

A Reprint from *Tierra Grande*

WHOSE LINE IS IT ANYWAY?

By Judon FAMBROUGH

Since Biblical days, landowners have had problems with boundary lines. Back then, problems arose primarily from moving the boundary markers; today, the disputes are more complex. Surveys may place boundaries on either side of existing fences. Title companies demand settlement of boundary line discrepancies as a condition for closing. How should the controversies be settled?

Lawyers stand ready to litigate the issue. However, the lost time, fees and ill will created by litigation may outstrip any benefits. Because surveys rarely duplicate each other, resurveying the property may further complicate matters by placing the boundary at yet another location.

Adverse possession can resolve disputes when a fence has served as the boundary for several years. However, fences, especially “fences of convenience,” do not necessarily establish property lines. Litigation may be needed to prove adverse possession (see “Use It or Lose It” *Tierra Grande*, April 2006).

Under the right circumstances, a formal boundary line agreement can be a quick, simple and economical solution. Basically, landowners mutually agree that a certain marker, monument or feature such as a fence serves as the boundary between their properties. Many landowners and real estate professionals are not aware of this resolution alternative.

While formal boundary line agreements are recommended, the agreements may arise by less formal means.

Implied Boundary Line Agreements

Implied boundary line agreements arise in two ways: by acquiescence or by estoppel. Under either, a bona fide dispute must exist as to location of the true boundary. The uncertainty, even if caused by mutual mistake, must be known by the parties at the time of the agreement.

“Uncertainty means that the true boundary line cannot be located applying standard surveying practices and legal rules of boundary reconstruction,” says noted Texas real estate

attorney Jim Johnson. “The rules are objective, not subjective. However, when surveyors disagree after applying the correct practices and principles, an uncertainty exists.”

By Acquiescence

For acquiescence — sometimes referred to as the doctrine of recognition and acquiescence — to apply, the parties must first agree to fix the boundary at a fence or other marker. Acquiescence to a fence or other marker for the boundary without a prior agreement will not mature into a binding implied boundary agreement.

Second, the parties must acquiesce (recognize and submit) to the agreed line or marker for an adequate period. The amount of time required is not precise. However, it must exceed the time required to acquire the property by adverse possession.

Just as adverse possession does not affect state-owned property, acquiescence does not apply to property owned by the state or its subdivisions. Acquiescence occurs only between private landowners.

By Estoppel

The second means of establishing an implied boundary line agreement is by estoppel. Estoppel prevents a landowner from acting inconsistently as to the location of the property line. A landowner cannot recognize and rely on an established boundary line for a period and later dispute the location to the detriment or harm of his or her neighbor (*Kier v. Fahrenthold*, 299 SW 2d 744).

In the *Kier* case, the defendant recognized and acquiesced to a boundary line for 38 years, making permanent and visible improvements to the property based on the agreed and accepted line. Later, the defendant questioned the location.

The court held that estoppel resolved the issue. Actions speak as loudly as words, said the court. The party claiming a boundary by estoppel (the plaintiff in the *Kier* case) was misled by the defendant’s conduct. Estoppel prevents this.

Formal Boundary Line Agreements

Formal boundary line agreements originate two ways: orally and in writing. Oral agreements share many of the attributes of implied agreements. First, the true boundary has to be in doubt or uncertain. Second, a mutual agreement must be made orally, establishing the location of the boundary line. Third, the parties must erect a fence, monument or marker evidencing the agreed location.

Here is where acquiescence and estoppel differ. Under acquiescence, the parties must rely on the marker as the agreed boundary for a period exceeding the length of time required for adverse possession. Under an oral agreement, the agreement establishes the boundary line immediately after erecting the fence, monument or marker at the agreed location.

Gulf Oil Corp. v. Marathon Oil (152 SW 2d 711) elaborates on ways to confirm the agreement. This case states that, generally, an oral (parol) agreement fixing an uncertain, doubtful or disputed division line must be executed by: (1) the erection of physical monuments on the agreed line, (2) the actual possession or use of the land up to the line or marker or (3) improvement or development of the property with reference to the line. The oral boundary agreement need not be supported by acquiescence or acts from which estoppel may spring.

Interestingly, oral boundary line agreements skirt the statute of frauds (Section 5.021, Texas Property Code). The statute requires a conveyance of land to be in writing, signed by the grantor and delivered to the grantee. Otherwise, the conveyance is unenforceable. However, *Houston Title Guaranty Co. v. Fontenet (339 SW 2d 347)* held that an oral boundary agreement has the same effect as a written conveyance and is not subject to the statute of frauds.

Why? Because the prerequisite for an enforceable oral boundary line agreement is for the true boundary to be in dispute, doubt or uncertainty. Therefore, the agreement is not a conveyance of land, only a settlement of a dispute. On the other hand, where the parties know the location of the true division line and orally agree to a different one, the oral boundary line agreement is unenforceable because the statute of frauds then applies.

The problem with oral agreements, as well as with implied boundary line agreements, is their binding effect on subsequent owners. The agreements are binding only upon subsequent purchasers with actual or constructive knowledge of them. Where an agreement is in writing, it may not be contradicted by evidence of a previous oral agreement or varied by an unsigned written agreement.

For this reason, all boundary line agreements should be placed in writing, signed by the landowners before a notary and recorded in the deed records. By doing so, the agreement gives constructive, enduring notice of the boundary location to all subsequent purchasers.

Guidelines for Agreements

The *Texas Real Estate Forms Manual* promulgated by the state bar contains a suggested boundary line agreement form. However, for those who wish to draft their own agreements, and even for those who use the suggested form, here are some guidelines and recommendations to consider.

- Identify the parties by name, and cite where each person acquired title in the deed records.
- Reference existing liens and encumbrances on the properties by citing where the deeds of trust or other encumbrances are recorded.
- Describe the location of the disputed boundary line.
- State that the existing fence, wall, marker or other monument or survey line does not represent the true boundary.
- Depict, by some means, where the agreed boundary line is located (this could be a fence, wall, marker, monument or survey line).
- Require each party to disclaim, renounce and quitclaim any rights to land on the other side of the agreed line.
- Allow either party, at his or her expense, to relocate the existing fence, marker or monument to the agreed boundary without further consent from the other party.
- Require the relocated fence, marker or monument to possess equal or greater structural integrity but replicate the original design.
- If livestock is involved, require the erection of the new fence before the old fence is removed.
- Secure consent from lienholders by having them subordinate their liens or other encumbrances to the agreement.
- Resolve whether the agreement applies to both the surface and minerals, if the parties own both.
- Discuss how existing encroachments will be treated. For example, must an encroaching eave or overhang be removed, or can it be maintained but never replaced? What is the status of existing trees or other property lying entirely within the formerly disputed area? Should or could trees and improvements be removed or may they remain?
- Address the ownership, maintenance and liability of the existing fence or monument before and after relocation.
- Make sure all cotenants with an undivided interest in the properties sign the agreement. Only those who execute the document are bound.

A similar form may be used to address misplaced fences that stay in place. To prevent either party from acquiring an interest in the land between the true boundary line and the fence, have each landowner grant the other the right to use the land up to the fence but specify that such usage will not mature into any easement or title by adverse possession.

For more information, see "Easements in Texas," Center publication No. 422. ♣

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THE TAKEAWAY

The author of Proverbs 22:28 had real estate in mind when writing, "Remove not the ancient landmark, which thy fathers have set." Today's boundary line discrepancies, however, need not be litigated if landowners agree to simple, less formal resolution alternatives.



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