sreal estate values and population densities continue to climb, the surveyor’s liability also expands. Encroachments, for example, are on the minds of survey requesters more than ever, and woe to the surveyor who misses one or describes it badly. Twelve months ago my firm analyzed 5,500 projects that were not ALTA/ACSM related, and only 17 – just 3 percent – specifically requested that encroachments be identified. But currently, at least half of our boundary survey clients request encroachment identification. And when we deliver finished survey maps, we’ve been asking clients if they assumed that we would be locating encroachments: they all say, “of course!”

As a company standard, our field crews know to always locate perimeter improvements, and we show their position relative to parcel lines on finished maps. But are we “covering our assets” when we do so, or are we increasing our liability? And should we be charging more for the service? I’ve had many interesting discussions with clients along these lines, and I’ll report on them in a future article. But this article is about encroachments and how to report them, and whether they should be reported at all.

**Some Definitions**

According to *Black’s Law Dictionary*, an encroachment is, “...an illegal intrusion in a highway or navigable river with or without obstruction...an encroachment upon a street or a highway is a fixture, such as a wall or a fence, which illegally intrudes into or invades the highway or incloses [sic] a portion of it, diminishing its width or area, but without closing it to public travel.” The word ‘encroach’ is defined, “To enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude. To gain or intrude unlawfully upon the lands, property or authority of another.”

These definitions appear to describe intrusions onto public entities such as streets or highways, or natural features like rivers. They only briefly mention intrusion onto another’s land or authority, and totally neglect trees and fences, two things
surveyors often puzzle over when it comes to encroachments. Trees can be natural occurrences, but they can also be placed by man. And fences, of course, must always be considered in relation to boundaries.

Better definitions can be found in *Real Property, Probate and Trust Law*, from the American Bar Association, in the section titled *Land Surveys – a Guide for Lawyers and Other Professionals, 2nd Edition*. When using this text as part of a master’s degree program I developed for Old Dominion University’s distance learning course, I found six specific references to encroachment out of 25 texts. All six mentioned trees, fences and hedgerows as items of concern, and it was suggested that perimeter improvements be shown on final maps. Additionally, one of the texts stated, “…a surveyor provides an opinion, not a guarantee.”

Knud Hermanson, in his essay titled “Surveying Services”, states: “Surveyors are no different from attorneys, doctors, ministers and others who offer services to the public. An attorney cannot guarantee a person’s innocence or guilt before or after a trial; a doctor cannot guarantee patients perfect health; a minister cannot guarantee a soul’s salvation after offering absolution. Some argue that the surveyor is different because the surveyor offers work product…these work products are not different from the abstract or estate plans resulting from the attorney’s service, the marriage certificate resulting from the minister’s service, or the medical chart resulting from the doctor’s service.”

In *Writing Legal Descriptions*, Wattles concludes that an encroachment can be a physical structure such as a building or fence, or natural objects such as trees or hedgerows. He also discusses tract maps or plats where a subdivider, for whatever reason, conveys land that is not his to convey. The resulting intrusion on adjoiners, though easily remedied by considering senior rights, must still be defined as encroachment.

*Brown’s Boundary Control and Legal Principles, 5th Edition* defines ‘encroach’ as “… to intrude; trespass; to gradually take possession of the right of another.” In Chapter 14, “The Role of the Surveyor”, Principle Five states, “… the land surveyor locates boundary lines according to the description in the deed and then relates lines of possession that do not agree with these lines and reports the facts to the client, preferably in writing.” This is my personal favorite, and the one I suggest surveyors follow. Our job is to report the facts on the ground; it is up to attorneys to decide how those facts affect rights of landowners. They should be able to decide based on our drawings.

**Potential Encroachments**

*Trees and Vegetation*

Trees and hedges are interesting potential sources of encroachment. We tend to think of encroachments as being above ground and visible, but what about roots? What about leaves that fall from trees? What if you show a tree on your map, and state that it does not encroach because no limbs are over the line? And what if the neighbor digs a wall foundation that destroys roots, killing the tree? Could an attorney drag you into any resulting lawsuit because your map noted, ‘no encroachment’? Showing the tree on your map was not the problem, but your assumptions about what the tree was doing underground might be. When drafting a survey, be cautious about what opinions are offered, and how they’re worded.

“Simply reporting your finding without expressing an opinion is the best approach.”
Fences and Walls

Look out your window and you’re likely to see a potential encroachment: your fence. Hopefully it’s on the property line, but if it’s wood, and requires painting or staining most years, how do you treat the neighbor’s side? Will he do the work to be neighborly? Has the topic ever been discussed? What if the neighbor sells, and your new neighbor won’t paint the fence and wants it taken down? Well, these are things to think about when you see a fence on a client’s property, and of course fences aren’t limited to wood; they can be chain link, vinyl, block, etc. Any fence near a property line must be described accurately so that attorneys can make decisions about rights. Accurate reporting and description is essential if we are to serve our clients well.

Drainage and Runoff

Drainage and stormwater runoff can encroach. In Arizona, I only see cases of this after a rain. A dry streak of 143 days ended recently, so I’m eager to see how many calls we get regarding runoff. When wet storm events are as rare as they are around here, people are often surprised by what water does when there’s a lot of it. You’re probably saying to yourself that drainage should be handled by an easement done at the time of platting or construction, but after the hurricane season we had last year, we observed water in many unexpected places. So when you’re performing a boundary survey, why not take a look at how water has influenced the site and locate erosion or other features, to be shown on the map for information only?

Utilities

Utilities are probably the number one item that comes to mind when we think about encroachments. In Arizona, water is the utility that most often requires an easement, and the majority of cases have to do with irrigation ditches and canals that were constructed in the early to mid-20th century for farming and grazing; typically, they had ‘blanket easements’ attached. When these properties are developed 50 to 60 years later, the irrigation provisions are usually no longer required. When you do an ALTA/ACSM survey, and there is a ditch on the property, should you call out the ditch as an encroachment if there is no longer a need for it? Showing the ditch is not going to cause problems for the surveyor, though in some cases it may bother the client. Still, better to annoy a client than to be dealing with, say, a developer who wants to know why a ditch wasn’t shown on a map you stamped.

Underground or utility easements are just as bothersome when it comes to encroachments. Say you draw an easement on your plat, and you fit those easements to the existing monumentation…and the utilities don’t fit the easement; are you surprised? Do you fit the easement to the utility, assuming that was the intent? Do you leave it the way it is, and call it an encroachment? Maybe the monuments you found have changed for some reason from when the easement was written, or maybe the easement description was not based on a survey. The list of reasons for the discrepancy could be endless. Simply reporting your finding without expressing an opinion is the best approach, and would most likely trigger discussions with the client and their attorneys, during which you can offer a verbal opinion, if asked.

Conclusion

The definition of the word ‘encroachment’ can take many forms, with subtle but important differences. Regardless of the definition, you are taking a risk when you describe them. My preference is to describe the property accurately, without necessarily calling out anything as an ‘encroachment’. As Mr. Brown says, just “report the facts to the client, preferably in writing” My Record of Survey drawings detail the deed lines, the lines of possession, and show any objects or improvements near these lines, together with distances to the lines. This has protected me from taking liability unnecessarily, while keeping me in the loop of the legal process when questions arise. As surveyors, we should be the ones called to testify about our drawings, because we are the experts concerning those drawings. And finally, never assume. Think of it this way: to ASSUME makes an ASS out of U and ME.

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