposals" A.J. le Blanc makes no mention as to what fairness and equity would require if his proposals were adhered to; that the Crown would need to pay riparian owners for their land that becomes the beds of rivers and lakes through the causes of nature. The statement " if the old accretion law were restored" is blatant insinuation that the rule of accretion is no longer the law of Saskatchewan. This falsehood appears to the basis of Ag. and Food`s disregard for the rights of riparian owners.

Now we have come back to finding a solution to the problem. As far as I can see, there are only two possible events that would cause Ag. and Food to cease and desist from continuing in their denial of the rights of riparian owners. One would be a judgment in a test case in court that ultimately ended in a decision by the Supreme Court. This is not likely to happen because as I have been told, 'when push comes to shove' and a court action seems immanent, the Dept. of Ag. and Food will usually back off, and offer to sell to the owner his own land for a dollar thereby maintaining the fiction that accretions belong to the Crown. The only other alternative in seeking a solution in this matter is to receive a pronouncement from highest level of the Dept. of Justice namely the Attorney General for Saskatchewan.

Paragraph 21 of Part III of the Land Surveys Act, 2000 states in part, that natural boundaries may only be determined :

> *(a) by agreement of all the registered owners for any parcel that uses the natural monument to mark, reference or witness a boundary.*

I believe a clear statement of the rights of riparian owners by the Attorney General of Saskatchewan would greatly facilitate the required agreement in such cases, and will underline the fact that whether an agreement is arrived at or not the equitable ownership of any accretion is not affected and remains with the riparian owner as attested to in the referenced documents.

At this point I wish to thank you for the time you have taken to read this paper and the accompanying enclosures. The quotations and enclosures are copied from a work compiled by A.C. Roberts, titled "*Riparian Rights - A Compilation - 1976*". This book should be in every surveyor's library, and perhaps as well as those of every lawyer and lower court judge.

When I mention lawyers and lower court judges I base this statement on the fact that my friends told me they paid a well known lawyer five hundred dollars to resolve their problem with the Dept. of Ag and Food and that they got nothing for their money. As for lower court judges one only needs to look at the unbelievable Judgement made by in the Court of Queen's Bench by Judge J. Walker on May 29th. 1989. This information was related by W.W. Stockton in Volume XXIII of the Association Newsletter dated March, 2002. ✷

Accrued Areas

By A.J. le Blanc (1963)

Saskatchewan provincial lands administrators are greatly apprehensive of the trend in recent years to have the English rule of accretion apply to land tenure in our province. Such recognition could, in our view, result both in jeopardizing the projects already established for the development and use of dried up lake beds or the control of water levels and in rendering almost prohibitive the undertaking of similar projects in the future.

This trend is attributed to a number of Court decisions for the settlement of private disputes, which decisions appear to be based either strictly on the common law or with inadequate consideration' of the legislative provisions made for the survey and development of our western provinces and the intent of those provisions. There have already been two immediate undesirable reactions, namely:

(a) many surveyors would prefer a rule that would provide for a fluctuation in the acreage covered by a certificate of title to conform with variations in the location of the bank, because this would remove the difficult task of re-establishing the bank according to the survey that governed the original grant from the Crown;

(b) employees of the Land Titles Offices have, on their own interpretation of the law, changed original descriptions of land by omitting the reference to the plan of survey on which the original grant was based.

Accretion being only one aspect of the general rule of riparian ownership, we should perhaps deal with the common law principle itself that the owner's title extends to the middle of the stream or road unless an intention to exclude the rule is indicated by the language of the conveyance or is reasonably to be inferred by surrounding circumstances.

A proper appraisal of the situation requires consideration of the special laws that were enacted for the settlement and development of these western territories, the policies and procedures that were adopted to carry them out and the most intensive study made of the situation at the highest legal level.

1. STATUTORY PROVISIONS

(a) The North West Territories Act introduced the English common laws to the extent that such laws were applicable to these territories and subject to repeal or variation by competent authority such as an Act of the Parliament of Canada.

(b) The Territories Real Property Act which adopted the Torrens System of Title did not contemplate the application of the English Law of land tenure.

(c) The Dominion Lands Act through a number of its sections showed a definite intention to exclude the English rules, viz,

  (i) the provision for a system of land survey by blocks about a mile square and quarters thereof;

  (ii) the provision for surveying the bank of lakes and rivers through the sections and quarter sections and showing the acreages of the fractions;

  (iii) the provision for the sale of land at a price per acre to be fixed by order-in-council:

  (iv) the provision for such dispositions as homesteads and pre-emptions to be for one quarter section each or not more than 160 acres.

(d) There were also dispositions made for lands under Special Statutes of the Parliament of Canada such as the Act to ratify the Rupert's Land Agreement and the various Acts that provided for the granting of subsidies for the construction of railroads. Under each of these arrangements the authority was to convey land in specific quantities.

(e) These Acts were strengthened considerably by the North West Territories Irrigation Act enacted in 1894 which by one of its sections prohibited the issue of any grant that would convey the bed or shore of any lake, watercourse, ravine or marsh.

2. POLICIES AND PROCEDURES

The early application of a law under the guidance of those who enacted it seems to be a factor of importance for accurately assessing its true intent retrospectively. The following appear to be some of the pertinent facts:

(a) Within ten years of the first surveys made in Saskatchewan the instability of the level of certain shallow lakes had become evident and as early as 1892, conveyances made in the following terms were quite frequent:

FIRSTLY: all that portion of a certain quarter section shown as not covered by a certain lake upon a plan of a given date, containing so many acres, and

SECONDLY: all that portion of the said quarter section shown as covered by the waters of the said lake, etc.

(b) The Manual of Instructions to Surveyors issued after the enactment of the Dominion Lands Act of 1908 states that the riparian rule may be excluded by the description and must be considered as always excluded in the area to which the Irrigation Act applies. We assume that this printed Manual was a consolidation of prior directives given to surveyors.

(c) A practice was established early of selling to the registered owner of a fractional quarter section the accrued acreage determined by a resurvey. Likewise we have encountered a number of instances where the Crown made good to the original grantee deficiencies in acreage complained of, usually by granting additional land to make up such deficiency; provision for recognizing such dereliction may be found both in the Dominion Lands Act and in our own corresponding Act.

(d) From the early years of settlement the public accepted as part of our system of land tenure that accretion subsequent to the survey mentioned in the title remained Crown property until separately acquired.

(e) It is only by following the course of the changes made in the descriptions of land and the various forms of survey adopted that one can visualize the sustained effort at the administrative level to carry out the original intention.

3. SUPREME COURT STUDY

It seems that the most comprehensive legal study of this problem at the Supreme Court level was done in respect of the appeal King v. Fares et al, which may be found at (1932) S.C.R. 78, 1 D.L.R. 421. While this judgment only decided the inapplicability of the rule of ownership to the middle of a stream or lake, many of the observations made by the judges and given as the basis for their decision appear to be equally applicable to the lesser rule of accretion, which we are now concerned with, for example:

Hon. Justice Duff:

> *"It is plain, therefore, that, since the price authorized by the Governor in Council was to be not less than $1.50 per acre, nobody had authority to convey to the Company additional land for the consideration thus paid, in other words, to make a gift to the Company of such additional lands. Indeed, no such conveyance could have been made without departing from the express enactments of the Dominion Lands Act."*

Hon. Justice Duff:

> *"It is plain, therefore, that in the survey of these fractional parcels in 1883 for sale or settlement, when the statute of 1879 was in force, (Dom. Lands Act) the authorized officials must have contemplated the survey of parcels of land, the boundaries and acreage of which should be fixed and determined so as to make it possible to dispose of them in the ordinary way, by sale or pre-emption, at the statutory price; and the evidence that this was so in fact is explicit. The shore line was run solely for the purpose of ascertaining the acreage of the fractional areas. The officials charged with the administration of the Act had no authority to include, in any sale of these areas, any unsurveyed part of the bed of the lake."*

Hon. Justice Lamont:

> *"In view of these statutory provisions I incline to the view that Parliament, by adopting a policy which in so many of its operations was inconsistent with the existence of the rule (the middle of the stream rule), indicated a legislative intention that it was not to be applied in construing conveyances of territorial lands, "and "............ Under these circumstances the intention both of the Crown and of the company must be held to have been not only that the 'ad medium filum' rule should not apply but that the patents to these fractional sections should be granted and accepted as covering only the acreage therein set out."*

It should be noted that the North West Territories Irrigation Act was not considered in this decision because the land had been granted before the enactment of that statute.

The situation, as we see it, is that those who devised the pattern of land tenure for these western provinces, that departed from the old concepts of common law, wanted to avoid the problems encountered in the Eastern Provinces and to some extent anticipated that the old laws of land tenure would present serious disadvantages here. It is admitted that the legislation could have been more precise and that there have been weaknesses in implementing the program; however, we doubt the wisdom of allowing the system, that evolved from such planning and administrative effort to be breached or set aside by legal interpretation of mere technicalities or for the purpose of restoring the age old principle of common law. We do not consider that a person who acquires a few acres of land within a quarter section should be entitled to own 160 acres just because the lake on the portion that he did not acquire has become dry.

We would like to continue our program for the development of dried up lake beds to the benefit of those who raise livestock. Often these areas can not be used by the owner of the surveyed higher land, particularly if he is a grain farmer without livestock. We have had some success in eliminating the original lake shore boundaries and establishing straight line boundaries by selling a part of the lake bed to the owner of the land above the bank and having the titles consolidated.

The flooding of accreted areas and the maintenance of water levels by artificial means could also present serious problems of costs, if the old accretion law were restored.

These are agricultural aspects with which we are concerned, other government agencies in our Province are concerned with other phases such as the retention of the shore and the accreted strips along the bank for public uses.

How serious are the problems encountered or anticipated by the other provinces we do not know. However, we believe that parallel legislation by each of the provinces that experience similar problems would be the most effective way of confirming the pattern of land tenure that was contemplated when the special legislation for the settlement of the western provinces was enacted. ✸

Sask. in limbo over riverbank buildup rights

Alberta and Manitoba allow landowners to add accumulated land to their property

By Sean Pratt, Saskatoon newsroom

Reprinted from "*The Western Producer*" - Vol.85, No.25, June 21, 2007

Slowly but surely the South Saskatchewan River has been gnawing away at one part of Wally Hamm's land and regurgitating soil on another.

"I'm losing land at the rate of a metre a year on one side and I'm gaining at the rate of a metre a year on the other," he said. Sixty-four acres of prime real estate have formed on the quarter located on the inside of the river bend since the original title was issued, land he wants to use as part of an off-the-grid organic acreage subdivision.

The riverbank property in the Rural Municipality of Dundurn has considerable value because it is within a short drive of Saskatoon.

"It could be worth hundreds of thousands of dollars," said Hamm.

But the province says that land belongs to the crown rather than to him, a policy that is at odds with neighbouring provinces.

"They're denying people their riparian rights," said Hamm.

Carl Shiels, executive director of the Saskatchewan Land Surveyors' Association, said Alberta and Manitoba adhere to common law principles with respect to riparian rights, allowing landowners to add accumulated land to their property.

The association contends Saskatchewan has no legislative authority to be laying claim to such land. At its annual general meeting in May, the group passed a resolution calling on the minister of justice to make a clear statement on what is the basis for its policy.

"On the face of it, it doesn't seem to be fair," said Shiels.

Riparian rights has been a long simmering issue in rural Saskatchewan, one that affects more people than most would think, said Ed Desnoyers, Controller of Surveys for the province.

"There would be hundreds if not thousands of landowners that are somehow affected by a water body," he said.

The issue has been heating up now that every land title is accompanied by a picture of the parcel. People are getting visual images of some of the riparian rights anomalies associated with their property.

Soaring cabin prices, treaty land entitlement agreements and increased flow in the province's waterways recently have also raised the profile of the issue.

Variety of situations

Most disputes surround large bodies of water, property like Hamm's that abuts lakes and rivers, but clashes also arise around creeks and sloughs on farmland, which are also owned by the crown.

Desnoyers said riparian rights disputes create extra work for his agency and can involve large sums of money. The province could argue there are a few sections in the Land Survey's Act that back up its stance, but that is open to interpretation.

"It's a big, big problem that has been around for 100 years and everybody tiptoes around the issue," he said.

If a landowner threatens to sue, the province often backs down, transferring property to the landowner for $1, said Desnoyers.

Hamm said he had the framework for such a deal in place a few years ago, but the province changed its mind and is now refusing to sell him the property. He doesn't want to go to court because it would be too costly.

His acreage development will proceed with or without the river front property but the parcels would be more attractive if people had access to the water.

Hamm said the province is holding up land development with an unwritten riparian rights policy that is subject to interpretation from one government department to another.

"In the absence of clarity, the bureaucrats are making some fairly stupid kinds of judgments," he said.

Shiels and Desnoyers agree it is time for some transparency on an issue that has been bewildering landowners for a century.

They contend the province either needs to make a statement that it will join its neighbours by following common law practices, or pass unequivocal legislation outlining an alternate set of rules.

The First David Thompson National Geomatics Awards

Ottawa, June 28, 2007 – The inaugural awards have been presented at the Gala Dinner of the National Surveyors' Conference on June 22 at the Loews Le Concorde Hotel in Québec City, Québec.

David C. Bazett, ACLS, BCLS
"Innovation in Geomatics"

The winner for the "Innovation in Geomatics" category was David C. Bazett, BCLS, CLS of Bazett Land Surveying Inc. with the Buckley Bay Ferry Terminal project. Finalists were Jim Christie, BCLS of McElhanney Consulting and Joseph Lin, OLS, of the Ontario Realty Corporation.

In the category "Contribution to Society", the winner was Ian Edwards, NLS, CLS of Edwards and Associates Ltd. and Information Brokerage Ltd. for the Land Gazette project. Finalists were John MacInnis, NSLS, Chairman of the NLS Board of Examiners, and John Blair, BCLS, CLS of McElhanney Consulting.

Ian Edwards, NLS, CLS
"Contribution to Society"

And finally, the winner for the "Unusual Applications in Geomatics" category was John Blair, BCLS, CLS of McElhanney Consulting for the Land Administration/Land Titling in Land-mine Contaminated project in Northwestern Cambodia.

John Blair, BCLS, CLS
"Unusual Applications in Geomatics"

The Association of Canada Lands Surveyors (ACLS) introduced the new David Thompson National Geomatics Awards Program in cooperation with all professional surveying associations across Canada through the Canadian Council of Land Surveyors (CCLS).

All commissioned surveyors, who are members of a Canadian surveying association, and who submit projects that have been completed within the last three years are eligible. The deadline for submissions is Friday, February 29th, 2008.

The ACLS is a national self-regulating professional association. It has 560 members located across Canada (and the world), who have expertise in surveying, photogrammetry, remote sensing, geodesy, hydrography and land information systems. For details, please visit: www.acls-aatc.ca

The CCLS is the national forum of the Canadian surveyors associations, facilitating national consensus based strategies and providing national and international representation within the geomatics profession. For more information, please visit: www.ccls-ccag.ca

For details on the David Thompson National Geomatics Awards Program, please visit: www.acls-aatc.ca/ENGLISH/awards/award.htm. For details on the National Surveyors' Conference, visit:

www.acls-aatc.ca/ENGLISH/agm/agm.htm

Factors that can Influence Ownership of Beds of Bodies of Water on Vancouver Island

Jeff Beddoes, BCLS, CLS, Deputy Surveyor General BC

From "The Link" - March 2007

Preamble to the following article:

I received a phone call from a fellow within the Ministry of Forests who asked me the simplest of questions, "who owns the beds of creeks on Vancouver lsland ". Unfortunately this simple question does not have a cut and dried, simple answer.

After trying to explain all the factors that one must consider in order to answer his question, it became apparent that I needed to respond to him in writing, thus the genesis of the attached paper.

Jeff Beddoes

Determining ownership of beds of bodies of water on Vancouver Island can be complex due to a variety of historical determining factors. No hard and fast rules can be established; rather all of the historical factors that could influence ownership of a body of water must be investigated to determine ownership of the water body.

The following bullets provide a list of many of the factors that must be investigated. The list may, however, not be exhaustive. Each circumstance likely has unique characteristics.

- Was the land surrounding the subject body of water granted by Canada, the Colony of British Columbia or the Province of British Columbia or did it form part of the First or Second E & N Land Grant?
  - ➢ Although quite unlikely, there may be federal grants of land on Vancouver Island. If the land was federally granted, the format and date of grant (generally referred to as a Dominion Patent) must be reviewed. Through wording in the document, Canada may or may not have retained the creek at the time of grant. The date of grant may also determine if ownership of water bodies are affected by the federal Railway Water Belt Act.
  - ➢ If the land surrounding the body of water was granted by the Colony or Province of British Columbia then the wording of the grant and the tracing attached to the grant must be reviewed. Through wording in the document, the Colony or the Province may or may not have retained the creek at the time of grant. Further, depiction of the body of water on the tracing in certain colours may affect ownership of the water body. In conjunction with reviewing the Crown grant tracing, the effect of section 55 of the Land Act must be considered.

    If the parcel of land in which the water body is located is within what is commonly referred to as the E & N Lands, ownership of the water body may have originally transferred to the E & N by the Province; however, ownership of the water body may also have been affected by the proximity of any other lands granted by the Colony or Province of British Columbia.

- Once it is determined how the land was transferred in the first instance then the following considerations may apply:
  - ➢ Was the body of water returned to the Crown by a subsequent plan prepared pursuant to the Land Title Act?
  - ➢ Does section 108 of the Land Title Act have any effect on ownership?
  - ➢ Is ownership of the body of water affected by the actions of section 56 of the Land Act?
  - ➢ Is ownership of the body of water affected by a ruling of a court of law?
  - ➢ Is ownership of the body of water affected by common law?
  - ➢ Is ownership of the body of water affected by case law or other legal precedent?
  - ➢ Is ownership of the body of water affected by a subsequent transfer (e.g. did the original owner transfer the surrounding land while retaining ownership of the bed of the body of water)?

This paper is prepared for information purposes only. It does not constitute legal advice. Factors and circumstances other than those described in this paper may affect ownership of the bed of a body of water.

Neither the author nor the Land Title and Survey Authority of British Columbia are in any way liable to a person who relies on the contents of this paper. A person reading this paper should seek his or her own legal and survey advice in respect of issues associated with the ownership of a bed of a body of water on Vancouver Island. ✷

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Validity of Mortgage Obtained by Fraud

By Alec McEwen

From "Geomatica" Volume 1, Number 1, 2007

Is a mortgage, issued on the basis of a document forged by an applicant and registered under a land titles system by a mortgagee acting in good faith, valid against the person on whom the fraud was perpetrated and who was unaware that the fraud had been committed? The answer to this question requires a consideration of two issues: the effect of registration that is assured by the state, and which of two competing but innocent parties must suffer as a result of the fraud.

In CIBC Mortgages Inc. v. Chan (2004), 151 20 R.P.R. (4th) 151, heard by the Ontario Superior Court of Justice, the defendants Mr. Lik Liu and his wife Ms. Suet Ching Chan resided at a Richmond Hill property which they held under joint tenancy. In 1998 Mr. Liu left Canada to obtain employment in Hong Kong and he returned twice a year to visit his family.

The answer to this question requires a consideration of two issues: the effect of registration that is assured by the state, and which of two competing but innocent parties must suffer as a result of the fraud.

Shortly after her husband's departure, Ms. Chan began to incur heavy gambling debts which by early 2002 had accumulated to a level of about $80,000. She then arranged to have a power of attorney prepared in her husband's name, on which she forged his signature, and registered the document against their title to the Richmond Hill property. The forged power of attorney included an authorization to dispose of or encumber the matrimonial home and it specifically referred to the ability to mortgage the property in question. Armed with this fraudulent document, Ms. Chan obtained a line of credit for $150,000 from the TD Bank, secured by a mortgage on the property. She paid her $80,000 gambling debts but continued to gamble. By August 2002 Ms. Chan had exhausted her line of credit with the bank and incurred additional gambling debts of $150,000.

Using the fraudulent -power of attorney, Ms. Chan obtained a line of credit from CIBC in the amount of $260,000, secured by a mortgage on the Richmond Hill property which was registered on September 6, 2002. She used the funds to pay off the TD Bank's line of credit and to discharge its mortgage.

Since Ms. Chan still had insufficient funds to pay her outstanding gambling debts, she borrowed the sum of $96,250.67 from Household Realty, secured by a second mortgage against the property. Once again, she utilized the fraudulent power of attorney which was registered, together with the mortgage, on January 14, 2003 against the title.

Each of the two mortgages was registered electronically in accordance with Ontario Regulation 26/99 and each contained the declaration of authenticity required by section 6 of that regulation. In early 2003 both mortgages were in default, and in July of that year CIBC and Household Realty commenced separate actions against Ms. Chan and Mr. Liu in which they claimed the principal and interest owing on the mortgages and possession of the property. Ms. Chan and Mr. Liu defended both actions and counterclaimed against the two financial institutions for declarations that both mortgages were void and that the principal and interest are cancelled. They also sought injunctions restraining the sale of the property.

The court accepted that Mr. Liu was completely unaware of his wife's activities in obtaining the lines of credit and that he had no knowledge of the fraudulent powers of attorney or the three mortgages. It also acknowledged that none of the three financial institutions were aware of the fraudulent nature of the powers of attorney upon which they relied in granting the lines of credit and in taking the mortgages as security.

The plaintiff financial institutions took the position that both their mortgages were valid because they had been registered pursuant to the Land Titles Act, R.S.O. 1990, c. L-5. The defendants argued that the mortgages were void because they were based on a forged power of attorney and that the plaintiffs were negligent in not inquiring into its authenticity. Mr. Liu also asserted that the transaction should be invalidated because the property was the matrimonial home and Ms. Chan did not have his consent to the mortgage.

Madam Justice Herman declared both Mr. Liu and the plaintiffs to be innocent parties, leaving a choice as to which of them must bear the loss, subject to any claim under the Land Titles Assurance Fund. She pointed out that the common law rule that a forged document is null and void is modified by section 155 of the Land Titles Act which reads:

Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

Section 155 should be read in connection with subsection 78(4) of the Act which provides:

When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate therein mentioned in the register.

Speaking with reference to the well-known mirror and curtain principles that underlie the land titles system, the plaintiffs submitted that mortgagees are entitled to rely on what is registered, and that in this situation the register shows that the people who signed the mortgage are the registered owners. Since the register is the mirror of the state of title, they argued, they were not required to go behind it. Mr. Liu agreed that the Act protects parties who rely on the register but he argued that the parties relied not on the register but on the forged power of attorney that Ms. Chan presented to the two mortgagees and on her fraudulent declaration.

Mr. Liu also submitted that according to the theory of deferred indefeasibility the registration of a void instrument does not cure its defect, even though a person who subsequently deals in good faith with the property can rely on the registration. Citing the authority of previous judicial decisions, Madam Justice Herman declared that because of the policy underlying the Land Titles Act and the wording of subsection 78(4) the registration of the two mortgages, both of which were given for valuable consideration and without notice of the fraud, is legally effective and can be relied upon. In other words, the defendants contended that the judge applied the doctrine of immediate indefeasibility to the registration.

The defendants further asserted that the mortgagees were obligated to inquire as to the legitimacy of the power of attorney and that they should have contacted Mr. Liu in Hong Kong or otherwise verify the document's validity. The court declined to find the mortgagees negligent in this respect because they had possessed no information to suggest a forgery, especially since this was a common situation where one spouse receives the other spouse's power of attorney. In the court's view:

To assert that the mortgagees should have made inquiries in this case is to assert that in every case of receiving a power of attorney, a mortgagee has an obligation to look behind the document and make inquiries to ascertain whether it was actually granted.

In concluding that the mortgagees are entitled to rely on their respective mortgages as registered, the court awarded summary judgment to both plaintiffs and dismissed the defendants' counterclaims. The court's decision evoked a lengthy response from Sidney H. Troister, a specialist in real estate law, whose critical comments are embodied as an annotation in the case report. In particular, he argues that the Land Titles system in Ontario is governed by the Land Titles Act, not by theories of immediate indefeasibility and deferred indefeasibility, and he considers that the judge incorrectly interpreted subsection 78(4) of the Act in the light of section 155. With regard to the forged document he writes:

Powers of attorney are very simple documents requiring virtually no authentication other than a witness. They are powerful instruments in the hands of attorneys and their use can create substantial havoc if used either without intended authority or worse, if relied on as being authentic when in fact, they have been forged. Given the extent of fraud occurring in real estate transactions, it is only a matter of time before commentators and courts tell us that powers of attorney cannot be taken at face value.

Mr. Troister's learned commentary was taken into account by the Court of Appeal in CIBC Mortgages Inc. v. Chan (2005), 261 D.L.R. (4th) 679 but it failed to influence the court's decision. Mr. Justice Armstrong, in dismissing the appeal on behalf of the court, found it unnecessary "to resolve which of the two competing theories of indefeasibility of title should govern in order to decide this case." In his view, the lower-court judge "got it right" by focusing on the language of sections 155 and 78(4) of the Act.

A plain reading of s. 155 and s. 78(4) leads to the conclusion reached by the motion judge that the two mortgages registered on title are effective in accordance with their terms.

Partly as a result of the court's decision, section 155 of the Land Titles Act was amended in December 2006 to read:

Subject to this Act, a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

The intent of this amendment is to ensure that ownership of a property cannot be lost as a result of registration of a falsified mortgage, fraudulent sale or counterfeit power of attorney. An innocent homeowner's property will be restored to him or her and the fraudulent document nullified. ✷


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Building a Healthy Principal and Pupil Relationship

by Steve Yenish, ALS

From "ALS NEWS" March 2007

A healthy principal/pupil relationship will ensure that both individuals gain from observing and evaluating each other's use of skills and experience.

Principals training new land surveyors are responsible for fostering the professional growth and development of these individuals as well as ensuring that they provide high quality services to the public. When principals supervise articling pupils they are obliged to provide the student with a good technical, ethical and even interpersonal education. Building a healthy relationship between the principal and pupil will assist in this education as well as benefit both in terms of productivity, increased confidence and commitment in an organization.

The responsibility of the principal is summarized quite clearly in the Alberta Land Surveyor's code of ethics Part 1, sec 2(1), under Duty to Personnel, where it states:

> *"An Alberta Land Surveyor has a duty to assist his pupils and employees to achieve their optimum level of contribution to society through their contribution to the profession."*

The statement is quite clear yet extremely broad. How do we perform this duty? We are advised in the ALSA pupil handbook:

> *"The surveyor must provide the pupil with sufficient practical training and experience .... and instruct the pupil in the art, practice and profession of an Alberta Land Surveyor."*

According to the aforementioned statements, principals have a duty to teach the pupil the profession of land surveying. Very little is mentioned about how we proceed to teach the pupil. There are a variety of courses and nearly unlimited literature regarding mentoring, supervision and leadership. The general theme of most of the literature points to building a successful relationship.

To properly perform the duty as described above, the principals must transfer the skills, knowledge and professional attitude that they have acquired to the pupil. To accomplish this task a relationship must be developed. When developing a principal/pupil relationship, several key components tend to appear, such as the following: respect, communication, feedback, trust, and reciprocity.

To establish a climate of openness and mutual respect, there must be freedom from fear of reprisals and intimidation. When fear and anxiety are removed from a relationship, improvements can be made in the communication process. Most importantly, when communication is constructive and supportive it maintains and improves the relationship so that conflict is not feared but surfaced and resolved.

Communication is a process by which information and ideas are exchanged and understood by two or more people. In the case of the principal/pupil relationship, communication should be open and mutual, and serve to educate, motivate and inform to the benefit of both parties. It is important that the pupil be made to feel a part of the organization by being involved in communicating, collaborating, problem solving, planning and decision making. Lastly, the pupil should be made aware of how his/her activities fit into the organization's goals.

Setting clear goals and expectations, communicating the goals regularly and offering feedback will allow the pupil to perform more effectively and increase their confidence. It is necessary to provide frequent constructive feedback to the pupil so that they know how they are progressing in relation to the goals, objectives and standards of the position. Positive feedback will build confidence in existing skills and areas of strength while more negative (but constructive) feedback will make the pupil aware of the area in which to improve. Offering constructive feedback is more effective when a trusting, open relationship has been established beforehand.

Offering constructive feedback is more effective when a trusting, open relationship has been established beforehand.

As the relationship between the principal and pupil develops, an environment of mutual trust should evolve. The principal will empower the pupil to accept more responsibility for projects and tasks which, in turn, will inspire leadership traits and foster accountability. However, the pupil should be insightful in knowing their limitations and be comfortable when seeking the principal's help as required. Experience serves to assist the pupil in establishing limits in knowledge.

To assist in limit-setting, the principal may engage in self-disclosure. Self-disclosure is a process where the principal discloses information about the principal's past successes and failures in their own work and relates their personal reaction to them. This process facilitates a trusting atmosphere where learning can occur on a one-to-one level. The pupil can learn from the principal's mistakes and discover how to remediate problems in an effective manner.

> A healthy principal/pupil relationship will ensure that both individuals gain from observing and evaluating each other's use of skills and experience.

A healthy principal/pupil relationship will ensure that both individuals gain from observing and evaluating each other's use of skills and experience. This reciprocity is critical in the capacity of both principal and pupil. As the pupil develops, he/she will offer his/her own unique perspective of situations which, in turn, also increases the principal's knowledge base. As such, the principal should be open to, and indeed encourage new ideas and observations from the pupil.

Pupils display various characteristics and needs at different levels of development. Therefore, the amount of supervision will vary accordingly and the principal must be vigilant in observing the pupil's skill progression. Supervision should decrease as the pupil gains the skills and experience of each task. The principal should recognize the development level and motivate stagnation beyond what is safe by encouraging the pupil to take on new responsibilities and expand awareness.

The benefits of a good relationship between principal and pupil are rewarding and fulfilling for both parties. The pupil develops the technical, professional, and interpersonal skills required to become a competent professional in an environment that is healthy and rewarding. In a healthy environment the pupil will be more committed and will improve the productivity of the organization. Furthermore, the confidence level of the pupil will develop and improve throughout the process.

Once the articling process is complete, the former pupil should be aware that to maintain professional competence one should continue their education throughout their career by engaging in professional association affairs, pursuing further educational opportunities and becoming a principal themselves. ✹

Understanding Engineers

Two engineering students were walking their bikes across campus when one said, "Where did you get such a great bike?"

The second engineer replied, "Well, I was walking along yesterday minding my own business when a beautiful woman rode up on this bike. She threw the bike to the ground, took off all her clothes and said, "Take what you want."

The second engineer nodded approvingly, "Good choice. The clothes probably wouldn't have fit."

§

To the optimist, the glass is half full. To the pessimist, the glass is half empty. To the engineer, the glass is twice as big as it needs to be.

§

What is the difference between Mechanical Engineers and Civil Engineers?

Mechanical Engineers build weapons and Civil Engineers build targets.

§

An engineer was crossing a road one day when a frog called out to him and said, "If you kiss me, I'll turn into a beautiful princess." He bent over, picked up the frog and put it in his pocket. The frog spoke up again and said, "If you kiss me and turn me back into a beautiful princess, I will stay with you for one week." The engineer took the frog out of his pocket, smiled at it and returned it to the pocket. The frog then cried out, "If you kiss me and turn me back into a princess, I'll stay with you and do ANYTHING you want." Again the engineer took the frog out, smiled at it and put it back into his pocket. Finally, the frog asked, "What is the matter? I've told you I'm a beautiful princess and that I'll stay with you for a week and do anything you want. Why won't you kiss me?"

The engineer said, "Look, I'm an engineer. I don't have time for a girlfriend, but a talking frog, now that's cool."

DAVID THOMPSON BICENTENNIAL COMMEMORATION

By Dennis Carter-Edwards

From “Ontario Professional Surveyor” Winter, 2007

The year 2007 marks the two hundredth anniversary of David Thompson’s first crossing of the Rocky Mountains and the 150`” anniversary of his death. In recognition of Thompson’s achievements, an international planning committee is developing a varied program of special events, park dedications, trail developments, educational material, re-enactments and other activities to highlight the outstanding contribution Thompson made during his lifetime and the rich legacy he left behind in the form of his maps, journals and Narrative. The Association of Ontario Land Surveyors is an organization with obvious links to the Thompson legacy. There is an opportunity for the Association to participate in the bicentennial commemoration, limited only by the imagination, energy and enthusiasm of the members. For more information, see:

www.davidthompson200.org

David Thompson, fur trader, astronomer and surveyor, was described by J.B. Tyrrell, as North America’s “Greatest Geographer.” As an employee of the Hudson Bay Company and later North West Company, he travelled over 90,000 kilometres by canoe, horseback, sled and on foot - often under very difficult circumstances. Thompson located the headwaters of the Mississippi, crossed the Rockies through both the Howse Pass and Athabaska Pass and travelled and mapped the entire length of the Columbia River. In 1798 he married Charlotte Small, daughter of a fur trader and a Cree woman. Their partnership lasted nearly fifty years and produced thirteen children. Charlotte was an active participant with Thompson in the fur trade, travelling with their children on many of his trips and facilitating his interaction with First Nations.

After he retired from the fur trade, Thompson was given a special assignment to produce his famous “Map of the North-West Territory of the Province of Canada” which covered one sixth of North America and remained in use into the twentieth century. As official astronomer to the British Boundary Commission between 1816 and 1827, he helped draw the border between Canada and the United States from St. Regis near Cornwall to Lake of the Woods. During the War of 1812, Thompson lived for a period in Montreal before moving to Williamstown, Ontario where he set himself up as a merchant, farmer and land developer. A casualty of the economic depression that crippled the economy in the 1830s, Thompson was forced into bankruptcy. The family moved back to Lower Canada where he struggled to support his wife and children. Thompson took on various surveying projects that included a proposed canal scheme to link Lake Huron with the Ottawa River and drawing the boundary between Upper and Lower Canada. Also in this period, he began writing his “Narrative” using the daily journals in which he meticulously recorded his observations on the places and people he encountered. A plan to publish the Narrative fell through. With advancing age, and persistent financial difficulties, David and his wife Charlotte moved in with their daughter and son-in-law Dalhousie Landell. David died 10 February 1857 and his wife a few months later. They were buried in the Landell family plot. Not until 1927 through the efforts of the Canadian Historical Society was a marker erected at their grave site.

Largely unrecognized at the time of his death, the David Thompson Bicentennial Commemoration offers a opportunity to bring his achievements and his legacy to a wider audience. ✷

What Was David Thompson Like?

There are no known photos or paintings of David Thompson. However, while researching this amazing man, Doug Bouck came upon this verbal description (www.collectionscanada.ca) and an artist’s rendering (from www.davidthompsonthings.com)

“He was plainly dressed, quiet and observant. His figure was short and compact, and his black hair was worn short / long all around, and cut square, as if by one stroke of the shears, just above the eyebrows. His complexion was of a gardeners ruddy brown, while the expression of deeply furrowed features was friendly and intelligent, but his cut-short nose gave him an odd look. His speech betrayed the Welshman, although he left his native hills when very young.”

2007 AGM HIGHLIGHTS

Wendy & Roger Morrow share the pride of a new commission with Brian Burridge & Jill Cheverie.

2007 AGM HIGHLIGHTS

Visiting ABCLS president Joe Johnson and wife Bobbi assume 'custody' of the travelling "Friendship Jar" that first came to Saskatchewan when it was presented to D.A. Bouck, SLS (Retired) in 1995

Congratulations to Robert King, ALS, recipient of SLSA Commission #292. With a new addition to the family drawing near, Robert opted to stay closer to home in Lloydminster rather than attend the 2007 AGM.

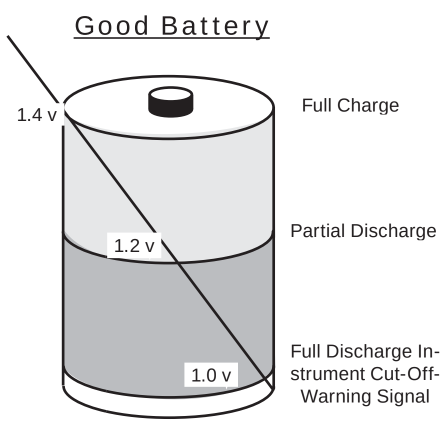
Benjamin Andrew King was born on July 3, weighing in at 6 pounds 8 ounces.

MY TOTAL STATION BATTERY HAS ALZHEIMER'S... AND THAT'S A GOOD THING?

BY: ARTHUR DIAS, B. SC.

From "Professional Surveyor" - December 2006

How many times have you heard the phrase, "My battery pack is holding a memory"? Being in the battery business, this is something we hear all the time. This term is used to explain the tendency of a rechargeable battery to remember the point up to which it was discharged over several cycles, before full discharge was attained. Subsequently, the battery behaves as if this point is the point of full discharge. This is a generally misunderstood phenomenon and a term often misused to explain various battery problems. There are many scientific and theoretical explanations for why rechargeable batteries behave poorly at times. But in a practical sense, these problems can be analyzed and addressed without having to have a degree in chemical engineering. So, if your battery has "Alzheimer's", based on the explanation above; it's a good thing.



"Memory Effect" is essentially caused when a rechargeable battery is recharged to full capacity, then used in the field to a point where the battery never reaches full discharge before being placed on recharge again. For argument's sake, let's imagine a battery being a container of sugar, where you fill it up and then use what you need before refilling it again. If you constantly use only the top portion of the container and refill it with new sugar, the remaining portion you have not touched in a while begins to get stale. The same is true for a battery. The remaining charge you never allow the instrument to access, over time starts to stagnate.

Initially, the charge in a battery is at a uniform voltage throughout the cells. The voltage begins to drop immediately after removal from the charger. If all the charge in the battery is not consumed before recharging, the portion that is left unused continues to drop in voltage and becomes "stale". Eventually, the voltage in this "stale" portion drops so low that when your instrument is finished gobbling up all the "fresh" charge, it hits this "stale" portion like a brick wall. The instrument is confronted with a sudden drop in voltage, at a level below the "low battery" indicator threshold. The battery cannot power the instrument now without being recharged again.

The only way to recover the performance of the battery is to somehow remove that "stale" charge in the battery and restore a fresh new charge. Unfortunately, some total station manufacturers have designed their instruments and chargers in a way that makes it almost impossible to correct this problem. Chargers with a "discharge" function built in may not work to correct the problem at this point either. The low voltage point of stale charge will also cause the discharge operation to cease prematurely, leaving the stale charge still in the battery. In a case like this, a battery service shop with the proper equipment, can analyze the battery, remove the stale charge and solve the problem.

Trying to live with the problem will only make it worse and can actually ruin the chances of correcting the problem at all. Just like the container of sugar example, eventually this stale part will become so solid and entrenched in the battery that it will permanently ruin that part of the battery and diminish its ability to accept a usable charge again. What also appears to happen is that the portion of the battery that is able to receive fresh charge, now goes through many rapid cycles and in effect "wears out" that portion of the battery prematurely. You are now left with a container of hard packed stale sugar at the bottom, with the top part of the container so worn out that it can barely contain the new sugar you keep replenishing it with.

Here are several things that can be done to avoid this problem. Some I am sure you have heard before, but they are still worth repeating.

1. Always fully discharge the battery each time you use it in the field. Number all your batteries and learn the run time of each one through regular use. If you still carry enough battery power with you for the next day's work, wait and use that all up before recharging again. Always avoid recharging any batteries that have not been fully run down.

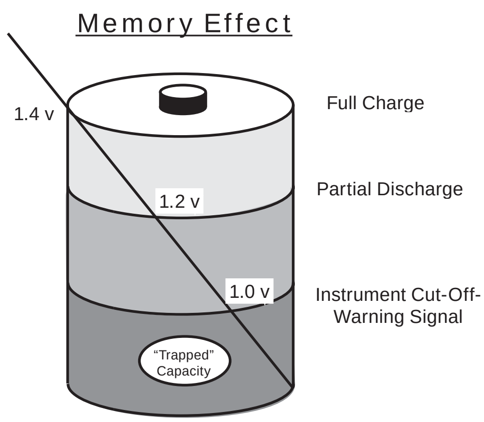
2. At the first sign of a sudden decrease in performance, set that battery aside until returning to the office. At the office, put this problem battery back into the instrument and set the instrument on a heavy battery demand operation (like

"tracking mode" measuring against a prism). Now run the instrument to the point where it shuts off on its own from lack of battery power. Wait five minutes and repeat the procedure. Repeat this until you feel the instrument has drained as much as possible from the battery. Now put the battery on charge (preferably a slow charge, if your charger has that setting).

3. If storing the instrument away for a week or two, do not recharge the battery until the night before it is needed in the field again.

4. If storing the instrument for a month or two, or even longer, charge up the battery before storage and then once a month until the storage period is over. Every second month, fully discharge the battery before recharging.

5. Always let the battery reach room temperature before recharging. Excessively cold batteries will resist being charged and actually fool auto shut- off chargers into thinking the battery is fully recharged when in reality it is not. When the battery is not allowed to fully recharge over many cycles, you may end up with the same problem as the "memory effect".



Within the last few years, many instrument manufacturers have switched to Nickel-Metal Hydride (NiMH) cells in their battery packs instead of the old industry workhorse, NiCd. The main advantage of NiMH cells is the ability to hold much more charge in the same size cell as the equivalent NiCd and they are more environmentally friendly as well. NiMH cells have also been touted as not having the memory effect problem of the NiCd cells. However, our experience has shown that this is not always the case. Although they may resist the effect from taking hold as easily as NiCds, the same maintenance procedure should be followed ...always fully discharge the battery before recharging again. NiMH cells also have one big drawback compared to their NiCd counterparts - their internal resistance is higher.

The internal resistance of a cell will govern how readily it will accent a charge when applied, and how easily it will release that charge while maintaining it's voltage when required to do so. Internal resistance also explains why NiMH battery packs sometimes get much warmer during recharge than NiCds. Since internal resistance is a problem that gets worse with the age of the cell for both NiCd and NiMH, designing the instrument and charger to meet these demands is a difficult balancing act, with some manufacturers having done a better job at it than others.

A NiMH charger that is designed to charge the battery in a 10 to 14 hour period will always do a better job of topping up the battery than a charger that is designed to do it in 2 to 3 hours. The internal resistance of the battery will always force the charger to apply a higher voltage during recharging to overcome the resistance. This resistance is more pronounced during a fast charge procedure than during a slow charge. Eventually the charger is forced to such a high voltage that it assumes the battery is recharged and shuts off, never recharging the battery to its full potential. As the NiMH battery gets older, the problem gets worse. It is always best, if your field working procedure allows for it, to choose a slow overnight charger cycle. Many OEM chargers for NiMH cells offer both fast and slow charge cycles. Also, chargers that monitor the internal temperature of the battery during a fast charge seem to do the best job of recharging the NiMH batteries quickly.

Another point worth mentioning is the idea of replacing old NiCd cells in a pack with NiMH cells, during a re-cell procedure. This is only recommended if you have just that one battery to run your instrument. You must also be prepared to accept that NiMH cells do not maintain original performance through as many cycles as NiCd cells. But since the NiMH cells start out with the ability to hold much more charge than their NiCd counterparts, the advantages of the NiMH cells are still something worth considering. Unfortunately, your old NiCd charger may never properly recharge the NiMH cells to their full potential because it was not designed for the different requirements of the NiMHs. Even at less than 100% performance, however, the greater capacity of the NiMH cells will generally be realized if that battery is properly maintained from the beginning. In reality though, many users will just add this NiMH battery into a mix of other NiCd batteries being carried into the field for the instrument. Our experience has found that in short order, the NiMH battery will get "lazy" and settle into a performance that is no better than if it had been re-celled using NiCd cells. The advantages of converting to NiMH cells over the original NiCd cells would be lost, not to mention, this "misfit" battery pack now has a diminished life cycle.

The final bit of advice I can give, similar to the advice we often get from our own doctor: batteries stay healthier through regular exercise on a daily basis! ✷

Arthur Dias is a founding partner of Dias & Dias Electronics and www.surveybattery.com.

His company has been repairing battery packs worldwide for surveying equipment for over 11 years.

2007 Murray Skelton Memorial Golf Tournament

Manitou Beach Golf Club

TOURNAMENT WINNERS

Men's Low Gross	Murray Skelton Trophy	Jim Condon
Men's 2nd Flight	Polar Bear Trophy	Ryan Maloney
Men's 3rd Flight	CCLS Plaque	Wes Jamieson
Callaway Champion	Old Plumb Bob Trophy	Jill Cheverie
Ladies Low Gross (1st)	Tri-City Surveys Trophy	Kathy Wallace
Ladies Low Gross (2nd)	Plaque	Maureen Webster
Longest Drive	"Naked Lady" Plumb Bob Trophy	Bob Wallace

Walt Schoenfeld (Tournament Organizer), Malcolm Vanstone, Heath Miller

Mike Waschuk, Ryan Maloney, Jim Clarke, Grant Beach

Jim Condon (Life Member), Wes Jamieson,
Paddy Brennan (Hon. Member), Gord Webster

Sherry Quirk, Jan Webster, Donna Jamieson, Kathy Wallace

Dave Quirk, Bob Wallace (ALSA President),
Les McLaughlin (AMLS President)

Sherry Broderick, Bobbi Johnson, Maureen Webster, Wendy Morrow

Bob Webster (Past President), Ron Eichel,
Joe Johnson (ABCLS President), Roger Morrow

Norm Georgi (Butler Survey Supplies), Marc Beaudry (Terrapoint Canada),
Jill Cheverie, Kathy Clark (Partner's Program Organizer)

Bruce Jones, Wayne Stockton, Jack Webb (Life Member), Merv Zulynik

Barry Clark (Conference Chairman), Brett Findlater (Spatial Technologies),
Gerald Johnson, Brian Burridge

Two Irons and Just One Corner

By: Don Duffy, BCLS, Victoria, BC

Reprinted from "*The Link" - March 2007*

Reading the Reasons for Judgment in a recent BC Supreme Court case, (Spraggs v. Coldstream Resort, 2006 - 35613, Vernon Registry), caused me to do some thinking about what I have learned about survey evidence since I started out as an articled student in 1954. Calgary Technology, which I attended from 1952 to 1954, didn't teach much about the legal side of surveying in those days.

Articling to Dave Usher in Edmonton and working for the Atkins & Usher firm was a great learning opportunity, as the firm had a large practice in city surveying, as well as in a variety of rural work throughout northern Alberta.

There were only a few Edmonton firms which had survived from the boom days of 1912 through the depression of the thirties and the war of the forties and Mr. Atkins' firm was one of these. By the time I started to work there, Mr. Atkins had retired, but Dave had all the field notes and records, as well as a healthy respect for the work done by the Edmonton surveyors in the early years. Since all of the downtown and most of the surrounding area had been laid out as subdivision plans during the boom years before 1914, all of the original corners were wooden posts. Most of these, of course, had disappeared, though the remains of some could still be found by careful digging. Survey evidence was mostly secondary, consisting of building corners and iron pins or lead plugs which had been set in the intervening years and recorded only in the surveyors' field books.

Attempting to do a retracement based only on posts of record in the Land Title Office would have been a recipe for disaster.

It came as a surprise to me, when I moved to Prince George in 1958, that it was quite routine for land surveyors in British Columbia to ignore old iron pins or other evidence if it was not recorded in the Land Registry Office. At least in the Kamloops Land Registry District, which then included Prince George and most of northern British Columbia, this attitude was strongly encouraged by the L.R.O. staff who questioned any plan which was even partly based on evidence not previously of record in their office.

About 1962, the Land Registry Act was amended, to require the filing of a posting plan, where a land surveyor had reposted lot corners.

This was a very positive step, but of course it did nothing to legitimize the thousands of posts that had been set previously but never recorded. The early posting plans were often treated very casually by the staff of some land registry offices and were not subjected to the standard of review required for subdivision and reference plans.

This attitude was largely responsible for the view, still held by some land surveyors, that re-established posts recorded on a posting plan are in some way inferior to those recorded on a subdivision or reference plan.

The law, based on BC statutes, supported by several court decisions, is quite clear, however. Original posts, in their original positions, cannot be challenged, even though dimensions joining them may differ from plan dimensions. Any posting of a re-established corner, whether recorded on a subdivision, reference, or posting plan, or not recorded at all, is subject to challenge, if it can be proved to have been wrongly set. Thus, even on a subdivision plan, a post which is on one of the external boundaries of the original parcel and was re-established when the subdivision was surveyed, may be rejected by the courts years after the plan was registered.

This is what happened in the Spraggs V. Coldstream case. This case also provides an interesting commentary on the subject of "agreed boundaries", where adjacent owners, in the absence of conclusive evidence, agree on a boundary location, which is then recorded by a survey plan.

Spraggs and Coldstream own adjoining parcels which front on Kalamalka Lake. At issue is the location of the common boundary and, in particular, the northeast corner of the Spraggs parcel.

In 1946, F.G. de Wolf, BCLS, subdivided a large block of land, creating many lots, two of which are the parcels involved in this lawsuit. It is common knowledge that the de Wolf survey was of low quality, creating many problems.

In 1957, Peter Tassie, BCLS, was employed by Mr. & Mrs. Hutt, then owners of the Spraggs parcel, to prepare a field study for a proposed subdivision. Mr. Tassie could not find the original northeast corner of the parcel, so he set a new iron pin at a point that he calculated to be the corner. His location was based on ties he made to several other corners. The Hutts did not proceed with their subdivision, so Mr. Tassie did not prepare a plan.

In 1958, the District of Coldstream closed the road which had formerly separated the two parcels, granting each of the abutting parcels half of the closed road. This is reflected in Plan 7417, prepared by Mr. Tassie. In depicting the boundaries, he relied upon the iron pin he had set in 1957.

In 1975, R.N. Shortt, BCLS, prepared Plan 26056, which purported to define the boundary between the parcels. Mr. Shortt placed his own pin, at a different location than the Tassie pin, to define the northeast corner of the Hutt parcel. On Plan 26056, there is a form of agreement, signed by the Hutts and signed on behalf of Coldstream, which states that the parties agree to the boundary location as defined by this plan and that this agreement is binding on themselves and their successors and assigns.

In this legal action, the Spraggs contend that the Tassie pin is the true northeast corner of their parcel, and that Plan 26056 is wrong. Coldstream contends that the Spraggs are bound by the agreement on Plan 26056, or alternatively, of the "conventional line doctrine" of common law.

There are two questions at issue. The first is whether Spraggs can impugn the agreement, signed by the previous title holders, in 1975. In considering this question, the judge refers to several cases from eastern Canada, as well as to a 1995 article in the University of New Brunswick Law Journal. His conclusion is that the agreement can be overturned, if it was intended only as an acknowledgment that the boundary was correct and if the parties have not subsequently relied on the line to establish substantial improvements. On the other hand, it cannot be overturned if the intent of the parties at the time was to establish a fixed and final boundary, regardless of whether or not it was correct, in terms of survey evidence.

The second question is, if the agreement is not binding, how should the boundary dispute be resolved?

In considering the first question, the judge notes that none of the original signatories testified at the trial. In determining the intent of the parties, the judge relies on the testimony of Mr. Shortt, who stated that he first became aware of a boundary problem after he was engaged to prepare a survey certificate for Coldstream. Because of numerous discrepancies in the de Wolf survey, he found it very difficult to define the boundary. He testified that he was aware of the Tassie iron pin, but did not regard it as determinative of the corner location because it was part of a survey which had not been completed and was not recorded on a registered plan.

On the first question, the judge concluded that the intent of the parties was to affirm that the Shortt survey was correct, but not to establish a final boundary regardless of whether the boundary retracement was correct or not. He also found that no one had relied on the survey to construct permanent improvements.

The judge then went on to decide the second question. The details of survey evidence used by Mr. Tassie and Mr. Shortt in establishing the different locations of their two iron pins are not available to readers of the Reasons for Judgment, so we are not able to second-guess either them or the judge. His decision was that the Tassie iron pin is the true corner.

To a land surveyor, the most interesting aspect of this decision is that the judge gave no weight at all to the question of whether or not a re-established corner pin had been recorded on a registered plan. The Tassie pin set in 1957, had never been recorded in the Land Title Office. The Shortt pin had been of record as a common corner of the parcels since 1973.

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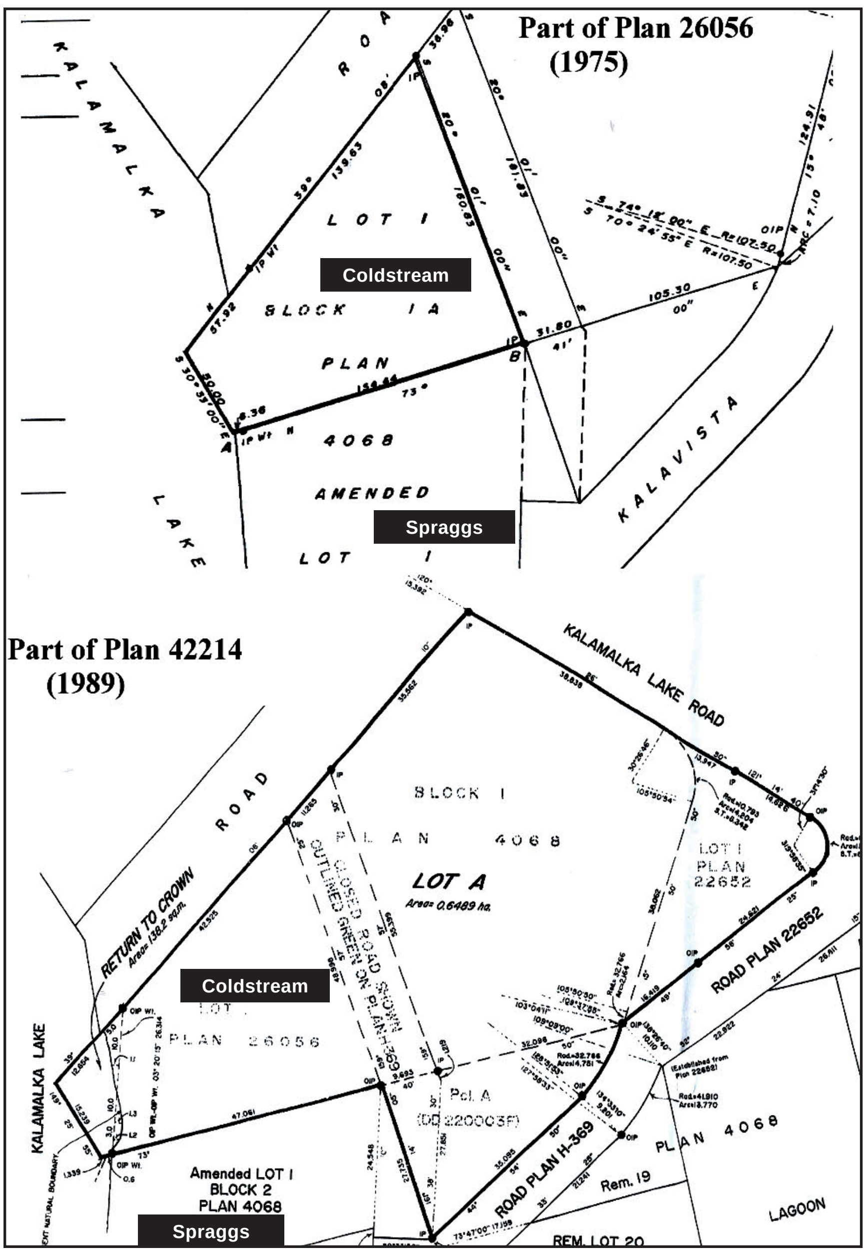

The Future With Digital Data - A Work in Progress

by James W. Whitehead, RE, L.S.

Reprinted from "The Maryland Surveyor" Volume 33, No. 1 - Fall 2006

Remember when the surveyor work product consisted of the venerable field book, the dog-eared work map, the final linen plat and perhaps a written survey report and legal description, prepared in many cases by the actual licensed professional himself or a trusted lieutenant with 20 plus years of experience? If you found all the surveyors in a County, State or region in a conference they were all probably using the same engineer's transit, the same field book, the same style of notes and probably even the same abbreviations for monuments on their plats. There was a clear training path for the young surveyor called the three-man field crew and there was a corresponding office track. In fifteen or twenty years, if you worked hard, you could hope to be a licensed Land Surveyor, maybe. We had a process that was industry recognized, time honored and consistent within the profession.

Gone are those days. The two-man crew, the total station, the data collector, the digital file, the AutoCAD map have replaced them all. Data storage is different as well; we even have a new term, mega-data. That is data about data. The field book of old was judged for accuracy, integrity, legibility, form and clarity. Have you looked at a raw data file print out lately? How do you read it, how do you store it? Can you relate it to a field book sketch? Do you have a field book? Maybe we need a new process. Every time I am faced with a mistake or an issue in my office I find that the root cause is a flawed process.

Field books of old collected information on the weather, temperature, field party personnel and instrument type and number; the modern data collector may or may not provide these insightful facts. Field books included explanatory statements about how you did what you did, tabulations, sketches, and customary symbols.

Enter the modern data collector. Data collectors store information in either binary or ASCII format. There area wide variety of data collectors in use. There is a wide variety in organizational structure in the various data collectors on the market. While some efforts have been made in the standardization of digital data this area of our profession is largely virgin ground.

The data collectors on the market are generally used with specific instruments but others are more flexible. There is a wide variety or main line software and piggyback software on the market that handles processes and organizes the data; more often than not, the surveyor surmises that this software works correctly without actually knowing that it does. Basically, there is no standard course for calibrating your chain or your data collector any more. You can send it back to the shop for service in the "black box room".

Enter the computer, software and the modern plotter. These complex machines engage the technician but disengage rather than engage the licensed professional in his work. The computer enables the operator to study the results of data without actually knowing that the result he is studying is portrayed correctly. The new data collectors interface with these computers through Windows Operating Systems; with each new development the capability of the collector and the software is enhanced and the user is more disconnected from the actual process.

Files are transferred from the data collector to a PC through a process known as "downloading"; from there the files are imported into project drawings. Raw data files are protected files that in theory cannot be manipulated and represent the modern digital field book with no sketch. However, the truth is, these files can be accessed.

The new technology has advantages and disadvantages; as land surveyors we need to develop processes that manage these features to our advantage. Data collectors have removed the recording errors of the past to some extent and we can import field data into drawings with greater speed so that office time is significantly reduced. However, these advantages can be offset by a tendency to accept imports as correct information without having a process to test the reliability of the data. Files can be lost, and valuable field sketches either separated from the data or they are simply not available.

In a similar manner, the data is then processed by a largely invisible software package that in miracle manner displays the final result to four decimal places. The software programs that manipulate this data, organize it and create the final products that are complex and require substantial training to operate; however, the final product largely wants to be accepted on face value as correct.

Interestingly, many licensed surveyors cannot use the software or the PC on an interactive basis; similarly, they are rarely engaged in uploading them, downloading them or interpreting them; this is entrusted to technicians. If this is the case one has to wonder who is providing the process that controls the program; are we in charge or is the computer technician in charge? Worse yet, is the computer in charge?

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Lincoln the Land Surveyor

by Robert E. Church, Executive Director, Illinois Professional Land Surveyors Association

Reprinted from "Turning the Horizon" (Museum of Surveying)) - Volume 5, Issue 1 - 2006

During the cold winter of 1835 - 1836, a tall, lanky 27-year-old man from the fledgling town of Salem, Illinois walked around the current town of Petersburg, two miles from his home. At that time, there was no town; there were just fields and a few log cabins. But a town was being planned and it had to be laid out.

The lanky man was Abraham Lincoln and he was plotting the future town of Petersburg. During that winter he juggled his duties as a state representative with his job as a land surveyor. When not at the state capitol, Lincoln lugged surveying equipment around the future town and dutifully planned lots and streets.

Most people are familiar with Lincoln the rail splitter, Lincoln the husband and father, and Lincoln the legislator and president. But few know about Lincoln the land surveyor, even though land surveying played a key role in launching his career as a politician.

Lincoln first came to this area in the spring of 1831. He settled in Salem (now called New Salem) and tried several jobs: tavern keeper, rail splitter, grocery store keeper, and postmaster. But they didn't pay very much.

Abraham Lincoln
Deputy Surveyor, Sangamon County, Illinois
1833 - 1837
(from www.iplsa.org)
This depiction is from a limited edition print by
Lloyd and Ned Ostendorf - available for purchase

At the same time, many of settlers were coming to Illinois, which had become the twenty-first state in 1818. Speculators from the east were buying large tracts of land here and mapping out new towns. New towns meant new roads had to be laid out among the prairies and swamps. Thousands of farm sites were being established and each of them had to be surveyed, too.

It was a good time to be a land surveyor. Business was booming. John Calhoun, county surveyor for the area, had more work than he could handle and needed help. But it was hard to find men who had the time or ability to survey.

Calhoun had heard about Abraham Lincoln of Salem, Illinois after Lincoln unsuccessfully ran for the Illinois legislature in 1832. He sent word to Lincoln that he'd like Lincoln to be the Deputy Sangamon County Surveyor. When Lincoln got the offer, he jumped at it, despite knowing nothing about surveying. He travelled to Springfield to meet Calhoun and agreed to accept the position on the conditions that it carried no political obligation and that Calhoun would not restrict Lincoln from expressing his political opinions. Lincoln told Calhoun he had no knowledge of surveying, but Calhoun assured him he would have time to learn. The deal was sealed.

Lincoln borrowed two books about surveying and studied whenever he could. He got Mentor Graham, Salem's schoolmaster, to help him and worked day and night until he had thoroughly absorbed surveying principles. Lincoln bought a second-hand surveying compass with a Jacob Staff, and he was ready. Six weeks after meeting Calhoun, Lincoln reported for work and was immediately assigned to help appraise Salem lots. It was October, 1833.

Although surveying was the best paying job Lincoln had at the time, financial problems continued to plague him. He got $3 a day as a surveyor, which was substantial, considering the governor made $1,000 a year then. But surveying was also a costly profession. Lincoln had to travel great distances for jobs, so he was forced to buy a horse. He made payments on the $50 steed whenever he could.

That became tough after another venture failed. He was still Salem's postmaster and operated a grocery store there. When the store went belly up, Lincoln was $1,100 in debt. Like his horse, he paid this off bit by bit. Then, in February, 1835, one debtor became impatient. He sued Lincoln, who couldn't pay, and ended up losing his horse, saddle, bridle, and surveying instruments. The items were sold at auction.

Lincoln became depressed. Losing the equipment meant losing his livelihood. Upon learning Lincoln's plight, a well-to-do farmer named James Short bought the horse and surveying instruments at auction and returned them to Lincoln. Again, Lincoln paid him little by little until the debt was repaid. (Thirty years later, when Lincoln was president, he learned that Short had serious financial problems, so Lincoln commissioned him as a territorial Indian Agent.)

With his equipment back, Lincoln returned to surveying, which aided his political career considerably. He met many people and made lots of friends during his travels. Realizing the advantage this gave him, in 1834, a year before he laid out Petersburg, Lincoln ran for state representative and was elected.

During the years Lincoln was a land surveyor he completed about 30 property surveys and laid out five towns. One of his most important jobs was laying out Petersburg (which became the seat of Menard County in 1839). According to Lincoln's official land records, he laid a stone at what would become the southwest corner of Petersburg's public square and from there laid out 64 blocks of eight lots each.

However, legend has it that Lincoln "skewed the line," or fudged a bit, while surveying part of the town. About 25 years after Petersburg was laid out, several property owners along a certain street had trouble establishing their property lines. They consulted Lincoln's original plat (but found no answers. They sent a committee to Springfield to consult a distinguished surveyor, but he couldn't help either.

Eventually the case went to court. While the trial was pending, an old Irishman name McGuire, who had worked for Petersburg farmers, returned to town. When someone mentioned the case, he promptly said, "I can tell you all about it. I helped carry the chain when Lincoln did the survey. Over there where they are having the problem and quarrelling over the lines, when Lincoln was locating the street he straightened up from his instrument and said, "If I run the street right through, it will cut four feet off of the end of Jemima Elmore's house."'

Mrs. Elmore was the widow of a soldier who had been killed in the Black Hawk War, and Lincoln knew the little house was all she had. He was quoted as saying, "I reckon it won't hurt anything out here if I skew the line a little and miss her house."

After surveying all day, Lincoln would retire to his friend John Bennett's new hotel. His hotel room served as his office. At night Lincoln used a drawing board, T-square and triangles to measure and draw the future town's blocks and streets. He carefully inked the lines and used a wadded ball of stale bread as an eraser to clean the drawing.

Lincoln filed a plat (official drawing) of Petersburg on February 16, 1836. It says, "I hereby certify that the Town of Petersburg has been surveyed according to law and that it is a correct plat of the same."

Today, you can see Lincoln's surveying equipment and saddle bags at Lincoln's New Salem State Historic Site. The State of Illinois purchased the items in 1873 and they were displayed at the National Lincoln Monument until 1895, when they returned to Illinois. Each year at New Salem members of the Illinois Professional Land Surveyors Association dress in period clothing and use antique instruments to demonstrate surveying techniques from Lincoln's time.

While you're in the area, don't miss the Illinois Professional Land Surveyors Association Museum in the Menard County Historical Building. It's located at Seventh and Jackson Streets on Petersburg's downtown square. The Museum contains old surveying equipment, maps and prints depicting early surveying in Illinois. Nearby, at the southwest corner of the square, you'll also find a rail with drawings and information about Lincoln's time as a surveyor. ✷

76 - " The Future With Digital Data "

How did this happen? It occurred immediately after the 1991 recession as we all limped back to economic health. It occurred with the proliferation of computers, instruments, data collectors, software and related technology that swept over us between 1993 and 2003. Data collectors, reflectorless technology, GPS, digital scanning and a host of other unbelievable technological breakthroughs have buried us in the aforementioned mega data.

The industry must address this. We are duty-bound to create a clear and cogent PROCESS. We need to manage this wide array of technology, computers, data collectors and related hardware/software interfaces through a process that is industry standard, that is accepted industry wide, and that is consistently used industry wide.

It is the duty of this profession to create standards that define our duty as professionals. These standards must be standards of "process". How should a raw file look? What additional attributes should it have? How should it be downloaded, checked, manipulated, stored, used, presented and incorporated into final work product? What hands-on controls should the licensed professional have; how much training? These are the questions that we must answer and that the profession will address over the coming years. As the licensed professionals of today we owe it to ourselves and to the next generation of surveyors to answer these questions for the entire industry. ✷

James W Whitehead, PE, L.S. is the President Elect of Maryland Society of Surveyors. He has served as Secretary, Vice President, Chair of the Legislative Committee and Chapter Chair. Jim is licensed in four states and the District of Columbia. With more than 30 years of experience in engineering and land surveying, and with extensive experience in roadway design, planning, and land development, Jim presents accredited seminars and technical programs for college credit and the licensure program.

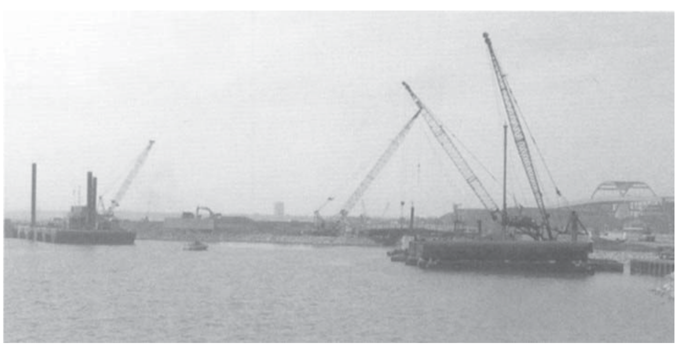
Can Lakebeds Be Filled?

From a speech by Duane H. Wunsch

From “Wisconsin Professional Surveyor” September 2006

Can the riparian owner acquire title to lake bed or enlarge their parcel by placing stones, and soil on the lake bed? Materials deposited on the lake bed may be either physically separated from the riparian’s land by an expanse of water (creating an island), or contiguous with upland. In neither case, can they ripen into legal private ownership.

Instances in which the title of the private riparian owner of land appears to have been derived from soils and rock placed on lakebed are occasionally revealed by a land survey prepared at the time of the sale. A riparian owner, as against the public, may have been able to intrude into the navigable water as a result of the construction of breakwater necessary to protect his land from the action of the water. Miller v. City of Milwaukee, 14 Wis. 642 (1861). However, the riparian owner can not have thereby acquired the title in fee to land occupied by the breakwater structure. Diedrich v. The N.W.U. Ry. Co., 42 Wis. 248 (1877). Similarly, the creation of an island by dredging earth and sand eight to fifteen feet high above the waters of Green Bay did not constitute accretion, and did not enable the riparian owner to subsequently acquire the title to the bed of the lake. Menominee River Lumber Co. v. Seidl, 149 Wis. 2d 608,146 N.W. 2d 577 (1967).



Milwaukee Harbor on Lake Michigan

Land above the ordinary high water mark which forms a continuous shoreline, and which as experienced enclosure, fencing or other acts of occupancy represents an opportunity for private ownership.

Beach of shallows once covered by water but later exposed is capable of being acquired through adverse possession by a riparian owner who occupies the area contiguous with the private riparian title of the upland held in fee. Illinois Steel Co. v. Bilot, 109 Wis. 418, 18 N.W. 855 (1901); Knutson v. Munson, 211 Wis. 535, 248 N.W. 440 (1933); Jansky v. City of Two Rivers, 227 Wis. 228,278 N. W. 527 (1938).

There have been instances in which titles acquired by adverse possession of submerged lands have within certain locales been quite widespread, and in one case comprised a distinct maritime economic community. However, land placed by artificial means upon a lakebed does not divest the State’s title, nor does it vest any title in the private riparian owner. Menominee River Lumber Co. v. Seidl, 149 Wis. 316,135 N.W. 854 (1912).

Only a grant by act of the State’s legislature can establish a private title in lake bed. Such grants are unusual. ✷

The forgoing was excerpted from a presentation by Atty. Duane H. Wunsch at a meeting of the Society’s Milwaukee Chapter on February 12, 2004. Mr. Wunsch is the legal counsel for Commonwealth Land Title Insurance Company in their Brookfield, Wisconsin office.

75 - “ Two Irons and Just One Corner ”

Update

The trial court decision in this case was overturned by a decision of the BC Court of Appeals in January of 2007 and sent back to the trial court for a new trial.

The general sense and conclusions of my article are not affected by this decision, as the Appeal Court makes a point of saying that the Tassie pin and not the Shortt pin, is correct. The problem seems to have been that the trial court judge was not clear enough in stating exactly where the boundary should be placed as a result of his decision.

It seems to me that the plaintiffs failed, in their pleadings, to show, by means of a clear plan, exactly what they expected to achieve as a result. The judge neglected to draw this information out in the trial and therefore the decision is unclear.

Since there will be a brand new trial, probably with a different judge, it is possible, though unlikely, that the results will be quite different. ✷

Don Duffy, BCLS, July 7, 2007

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