VOLUME 49 ISSUE 2

HOOSIER SURVEYOR

December 2022

BROUGHT TO YOU BY THE INDIANA SOCIETY OF PROFESSIONAL LAND SURVEYORS

IN THIS ISSUE

2022 Officers and Directors

Term Expires Jan. 2023

Past-President
Norman Hiselman
Avon, IN
Phone: 317-846-6611
Email: hiselman@weihe.net

Director
Matt Badger
Washington, IN
Phone: 812-803-2442
Email: matthew.badger@centerpointe.com

Treasurer
Jacob Hoffman
Indianapolis, IN
Phone: 317-721-0036
Email: jhoffman@npesindy.com

Director
Ryan Swingley
Indianapolis, IN
Phone: 317-370-0400
Email: rswingley@espassociates.com

Term Expires Jan. 2024

President
Eric Meeks
Scipio, IN
Phone: 812-592-4145
Email: eric.meeks@meekscompany.com

Secretary
Rich Hudson
Valparaiso, IN
Phone: 219-462-2946
Email: rickandcal@comcast.net

Director
Zach Beasley
Indianapolis, IN
Phone: (765) 418-0687
Email: zbeasley@tippecanoe.in.gov

Director
Jason Copperwaite
Indianapolis, IN
Phone: (812) 738-4124
Email: jcopperwaite@ppa-eng.com

Term Expires Jan. 2025

President-elect
Vincent Barr
Indianapolis, IN
Phone: (317) 293-3542 x 132
Email: vbarr@vsengineering.com

Director
Alex Daugherty
Evansville, IN
Phone: (812) 719-4399
Email: adaugherty@vsengineering.com

Director
Ryan Selby
Indianapolis, IN
Phone: (317) 547-5580
Email: rselby@structurepoint.com

Director
Steve Maxwell
Huntington, IN
Phone: (260) 224-6813
Email: smaxwell@maxsurv.net

2022 - 2023 ISPLS Board Members: Ryan Swingley, Eric Meeks, Alex Daugherty, Matt Badger, Ryan Selby, Norm Hiselman, Zach Beasley, Nolan Mark, Rich Hudson, Jacob Hoffman, Jason Copperwaite, Vincent Barr

2022 Committees & Chairs

COMMITTEE CHAIRS

Education
Carol Morman

Government Affairs
Gary Kent

Past President's Council
Norm Hiselman

Workforce Development
Rodney Kelly

Scholarship
Ryan Selby

Trig Star
Tony Gregory

Young Surveyors Committee
Ethan Hopf
Levi Rednour

ISPLS LIASONS

Board of Registration
Jacob Hoffman
Jason Coyle, alternate

County Surveyors
David Gaston
Zach Beasley

Geodetic Control Workgroup
Eric Banschbach
Matt Healy

IGIC
Bryan Catlin

INDIANA'S NSPS DIRECTOR

Tony Gregory

Ryan Swingley, alternate

Don Williams, alternate

Featured

Contact

3502 Woodview Trace, Suite 300
Indianapolis, IN 46268
Phone: (317) 454-8309
Email: editor@ispls.org

President's Message

Eric Meeks, PS, ISPLS President

With the 71st Annual ISPLS Convention registration now open and fast approaching, Holidays around the corner, and a New Year's Day chasing them here quicker, signals the first days of winter are here. Coming from someone who enjoys getting into the field, the days of the early onset of daylight sure challenges the momentum of some projects. The warm inside after a day in the cold winter air can make you drowsier than anything able to be found on a doctor's prescription pad, all the while the covered table of breakroom goodies pushing the limits of health. We Surveyors do love this Profession.

Seemingly now with some distance between the period of COVID, and all the challenges faced, we continue to gain a resemblance of more parts moving more regular. ISPLS Workforce Development has accomplished more and more as that distance grows. Many large outreach events have been attended and represented well by ISPLS for our profession, as well as local opportunities that are becoming available. A trailer has been purchased and dedicated to carry the virtual sand table and materials to help fulfill an outreach mission, now giving the ability to streamline the coordination to attend events. Momentum lost has been regained and then some, with plans to keep moving in a positive direction. In the coming months the ISPLS Board of Directors along with the Directors of the IPLSF will be launching a "IPLSF Workforce Development Partner" program. Details are in the works to institute a level above the typical Firm Member participation. The goal of the program is to help sustain the workforce development mission through support of Industry Partners who either directly benefit or are parallel with the Society Mission. Keep a look out in the coming months for details.

The ISPLS website will also be seeing a change in the posting of available positions on the Career Center link. ISPLS will be rolling out with a fee based, paid program application for posting available positions. This change works with a platform that is more proactive in seeking candidates to fill those positions as well proactively promoting beyond the regular newsletter emails. The trials coming will test the success and gauge merit. Feedback is welcome from those who participate and please be encouraged to share your experience.

For those planning to Attend the upcoming ISPLS Convention, please consider attending a meeting or event outside of the regular educational sessions. There are plans of Committee meetings, alumni gatherings, and those ISPLS events surrounding the convention days. Check out the e-newsletter for announcements. Safe travels, holidays, and gatherings. See you at the convention.

The ISPLS 71st Annual Convention IS Near

Jan 18-20, Grand Wayne Convention Center, Fort Wayne, IN

Register Today For A Discounted Price!

On behalf of the ISPLS Board of Directors, we would like to extend to you an invitation to attend the 2023 ISPLS Annual Convention! You can register at www.ispls.org or Register Here.

This year's convention, like other years, will host a variety of different sessions about the land surveying profession that will also allow for you to receive CEU credits.

The conference will be held January 18 – 20 at the Grand Wayne Convention Center in Fort Wayne, Indiana. A list of sessions can be found below. If you want more information, you can check out our Registration Brochure.

2023 ISPLS Annual Convention Sessions:

So, is Boundary Evidence Becoming Less Relevant to the Surveyor? - Tony Gregory

The Land Surveyors Professional Obligations – The Future of the Field Surveyor - Michael Pallamary

What is the Future of Professional Surveying? - Tony Gregory

Boundary Line Agreements & Boundary Line Adjustments - Michael Pallamary

A Real World Analysis of Survey Monumentation - Anthony Hendricks

How Far is Far Enough? - Aaron Carl

Liability Associated with Reversionary Lines - Michael Pallamary

Running a Successful Surveying Business – New Challenges and New Markets - Michael Pallamary

Fading Footsteps - Tony Gregory

Now What? - Aaron Carl

Measurement is Dead - Michael Pallamary

Update from NGS - Jacob Heck

Indiana-Michigan State Line Survey - Steve Jones

Professional Conduct for Land Surveyors - Kory Allred

Ethics and the Professional Surveyor: NSPS Creed and Canons - Russell Olsen

Rule 12: Looking in from the Outside - Kory Allred

The Elevation Certificate and Common Pitfalls - Doug Wagner & Rodney Renkenberger

Digitally Capturing Ancent Italy - Civil & Environmental Consultants

Aerial Lidar Data Acquisition and Processing - Logan Campbell, Aerotas

IGIC and Geospatial Resources 2023: GIS, Lidar, 3DHP, IndianaMap - Trohn Enright-Randolph, Philip Worrall, Jinha Jung, & Shaun Scholer

Digitizing the Indiana Historical PLSS Land Records - Lorraine Wright, Clayton Hogston, Rachel Savich Oser

Hotel Accomodations

Courtyard Fort Wayne Downtown - 1150 South Harrison Street, Fort Wayne, IN 46802

Room Rates

Single Occupancy: $139

Daily Parking: $8

Online Reservation Link - Last Day to Book: December 20, 2022

Hilton Fort Wayne - 1020 South Calhoun Street, Fort Wayne, IN 46802

Room Rates

Single Occupancy: $139

Daily Parking: $15

Reservations

Online Reservation Link - Last Day to Book: December 23, 2022

THE UNDERGROUND DETECTIVE®

(888) 747-3799

Providing services in most of the Eastern United States

811 "One Call"...doesn't mark it ALL. Let The UNDERGROUND DETECTIVE locate the rest! We provide a variety of location services for any of your needs utilizing the most advanced technologies in the field.

- PRIVATE UTILITY LOCATING
- GROUND PENETRATING RADAR
- UTILITY MAPPING
- VACUUM EXCAVATION
- PIPE INSPECTIONS
- CONCRETE SCANNING

www.UgDet.com

AIR-LAND SURVEYS

A **ROWE** *Company*

Services

- Aerial Imagery
- Airborne LiDAR
- Mobile LiDAR
- Digital Mapping
- Volume Analysis
- Topographic Mapping
- UAV Services
- Aerial Control

Contact Denny Sauers, Jr., CP, directly at (616) 265-2093 or DSauers@airlandsurveys.com

Baker UTILITY PARTNERS

Insight into what's underground

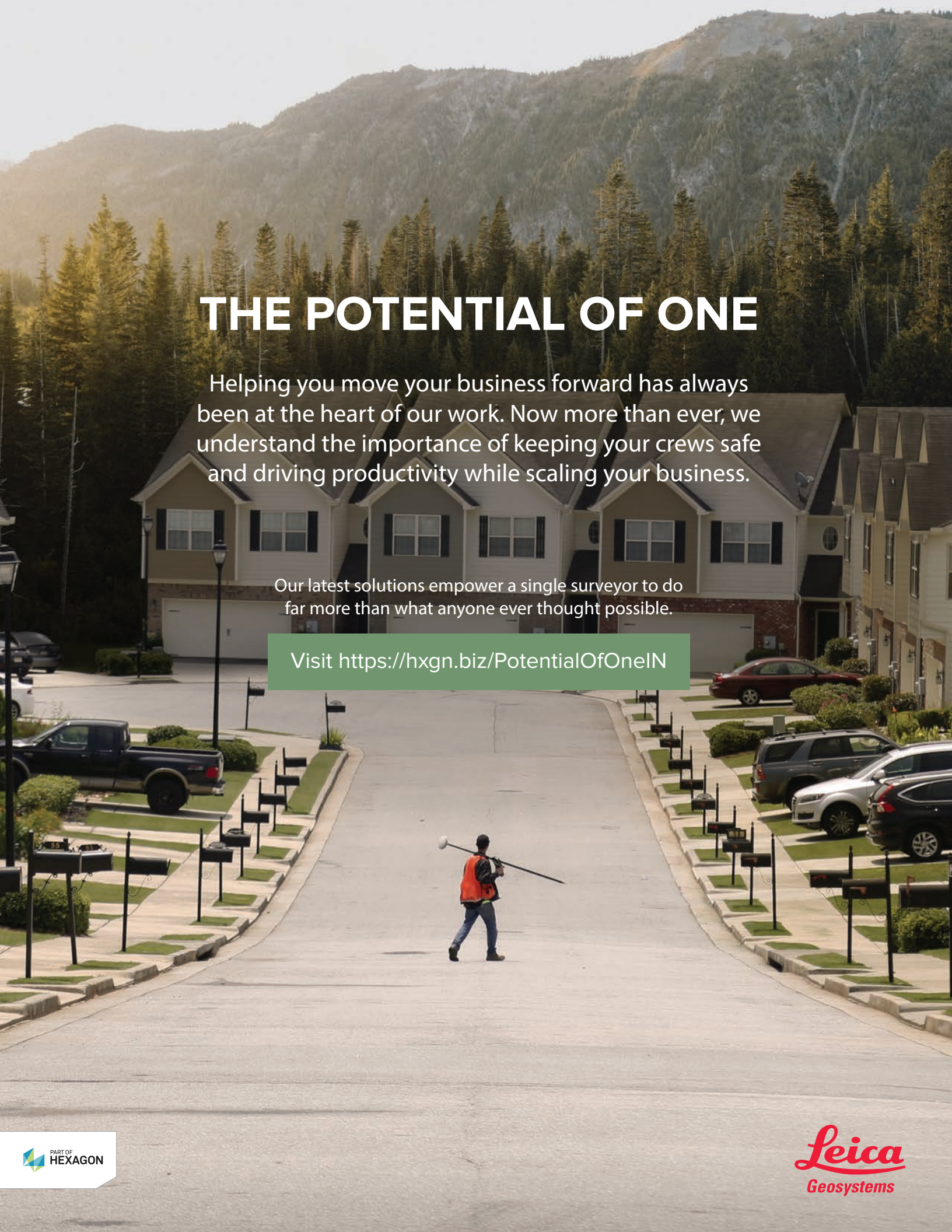
PUTTING THE CLIENT'S NEEDS FIRST

With over 90+ years of field experience, we are proud to offer the highest safety standards along with simple and cost-effective billing.

BAKER UTILITY PARTNERS
855.756.2283 | NATIONWIDE SERVICE
INFO@BAKERUTILITYPARTNERS.COM

Businesses from a variety of industries trust our experience and expertise. We partner with a wide range of clients, including builders, surveyors, architects, engineers, plumbers, electricians, and building consultants.

Committed to safety. Committed to you.


THE POTENTIAL OF ONE
Helping you move your business forward has always been at the heart of our work. Now more than ever, we understand the importance of keeping your crews safe and driving productivity while scaling your business.
Our latest solutions empower a single surveyor to do far more than what anyone ever thought possible.
Visit https://hxgn.biz/PotentialOfOneIN
PART OF HEXAGON
Leica Geosystems

Legal Surveys

Bryan Catlin, PS

The goal of this column is to provide brief summaries of recent Indiana Court of Appeals and Supreme Court cases involving topics related to surveying practice, certainly not to provide legal advice. Because of the recent changes to the court's website, I use Google Scholar to search for Indiana cases. Once cases were found, I search for a case by a party's name or case number on the Indiana site to obtain a more conveniently formatted document at www.in.gov/judiciary. Comments or suggestions for future columns are welcome by email to: Bryan.Catlin@indy.gov.

701 Niles, LLC, v. AEP Indiana Michigan Transmission Company, Inc., et al., Indiana Court of Appeals Case No. 21A-PL-2123, July 7, 2022

Here AEP was seeking an easement for an underground electric power line across properties owned by 701 Niles. The University of Notre Dame had also been in early discussions about obtaining an easement for an electric transmission line across the same properties but had paused negotiations. 701 Niles acknowledged the public nature of AEP's easement, but the parties could not agree to the value of the easement and AEP filed a condemnation action in the St. Joseph Circuit Court. Appraisers were appointed, hearings were held, and motions received by the trial court. During this process, 701 Niles learned that AEP intended to lease the easements to a third party, but AEP refused to provide the documents about this issue. AEP eventually proposed limiting the easement to eliminate the possibility of future above-grade use of the easement for transmission lines but wanted to add language allowing them to permit Notre Dame University to install and maintain electric transmission lines within the easements. 701 Niles objected that this was an unconstitutional use of condemnation to obtain an easement for a private entity for AEP's economic benefit by taking additional property rights without compensation. The trial court eventually found that the use of the easement by Notre Dame would be incidental, secondary, private benefits to AEP's primary public use in the taking and 701 Niles filed this interlocutory appeal.

On appeal, 701 Niles argued that the University's contemplated private use of the land was not incidental to AEP's public use and would be an unconstitutional taking, basically that there are two distinct easements in question here, and only AEP's can be obtained by condemnation. AEP argued that 701 Niles had waived their right to object to the University's use because they did not object to the use of the easement by AEP "and its successors, assigns, lessees and tenants" in the proposed easement language, or use the discovery process to identify any intended lessees or tenants. The court rejected this argument, noting waiver is the intentional relinquishment of a known right, which requires both the knowledge of the right and the intention to relinquish it, and the condemnation complaint did not put 701 Niles on notice of any intended use of the land by a private party. AEP had only asserted a public use, which 701 Niles did not object to, but had kept its memorandum of understanding with Notre Dame a secret. Here the court also noted that

the two uses are separable, and that AEP could have sought to obtain fee simple ownership of the land but had instead only sought an easement, and that the University's use did not further AEP's mission of providing electric services to its customers. The appeals Court agreed with 701 Niles that the University's potential private use was not incidental to AEP's public use, and the University would have to privately negotiate with 701 Niles for needed easements. The argument that 701 Niles had an adequate remedy at law for an unconstitutional taking was rejected as turning eminent domain law on its head. The trial court was ordered to enter an order finding AEP could not install the University's line in the duct bank without 701 Niles's express consent.

Duke Energy Indiana, LLC, v. Bellwether Properties, LLC, individually and on behalf of all others similarly situated, Indiana Court of Appeals Case No. 21A-CT-1848, August 3, 2022

This case has come around again. My original cases summaries follow in italics.

Bellwether Properties, LLC v. Duke Energy Indiana, LLC, Indiana Supreme Court Case No. 53S04-1703-CT-121, December 20, 2017

Again, as a reminder, my original case summary follows in italics.

Bellwether Properties, LLC v. Duke Energy Indiana, LLC, Indiana Court of Appeals Case No. 53A04-1511-CT-1880, September 13, 2016

On July 19, 1957, Duke's predecessor in interest, Public Services Company of Indiana, obtained an easement five feet on either side of the utility lines on property now owned by Bellwether. Over the years since 1957, the Indiana Utility Regulatory Commission has adopted versions of the National Electrical Safety Code (NESC), most recently the 2002 version. Bellwether

wanted to expand a structure on their property and contacted Duke about their plans. Duke responded that Bellwether could not build the planned expansion because the plan did not provide the horizontal strike clearance required by the 2002 NESC (since the type and voltage of the current lines require approximately twenty-three feet of horizontal strike clearance) and that 170 I.A.C. 4-1-26 and the 2002 NESC provided Duke with control over the entire twenty-three-foot strip in and around the easement.

On June 30, 2015 Bellwether filed a Class Action Complaint in the Monroe Circuit Court alleging one count of inverse condemnation. Duke moved to dismiss the claim arguing that it fell outside of the six-year statute of limitations. The trial court agreed with Duke and dismissed the complaint. This appeal followed.

The Court of Appeals weighed whether the incorporation of the NESC by the IURC provided sufficient notice of the regulations Duke cited sufficient to trigger the statute of limitations among several other questions. Two of the appeals panel agreed that it did not, since information about the type of utility lines and voltage were solely in the possession of Duke, so neither 170 I.A.C. 4-1-26 nor the 2002 NESC placed Bellwether on notice that Duke's control over land surrounding the easement had expanded. The trial court's order was reversed and remanded.

A dissenting opinion was filed, noting that in 2015, the Indiana Supreme Court had overturned an appeals court opinion that the statutory definition of synthetic drugs and look-alike substances were void for vagueness. So if an "ordinary Hoosier" can be charged with knowledge and understanding the complex drug statute, Bellwether should be charged with knowledge that there were horizontal strike clearance requirements, what the requirements were, and that they applied to the Bellwether easement.

Duke Energy sought and was granted transfer to the Indiana Supreme Court. The Supreme Court now finds that the evidence presented did not establish when the expanded horizontal strike clearance became effective for the line in question and thus the trial court dismissal was again reversed. Duke had essentially argued that any taking had occurred in 2002 with the adoption of the NESC so the six-year statute of limitations had run. But evidence of the timing of any voltage changes which affect the horizontal strike clearance was not presented.

Since the record did not include the 2002 National Electrical Safety Code which had been incorporated in the Indiana Administrative Code by reference only, the court had a staff member attempt to obtain a copy of the hundreds of pages long NESC from the Indiana Utility Regulatory Commission. Finding that the private, copyrighted 2002 NESC was only available for inspection at the IURC, and that copies were not provided for purchase or allowed to be checked out, the court now raises a new question for the trial court to consider. Namely, that if ignorance of the law is no excuse, that requires meaningful access to the laws. Incorporation of standards by reference is noted as having desirable advantages, but private standards are not always as accessible as federal statutes, regulations, and open-source materials. Courts must also have access to the Safety Code when faced with disputes such as this one. The Court noted that "In light of prevailing technology, incorporating copyright-protected materials by reference seems antiquated and at odds with government's obligation to provide meaningful access to laws." The Court was eventually able to track down a copy on-line, but was unsure if it was the same edition as the NESC referenced by the IURC or when it became available on-line.

The court noted that they were not prejudging whether there was meaningful notice of a taking in 2002. But it seems like they are giving a hint to the trial court. I think there may also be more appeals if the trial court does find that the property rights were taken and that it is now

too late for compensation, as this would seem to be a widespread situation. I doubt the IURC intended this outcome, but time will tell.

Back at the trial court, Duke filed an answer to the complaint, followed by a motion for summary judgment. Bellwether objected, and at a hearing the court denied Duke's motion saying there were disputes of material fact as to whether Duke's conduct amounted to a physical taking of property, and the current interlocutory appeal ensued.

The Appeals Court found that, if valid, the current situation would be a regulatory taking as Duke did not physically invade the property, and the NESC requirement did not deprive Bellwether of all productive use of its land. But the court noted the warehouse as redesigned was only reduced in size by 150 square feet, and the number of storage racks was now twenty-nine instead of thirty. The transmission line had been in place when Bellwether bought the 1.17 acre property in 2004, and Bellwether could have found the horizontal clearance restriction then or when the current project was contemplated. Finding that Duke was entitled to summary judgment as a matter of law, the judgment of the trial court was reversed, and the case sent back with instructions to grant Duke's motion for summary judgment.

Julie Card and Bruce Card, v. Alan Sprinkle and Lynne A. Sprinkle, Indiana Court of Appeals Case No. 21A-PL-2491, August 17, 2022

Thanks to Steve Koehne for bringing this opinion to my attention.

Here the Sprinkles have owned approximately forty acres of undeveloped real estate in Dale, Indiana since 1970. The Cards own Lot 83 in Yellowbanks Recreational development

just to the west, which includes a house built in 1983 and which did have four sheds constructed in 1990. The deeds for these two properties overlap for 184.97 feet, with the triangular overlap being up to 17.12 feet (this opinion includes a very helpful detail map apparently from a survey). The house on Lot 83 encroaches the Sprinkle property by 3.8', while a red shed is entirely on the Sprinkle property and not in Lot 83, and a brown shed is almost entirely on the Sprinkle property, and mostly on Lot 83. A mow line is about 51 feet onto the Sprinkle property. The opinion notes things in the overlap area as being on the Sprinkle property. In 2009, the Sprinkles had their forty-acre parcel classified as Forest and Wildland, which provides property tax incentives. Because a classified forest cannot contain any structures, the house and shed are a possible threat to this classification.

The Cards' predecessor-in-interest, Kevin Kern, purchased Lot 83 in 2003 when there were still four sheds on the property. The seller wanted to take one with him and Kern agreed. Shortly after the purchase, Kern tore down one shed. In 2004, Kern discovered that the brown shed was not entirely on his property, his property did not include the area where the red shed was, and he stopped using the red shed for storage. Kern believed the area to the east was owned by the owner of the Yellowbanks Recreational development and approached her about purchasing land east of Lot 83. She indicated she did not own that property, and Kern made no further efforts to discover who did. Kern continued to maintain the property, use the brown shed for storage, and continually mow the area.

The Cards purchased Lot 83 from Kern in 2014. Kern had given them a 1999 Surveyor's Report before the purchase which showed the house as entirely within Lot 83 but did not depict the sheds. Based on Kern's representations, the Cards believed the residence and brown shed were on Lot 83 but knew they were not purchasing the land around the red shed.

The valuation of Lot 83 for property tax purposes included the residence and four sheds until 2011, when two sheds were removed from the valuation. All taxes were paid by Kern and the Cards from 2003 through 2019.

In 2018, the DNR reinspected the Sprinkle property to maintain the Forest and Wildland classification. The inspector and Sprinkle walked the western line with a GIS-enabled tablet and discovered the Cards' house and shed were encroaching on the Sprinkles' property. [I believe they probably meant the inspector used a GPS-enabled tablet running GIS software and that they suspected there were encroachments, but that isn't what the opinion says]. The initial DNR inspection in 2009 noted the house and sheds, but the inspector did not indicate he believed they were encroaching on the Sprinkles. Sprinkle ordered a survey of his property which confirmed a corner of the house and the two sheds were located on his property. Sprinkle demanded the Cards remove the sheds and their house from his property.

The Cards declined and maintained Kern had satisfied the elements of adverse possession, and therefore had obtained title to the disputed property, which transferred to the Cards when they purchased Lot 83.

On April 10, 2019, the Sprinkle filed a complaint for civil and criminal trespass. The Cards filed counterclaims claiming ownership by adverse possession and seeking to quiet title. A bench trial was held in the Warrick Circuit Court on April 20 and 21, 2021.

On July 19, 2021, the trial court found that all elements of adverse possession had been met, except notice, and that Kern had only intended to claim the land upon which the brown shed, and residence were located.

The court went to lengths to note that the structures were not there when the Sprinkles purchased their property (in 1970), and they were not told they were encroachments during the DNR inspection (in 2009), among many other findings. The trial court concluded the Sprinkles did not have actual notice of encroachments until the 2018 survey, denied the Cards' counterclaims, entered judgment in favor of the Sprinkles on the trespass claim and ordered the Cards to remove the portion of their house situated on the Sprinkle property and all personal property and sheds on the Sprinkles' property. The Cards were also ordered to pay the Sprinkles' attorney fee of $16,680. The Cards appealed.

Relying again on Fraley v. Minger, the Appeals Court noted that Kern controlled the residence, brown and red sheds, and the land they were situated upon. But the trial court concluded Kern only intended to claim ownership to the house and brown shed and the land they sit on. The Cards did not challenge this conclusion of law on appeal. The appeals court noted that it is hard to imagine a more open and notorious use of property than using and maintain a house and storage building on that property. At any time Kern owned the property, the Sprinkles could have observed the house and brown shed on their deeded property and did in 2009. The Sprinkles not realizing it was on their property does not negate adverse possession.

The decision of the trial court was reversed and remanded with directions to vacate the awarding of attorney fees and for proceedings consistent with this opinion.

Mammoth Solar, a/k/a Starke Solar LLC, v. Connie Ehrlich, Daniel Knebel, Jennifer Knebel, John Masterson, Larry Lambert, Gail Lambert, Keith Davis, Gale Davis, and Dean Cervenka, Indiana Court of Appeals Case No. 21A-PL-2060, September 21, 2022

Here, the judgment by the Pulaski Superior Court, which held that the Board of Zoning Appeals (BZA) did not follow the requirements of the County Unified Development Ordinance when it approved, without required information, an application for a special exception to build a 4,511 acre solar farm, and therefore reversed the BZA approval and remanded the case back to the BZA was affirmed on appeal.

This opinion has 44 pages of information and analysis of mostly limited interest to surveyors except that the correct procedures need to be followed, or you risk legal setbacks. But for me the takeaway is you can't have a clear law and expect a judge to ignore it during judicial review.

Jason Morehouse and Sarah Morehouse, v. Dux North LLC, Indiana Court of Appeals Case No. 22A-PL-664, September 27, 2022

The Marshalls had owned three contiguous parcels in Hamilton County. They sold one in April of 1991, which had previously had road access by crossing the other two parcels via a gravel lane that had been in existence since at least 1985 to the Shorewood Corporation. In December of 2018, the Marshalls sold the other two parcels to the Morehouses. Shorewood had road access over other parcels they owned from the parcel they acquired from the Marshalls. Shorewood sold three parcels, including the one they had acquired from the Marshalls to Dux North, Inc. in 1995, who in turn sold to Dux North LLC in 2020 (an exhibit in the opinion shows the parcel layout). From 1991 until 2018, the owners of the parcel which Shorewood obtained from the Marshalls had used the gravel access across the other Marshall parcels to get to a public road with the Marshalls' permission. In June 2020, a Dux North member found the lock on a gate across the lane had been changed and asked about the new lock. Eventually, it was found that the Morehouses were concerned by an apparent misunderstanding of the Dux North

member about his lack of legal rights to cross the property, increased usage of the lane, use by strangers/trespassers, calls from the DNR, etc. The Morehouses offered a license agreement which acknowledged the Marshalls had permitted Dux North prior use, but that going forward, only Dux North members and a limited number of guests could use the lane, and only during duck season.

Dux North filed a complaint in the Hamilton Superior Court on October 5, 2020, for declaratory judgment against the Morehouses. Dux North alleged they had an easement of necessity over the Morehouse property. After a response, Dux North argued at a hearing that they either had an easement of necessity or an easement by prior use. The Morehouses did not object to this argument. The trial court found that Dux North had an easement by prior use over the Morehouse property and entered summary judgment for Dux North. The court also denied the Morehouses' motion for partial summary judgment on the issue of whether Dux North had an easement of necessity. This appeal followed.

The appeals court noted that Indiana case law sometimes conflated the elements required to prove these two distinct types of implied easements before the last two decades. An easement of necessity is implied when there has been a severance of unity of ownership of a tract in such a way as to leave one part without any access to a public road. An easement of prior use is implied when, during a period of unity of title, an owner imposes an apparent permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed, if the servitude is reasonably necessary for the fair enjoyment of the part benefitted. A request for an easement by necessity must show an absolute necessity, while a request for an easement by prior use must show the intention for continuous use.

Here, because the parcel in question had been part of Shorewood's large, unified tract with access to a public road, when it was severed from Shorewood there was no absolute need for an easement of necessity across the Morehouse property. Dux North argued that due to difficult terrain across other Shorewood tracts it was not a reasonable or practicable means for access, but the court noted the trial court erred when it denied the Morehouses' motion for partial summary judgement on the alleged easement of necessity over the Morehouse property.

Now the appeals court turned to the easement by prior use question. Dux North had shown that the road, an obvious servitude, existed when unity of title with the current Morehouse property was severed in April of 1991, but the court noted the evidence does not show it was in use at that time. The record showed the Marshalls had allowed use from 1991 until 2018, but did not specify when in 1991 that happened or if the road was even passable in April of 1991.

The decision of the trial court was reversed and remanded for further proceedings.

Nichole S. Hunter, v. Grandview Community Association, Inc., Indiana Court of Appeals Case No. 22A-PL-595, July 15, 2022 - MEMORANDUM DECISION - not regarded as precedent

Here the Morgan Superior Court ruled against Hunter, who had not responded to sixteen letters from the Grandview Community Association about violations of covenants and did not appear in court. The court then granted the association a summary judgment and a permanent injunction against Hunter. During later proceedings Hunter did not offer a meritorious defense and eventually appealed.

The appeals court concluded Hunter had waived all her appellate arguments and affirmed the judgment of the trial court.

Jo Ann Lance, v. Mark A. Lance, Indiana Court of Appeals Case No. 21A-PL-2872, July 26, 2022 - MEMORANDUM DECISION - not regarded as precedent

Here Mark Lance had talked several times with his aunt about buying part of her 13.4 acres to be near her and his aging father who lived nearby. In 2019 the aunt asked if he would be interested in buying all 13.4 acres. They entered into an oral agreement that she would sell him 2.5 acres for $18,000 in the northwest corner of her property which the nephew had approximately staked, the nephew would pay for a survey, deed and document preparation, the nephew would notify the tenant farmer about the agreement, and that $1,000 would be paid as partial payment. The aunt gave the nephew a written receipt signed and dated April 19, 2019, indicating the nephew had paid $1,000 for the sale of 2 ½ acres. There was no description of the property, no reference to a total purchase price, and no reference to a closing date on the receipt. With his aunt's permission, Mark informed his aunt's tenant farmer that 2.5 of the 13.4 acres could not be farmed starting with the 2019 crop year. Again, with his aunt's permission, he had a survey company survey the property and prepare documentation for parcelization to meet Warrick County ordinances. The parcelization application was filed, approved, and recorded in the Recorder's office in early August 2019. The nephew had also had a soil survey to determine suitability for a septic tank permit. At some point the nephew called his aunt to tell her he was ready to get financing and pay her the remaining $17,000, but she indicated she no longer wanted to sell him 2.5 acres. In late August, she sent a letter terminating any oral agreement and indicating she would be willing to discuss selling the entire parcel. She included a check for $2,000 to reimburse his $1,000 hold payment and $1,000 as a good faith payment for costs.

On January 27, 2020, the nephew filed a complaint in the Warrick Superior Court seeking specific performance, or, alternatively, damages for the alleged breach of the agreement as well as attorney's fees. The aunt filed a motion to dismiss asserting her nephew's claim was barred by the Statute of Frauds, IC 32-21-1-1(b)(4). The trial court denied the aunt's motion and eventually, after a bench trial found in favor of the nephew. The aunt was ordered to execute and deliver a general warranty deed to 2.5 acres per the survey while the nephew would pay the remaining $17,000. The court also entered judgment against the aunt for $13,952.11 for her nephew's attorney's fees and expenses, and this appeal followed.

On appeal the issue boiled down to whether the Statute of Frauds rendered the agreement unenforceable. The Statute of Frauds requires contracts for sale of real estate to be in writing, but the appeals court found the nephew had not taken possession of the property or made valuable improvements to it so there are other remedies that can be pursued. So, the specific performance order by the trial court was clearly erroneous. The judgment of the trial court was reversed and remanded for further proceedings to determine if the nephew was due any minimal restitution as a result of an unenforceable oral agreement.

Murphy Enterprises, Inc., v. The Board of Zoning Appeals for Floyd County, Indiana, Indiana Court of Appeals Case No. 22A-PL-584, July 27, 2022 - MEMORANDUM DECISION - not regarded as precedent

Here Murphy built a house based on a January 2019 permit. In October the Floyd County Building and Development Services (BDS) conducted a final inspection of the property, which it did not pass, and no Certificate of Occupancy was issued. On May

23, Murphy conveyed the property to Paul F. Davenport. On October 24, Kelley Lang, the BDS Building Commissioner, sent a letter to Murphy indicating site drainage was impacting a neighboring property. The letter requested Murphy provide a plan for mitigation of the drainage by a professional engineer or land surveyor no later than 11/1/19 and if a plan was not submitted, the situation would be presented to the Board of Zoning Appeals (BZA) and fines might follow. On November 15, Lang sent Murphy another letter stating the matter had been presented to the BZA which had passed a motion requiring correction of all building code violations within one week and correction of drainage issues within two weeks. Lang sent a third letter on December 16 that stated no visible work had been performed, so the issue was again presented to the BZA, which passed a motion to fine Murphy $100 per day.

On January 9, 2020, Murphy filed a petition for judicial review of the BZA's decision. He alleged the building code violations were corrected in a timely manner, and additionally, he was never given notice of an opportunity to appear at any of the BZA meeting to present evidence, denying due process. After several other motions, filings, change of Venue from Judge, etc., on September 27, 2021, the BZA filed a motion to dismiss Murphy's petition as Murphy hadn't filed, communicated, or prosecuted any matters herein since March 27, 2020. After a hearing on January 24, 2022 in the Floyd Circuit Court, the court granted the BZA motion to dismiss, over Murphy's arguments, which led to this appeal.

On appeal Murphy tried to raise new arguments which the court did not allow. Finding that there was no good reason Murphy had greatly exceeded the sixty-day period of inaction before a trial court can dismiss a complaint, the decision of the trial court was affirmed.

Cherie M. Drew, v. Southgate Development LLC and Charlestown Enterprises, Inc., Indiana Court of Appeals Case No. 21A-PL-2642, August 8, 2022 - MEMORANDUM DECISION - not regarded as precedent

From the Clark Circuit Court comes this case where in 2016, Drew and her now-deceased husband purchased property from Charlestown. At the time, Drew believed there was legal access to a publicly-dedicated road across other property owned by the Charlestown Christian Church based on warranties of title in the deed and oral statements allegedly made by John Wood of Charlestown that Ray Lee Drive alongside the church was the legal access point for the Drew property, Charlestown also owned a second tract adjacent to Drew on the other side of the church which was sold to Charlestown Venture in April 2017, which subsequently sold that tract to Southgate Development in June 2017. In 2019, when she listed the Drew property for sale, Drew learned the property was landlocked and that Ray Lee Drive was a private easement for ingress and egress benefitting the church which did not extend to the boundary of the Drew property. The parties to the easement refused to extend the use of the easement to benefit the Drew property.

Drew filed a complaint seeking a declaratory judgment against Southgate for an easement of necessity as the last parcel in unity of title with the Drew parcel and alleging breach of warranty and breach of implied covenant of good faith and fair dealing against Charlestown. Southgate admitted that its property shared unity of title with Drew, that Drew is landlocked, and that the severance of unity of title is what resulted in the Drew property becoming landlocked. But Southgate denied an easement of necessity arose by operation of law at the time of the Southgate conveyance and that Drew's claims were barred by the doctrine of laches, unclean hands, and waiver. Drew filed a motion for declaratory judgment, noting Southgate had admitted to facts giving

rise to an easement implied by necessity which is absolutely necessary for the enjoyment of the Drew property and that there were no material facts in dispute. Southgate alleged there were material facts remaining to preclude a declaratory judgment, including whether Southgate is a bona fide purchaser. After a hearing where none of the parties presented evidence, the trial court denied Drew's motion for declaratory judgment, and this appeal followed.

The appeals court noted Drew must show that the Drew property became landlocked at the time of severance, which she has not done, so the facts related to the alleged easement are disputed. But the trial court relied on case law that mischaracterizes what Drew must prove to establish an easement of necessity, so Drew is entitled to present evidence on the two required elements. Drew had also asserted Southgate does not have a bona fide purchaser defense against an easement of necessity, and the appeals court noted evidence needs to be presented before determining if that might be true. So, Drew has not yet shown she is entitled to an easement of necessity over Southgate, and the trial court must determine if Southgate is a bona fide purchaser, and if so, if that defeats an easement of necessity in this case.

The judgment was affirmed in part, reversed in part, and remanded for further proceedings.

Bryan F. Catlin, PS has been registered as a Land Surveyor in Indiana since 1991. He holds B.S. Land Surveying Engineering and M.S. Engineering (Geodesy) degrees from Purdue University.

AUTODESK
Platinum Partner

SURVEY SMARTER, FROM START TO FINISH.

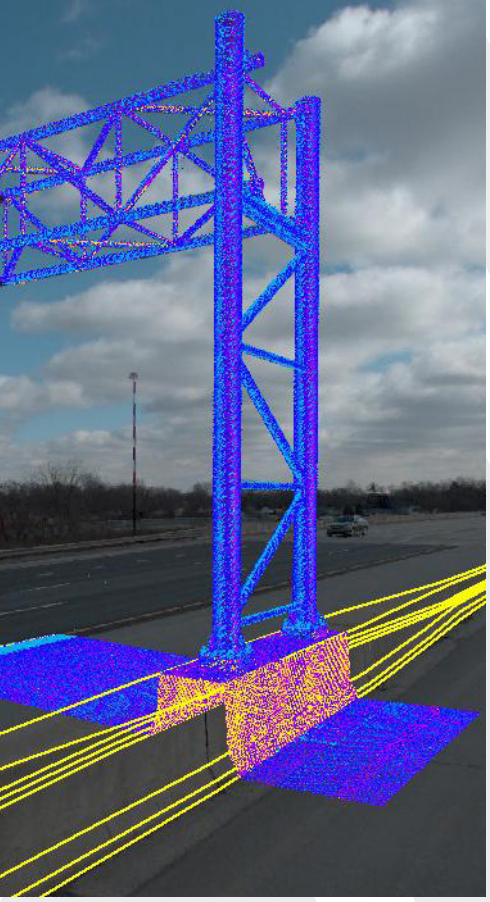
SCAN HERE

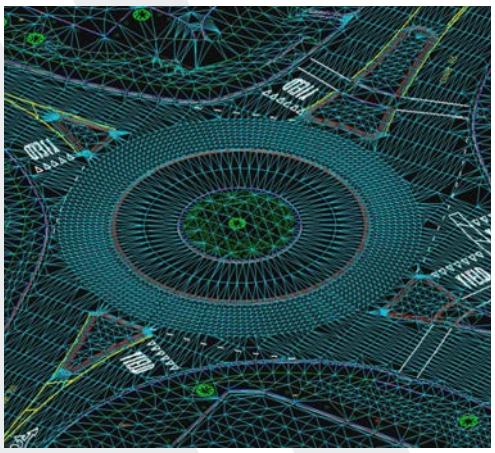
Topcon's digital tools improve your productivity, period. You'll see simplified workflows, seamless integration, and dramatically increased accuracy. You'll also speed your billing collections with digital confirmation of as-builts. So, what are you waiting for? Discover these solutions today. And do it with the help of your local Topcon Solution Store.

Accelerate Productivity.

TOPCON SOLUTIONS Store

Learn more at topconsolutions.com/productivity-bundle





SURVEY SPECIALTIES

MOBILE LIDAR SCANNING

3D LASER SCANNING

PAVEMENT & ASSET INVENTORY

SUBSURFACE UTILITY ENGINEERING

3D GROUND PENETRATING RADAR

MOBILE & AERIAL MAPPING

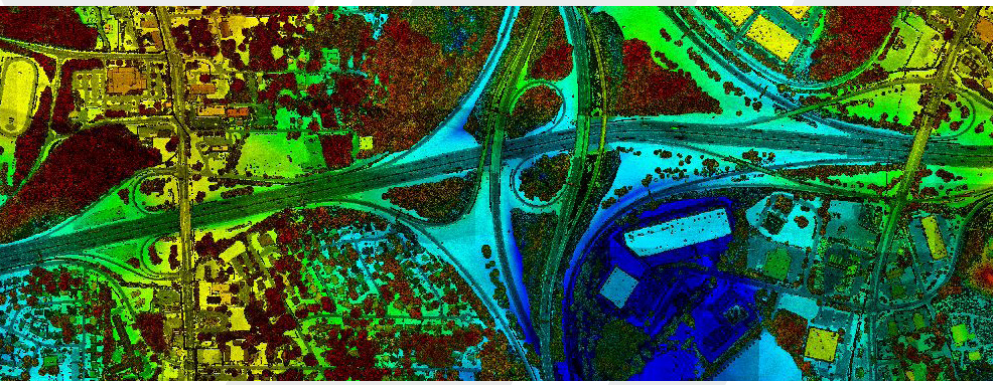
UAS SERVICES

HYDROGRAPHIC SURVEYING

LiDAR is an Art.
ESP is your Picasso.

Commission your masterpiece today!

ESP



ESP ASSOCIATES, INC.

Ryan C. Swingley, P.S.
8673 Bash Street
Indianapolis, IN 46256
rswingley@espassociates.com
317.537.6979

ESTABLISHED IN 1986 - PIONEERING
MOBILE LIDAR TECHNOLOGY SINCE 2010

www.espassociates.com

Hoosier Surveyor Podcast

Listen To ISPLS's New Podcast

The time has come to welcome a new project, and that is the "Hoosier Surveyor Podcast." This podcast is an ISPLS run podcast with the help of Ryan Selby, and other board memebers.

You can expext a monthly podcast recording of ISPLS updates, conference news, surveyor news, and so much more! You can now listen on Buzzsprout! More streaming services such as: Apple Podcasts, and Spotify, will be available later these coming weeks. Take a listen here: https://www.buzzsprout.com/2093309

If you have any topics that you would like to discuss or potentially be a guest on the Hoosier Surveyor Podcast, please email info@ispls.org. We look forward to hearing from you!

INTRODUCING THE BRx7 GNSS RECEIVER

LTE Bluetooth Wi-Fi

800+ channels
BEST-IN-CLASS

Magnetic interference-free tilt

11+ hours of life with dual, hot-swappable batteries
BEST-IN-CLASS

Rugged, compact IP67-rated housing

Fixed+

SureFix® for extreme confidence in your RTK solution
BEST-IN-CLASS

Optimized for SurvCE|PC

SurvCE|PC

Exceptional performance under canopy
BEST-IN-CLASS

Carlson Listen-Listen ready

Long-range, spread spectrum dual-band UHF radio
BEST-IN-CLASS

THE HIGHEST PERFORMING, MOST REASONABLY PRICED, BEST-SUPPORTED GNSS SOLUTION AVAILABLE TODAY

GET A DEMO AND SEE FOR YOURSELF!

Ask us about package deals on the BRx7 with the RT4 Tablet or Surveyor 2 Data Collectors and Software.

Savings of $2000 or more!!

Carlson Midwest, LLC
4142 E US HWY 136 Pittsboro, IN 46167
317-223-7653 mjsparks@carlsonmidwest.com

Carlson MIDWEST LLC

Carlson Authorized Reseller

Future Indiana Surveyor



SEILER GEOSPATIAL

Providing high accuracy products, superior training, and support since 1945

- GNSS and total station solutions designed with the surveyor in mind.
- Field and office software that supports your workflows.
- Scanning and leading aerial mapping solutions that capture and deliver precise data faster.
- Training solutions that show you what to do with all your data.
- Experienced and knowledgeable staff to support your needs.
- Service and repair solutions to keep equipment in peak service.

Authorized Distributor for Trimble, Spectra Precision, GeoSLAM, DJI, Esri, Bluebeam, Autodesk and more!

Now Serving northwest counties of Lake and Porter, Indiana!

Read more PMW Acquisition www.seilergeo.com/precisionmidwest/

SCAN ME

Seiler Indianapolis

Todd Jamieson - (317) 503-5925
BJ Rhea - (317) 260-3645

Email: surveyindiana@seilerinst.com

Survey Techinical Support: (844) 266-7266
www.seilergeo.com

Trimble Authorized Distribution Partner

SPECTRA GEOSPATIAL AUTHORIZED DISTRIBUTION PARTNER


SALES • SERVICE • RENTALS • TRAINING • FINANCING • REPAIRS

ISPLS Firm Members

Cripe

Eric C. White, PS
Survey Project Manager
ewhite@cripe.biz

3939 Priority Way South Drive, Suite 200 Indianapolis, Indiana 46240
Telephone 317 706 6333
www.cripe.biz

AMERICAN STRUCTUREPOINT INC.

Jeff Douglass, PS
Survey Group Leader
jdouglass@structurepoint.com

8025 River Road, Suite 200
Indianapolis, IN 46240
317.547.5580

www.structurepoint.com

Etica GROUP

Surveying
Engineering
Construction Inspection
Building Envelope
Architecture

Director of Survey Services
Rodney Kelly, PS
rkelly@eticagroup.com

317.466.9520
www.eticagroup.com
Certified WBE | DBE | WBENC

Indianapolis • Fishers • Avon • New Haven

LOCHMUELLER GROUP

Sean Suttles, PS, CFedS
Chief of Surveying - Associate

SSuttles@lochgroup.com
T 812.759.4164
C 812.459.6211

www.lochgroup.com

6200 Vogel Road
Evansville, Indiana 47715

Marbach
Engineering & Surveying

Chris F. Marbach
Professional Surveyor
President
chris@marbach.us

Marbach, Brady & Weaver, Inc.
3220 Southview Drive
Elkhart, IN 46514
Phone: (574) 266-1010
Fax: (574) 262-3040

Marbach-Palm, Inc.
8888 East U.S. Hwy 20
P.O. Box 960
New Carlisle, IN 46552
Phone: (574) 654-3450
Fax: (574) 262-3040

www.marbach.us

JSE
JANSSEN & SPAANS ENGINEERING
jsengr.com

Janssen & Spaans Engineering, Inc.

9120 Harrison Park Ct.
Indianapolis, IN 46216

O: 317.254.9686
F: 317.259.8262

info@jsengr.com

UNITED Consulting

1625 N. Post Road
Indianapolis, IN
46219-1995

Tim Coomes, P.L.S.
Manager
Survey Department

Bus. (317) 895-2585
Fax (317) 895-2596
Cell (317) 443-1244
E-mail: timc@ucindy.com
www.ucindy.com

TBIRD
Design Services Corporation
Engineering and Surveying

John C. Nagy, P.L.S.

105 N. 10th Street
Lafayette, IN 47901
www.tbirddesign.com

Phone: 765-742-1900
Fax: 765-742-1905
Mobile: 765-479-8320
nagy@tbirddesign.com