

# **PDH Academy**

## **EASEMENTS AND RIGHTS-OF-WAY FOR THE LAND SURVEYOR**

**PDH333**

**4 HRs**

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## EASEMENTS AND RIGHTS-OF-WAY FOR THE LAND SURVEYOR

### 15 QUESTION FINAL EXAM

1. The term that refers to property in the form of land itself or to objects affixed to the land such as buildings:
  - a. Personal property
  - b. Real property
  - c. Chattel
  - d. Dominant estate
  
2. With this type of deed, the grantor makes no certain claims regarding his or her ownership of the real estate or the right to sell it:
  - a. Corporate warranty deed
  - b. Trust deed
  - c. Quitclaim deed
  - d. Executor's deed
  
3. This type of deed is executed between a borrower and a lender:
  - a. Warranty deed
  - b. Quitclaim deed
  - c. Bargain and sale deed
  - d. Mortgage deed
  
4. An easement that authorizes the holder to prevent the owner of the servient estate from engaging in certain activities is known as a:
  - a. Positive easement
  - b. Appurtenant easement
  - c. Affirmative easement
  - d. Negative easement
  
5. When the location of an easement is considered reasonably obvious and visible upon an ordinary inspection of a property, the easement is said to be:
  - a. Express
  - b. Apparent
  - c. Implied
  - d. Explicit

6. An easement that grants the right of passage over the land of another along a particular alignment is known as a:
- Right-of-entry
  - Right-of-passage
  - Right-of-way
  - Right-of-ingress
7. Which of the following items is not likely to be the subject of a utility easement:
- A public highway
  - A water pipeline
  - A fiberoptic cable
  - An overhead power line
8. An easement prohibiting the obstruction of a desired view is known as a:
- Beautification easement
  - Overlook easement
  - Natural easement
  - Scenic easement
9. An easement in which the intentions of the parties are clearly declared in writing is a:
- Implied grant
  - Reservation
  - Express grant
  - Prescriptive right
10. When a grantor in a land conveyance retains an easement right unto himself or herself, this is referred to as a:
- Easement by reservation
  - Easement by prescription
  - Easement by estoppel
  - Easement by necessity
11. When an easement is extinguished because the period of time for which it was granted has passed, the easement has been terminated by:
- Release
  - Abandonment
  - Cessation
  - Expiration

12. When a servient tenant acquires fee-simple title to land upon which he or she holds an easement, that easement is automatically extinguished by the principle of:

- a. Merger of title
- b. Vacation
- c. Release
- d. Reversion

13. Statements relating to the matters affecting an easement are known as:

- a. Warrants
- b. Recitals
- c. Assertions
- d. Affidavits

14. Which of the following types of easements is extinguished automatically upon the death of its holder?

- a. An easement in gross
- b. An appurtenant easement
- c. A right-of-way
- d. An easement by custom

15. When a servient estate to an easement is destroyed, the easement is automatically:

- a. Assigned
- b. Renewed
- c. Terminated
- d. Reverted

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## Introduction

This course represents an overview of easements and rights-of-way as they relate to the practice of professional land surveying. It seeks to address the diverse types of easements likely to be encountered by the surveyor, the methods by which these easements are created, and the processes by which they are terminated. Definitions will be included throughout the course for the sake of clarity.

It will first be beneficial to define what an easement is and what it represents. In simplest terms, an easement is a non-possessory interest in the real property of another party.

An easement, therefore, is not real property, but instead represents only an interest in real property by another party. This distinction is of foremost importance not only to the surveyor, but also to the attorney, title searcher, contractor, utility company, and landowner to name but a few.

It will be useful to define the various rights and interests in real property that will be mentioned throughout this course.

**Real property** is a term that is applied to land and immovable property on land such as buildings. This is to be differentiated from personal property, which is all property that is neither land itself nor immovable property on the land.

An **estate** refers to the interest that a person holds in real property or personal property. Estates may be classified by the term of enjoyment by the holder as an estate in fee, and estate for life, and estate for a number of years, or an estate at will.

**Fee-simple** is total ownership in real property. It is the highest level of ownership that can be held. This state of ownership may also be referred to as fee simple absolute. The word *fee* means that the estate is inheritable by the owner's heirs. *Simple* means that the estate is not a *fee tail* estate (defined below). And *absolute* means that no conditions or limitations exist in regard to time and that the estate may continue indefinitely.

A **defeasible fee-simple estate** is an estate in which either a future condition must be satisfied, or a prohibition must be observed. Otherwise, the estate may be considered defeated and revert to the grantor.

Conversely, an **indefeasible estate** can never be defeated, revoked, or voided.

**Fee tail** estate is an estate in which conditions exist regarding the inheritance of the estate. If the stated conditions are breached, the estate reverts back to the grantor, if living, or the grantor's heirs if not.

A **life estate** is an estate in which the duration is limited by the life of the holder. Upon the death of the holder, the estate reverts to the grantee.

An **estate for years** is most often created by a lease agreement and is limited by a stated period of time.

An **estate at will** is an estate that can be terminated at any time.

It will also be useful to understand the terminology relating to the transfer of rights and interests in land that will be mentioned in this course.

A **grant** refers to any transfer of real estate and may take many forms.

A **deed** is the most common and familiar means by which real property is transferred between individuals. Deeds may take various forms.

A **general warranty deed** is the most common type of deed used to convey fee simple ownership. A general warranty deed affirms that the grantor is the owner of the land and possesses a legal right to sell it. It also offers assurance against encumbrances, it covenants good title that is superior to competing title claims, it warrants that the grantor will do whatever is necessary to clear the title if issues arise. Most importantly, a general warranty deed offers a covenant of seisin, guaranteeing that the title is being transferred fully from the grantor to the grantee.

A **quitclaim deed** is useful in transferring property among family members and for remedying errors in title. In a quitclaim deed, the grantor makes no certain claim of ownership of the real estate, or his or her right to sell it. In many cases, for the sake of clearing up title issues, a grantor may provide a quitclaim deed in full knowledge that he or she does not own the property. A quitclaim deed makes no warranties against defects in title or encumbrances.

A **grant deed, special warranty deed, or limited warranty deed** provides the same legal protections as a general warranty deed, with the condition that the grantor only warrants the period for which he or she owned the property. Any title issues originating from the time prior to the **grantor's** ownership of the property become the responsibility of the grantee.

A **deed of trust** is used in mortgage lending and is executed by a lender, a borrower, and a trustee. During the term of the mortgage, the borrower transfers the title of the property to the trustee who holds the title until the borrower has paid the mortgage in full. In the event that the borrower defaults on the mortgage, the trustee is required to sell the property and use the proceeds to pay off the lender.

A **bargain and sale deed** is used to convey real estate in foreclosure proceedings. A bargain and sale deed transfers title to the grantee but it does not warrant against encumbrances.

A **mortgage deed** is similar to a deed of trust except that it is only executed by the borrower and the lender. No trustee is required. Under a mortgage deed, the title is held by both the lender and the borrower until the mortgage is satisfied in full, at which time the title goes entirely to the borrower.

A **will** is the means by which a person may specifically arrange for the disposition of their real and personal property upon their death.



**Involuntary alienation** refers to the transfer of property due to foreclosure, bankruptcy, or the nonpayment of property taxes.

**Adverse possession** is the process by which lengthy occupation may ripen into title to real property. Adverse possession is an unwritten right and is governed by statutory law on a state-by-state basis. Adverse possession always has a time requirement, and furthermore the real estate in question must be held in a manner defined as actual, open, notorious, and adverse.

**Eminent domain** refers to the authority of a public or quasi-public entity to claim private property for public use by means of condemnation. An entire section will be devoted to this subject later in the course.

**Escheat** is the reversion of real property to a government entity due to the lack of a provision in a will or any legal heir to the property existing at the time of the owner's death.

## **Section 1 – Easement Basics**

Because an easement does not represent ownership of the real property itself, it is known as a non-possessory interest. However, since it does represent an interest in real property, it is regarded as realty in a legal sense.

It is particularly important to know that a person cannot hold an easement in their own land. Being the landowner, they already possess any rights that may be granted by an easement. If a person acquires real estate upon which they already hold an easement, the easement is immediately and automatically terminated upon the transfer.

Easements are granted for one or more specific purposes and as such, the easement holder is restricted in terms of how he or she may use the land.

An easement is not the same thing as a license. Rather than a non-possessory interest in real property, a license grants permission to a party to commit an act or acts upon the real property of the owner. Licenses are generally temporary in nature and may not be bought or sold. Licenses are also revocable and do not transfer with the land upon conveyance. A license may be written or verbal and may be as simple as granting permission to someone to enter your land for a particular reason. Permission given to an individual to perform work on one's property is a common example of verbal license.

An easement differs from a *profit a prendre*, which is the right of one person to use the land of another, along with the right to enjoy the profits generated from the use of the land. Timber rights, mineral rights, and grazing rights are common examples.

### **Categories of Easements**

Generally speaking, easements fall into two broad categories, easements in gross and easements appurtenant.

#### **Easements in Gross**

An easement in gross refers to a personal right that once granted to one party may not be assigned to another party unless explicitly stated otherwise. An easement in gross may be thought of as a personal right, terminating upon the death of its owner. With an easement in gross, there is a servient estate but not a dominant estate.

*Definition – Servient Estate: The estate upon which the easement is imposed or against which it is enjoyed; an estate subjected to a burden or servitude for the benefit of another estate.*

*Definition – Dominant Estate: That estate to which a servitude or easement is due, or for the benefit of which it exists.*

### **Easements Appurtenant**

An easement appurtenant (or appurtenant easement) serves to benefit the owner of the dominant estate and also affects the physical use of the property. To be an easement appurtenant, both a dominant estate and a servient estate must exist. The party owning the dominant estate possesses the right to use the easement on the servient estate.

There are two categories of appurtenant easements: affirmative and negative. An affirmative easement permits its holder to use the servient estate for the purpose or purposes set forth in the easement. This may include uses or intrusions that would, without a valid easement, be considered as trespasses. Easements for ingress and egress, utility infrastructure, and transportation are examples of affirmative easements.

A negative easement is an appurtenant easement that authorizes the holder to prevent the owner of the servient estate from engaging in activities or making modifications to the real estate that would otherwise be permitted. A negative easement is a specific limitation of the rights of the owner of the servient estate to use his or her property. Scenic easements and conservation easements are common examples of negative easements whereby landowners may be restricted in terms of how their real estate may be modified.

Easements may be further classified into apparent and nonapparent easements. An apparent easement is one that is reasonably obvious and visible, such as a roadway or an overhead utility line. A nonapparent easement, conversely, is an easement that is not reasonably obvious and visible, such as a conservation or scenic easement.

Easements may be either perpetual or temporary. An easement is presumed to be perpetual unless its own terms explicitly create it as a temporary easement or if it is legally extinguished. Oftentimes a municipality or a utility company will acquire perpetual easements for the placement of utility facilities in a corridor, along with temporary easements for the period of construction, covering a larger area, which are automatically extinguished at the completion of construction.

A secondary easement is a right appurtenant to an actual easement. That is to say, it is the right to do whatever is necessary to experience the full enjoyment of the actual easement. The

rights implied by a secondary easement are limited and must be used in a reasonable manner as to not cause undue injury or inconvenience to the servient estate. An example of a secondary easement is the right to clear vegetation in reasonable manner along a primary easement granted for ingress and egress.

### **Rights and Duties Associated with Easements**

The concept of an express easement includes the right to do the things that are reasonably necessary to enjoy the easement in the legal sense. These rights may be limited by any conditions stated in the easement and also by the specific purpose intended by the granting of the easement. When an easement is expressly granted for a specific purpose, the grantee's rights are restricted to that purpose alone. The rights of ingress and egress over a specific path or the right to install utilities within a legally described corridor are examples of express easements.

Some easements are granted with more general terms and in such cases the uses of the easement must be necessary, convenient, and not unnecessarily burdensome to the servient estate. An example of an easement granted with general terms is what is known as a blanket easement, where no specific location is given for the easement upon the servient estate. Blanket easements are commonly used for some utility projects where a specific route has not been established prior to construction.

The servient owner retains the right of full usage and enjoyment of land affected by an easement, as long as such usage and enjoyment does not interfere with the usage and enjoyment of the easement by the easement holder.

The holder of an easement has a duty to take reasonable care to avoid damage or injury to the servient estate. The easement holder may be liable for such damages, particularly if it may be demonstrated that he or she was malicious or negligent.

## **Section 2 – Types of Easements Commonly Encountered**

An easement may be created for nearly any reason for which it is desirable for one party to use the land of another party for a specific purpose. This section will cover the types of easements commonly encountered in the practice of land surveying.

### **Rights-of-Way**

A right-of-way is the privilege that one entity has of passing over or across the land of another along a particular alignment. Rights-of-way commonly apply to rights of ingress and egress, overhead utility lines, pipelines, and roadways. By definition, a right-of-way itself is an easement. Right-of-way is also used to describe the strip of land that is used for the easement. A highway right-of-way is a common example of this usage.

Rights-of-way may be classified into two general categories. A public right-of-way, as its name states, is for use by the public. Public roads and highways are the most familiar examples of public rights-of-way. Private rights-of-way are not available for use by the public but instead are for use by a specific person or group of people. A private right-of-way may be in the form of

an access road, an ingress and egress easement, or any other right of travel not granted to the public.

A right-of-way may also come in the form of an unwritten right. A landowner who has granted access across his or her property by way of oral permission has created a right-of-way. Legal research and title examination are unlikely to discover this sort of right-of-way. This situation highlights the duty of the surveyor to make careful note of land usage by others, as it may point to the existence of an unwritten right.

Public road and highway rights-of-way may be found in the form of easements or fee-simple ownership, depending upon how the governing jurisdiction acquired the right-of-way. In either case, it is customary to refer to the strip of land as the right-of-way.

There are numerous auxiliary easements that are often associated with highways. Among those are: Maintenance easements, utility easements, drainage easements, sight distance easements, and sidewalk easements.

Private rights-of-way come in many forms. Driveways, roads that have not been dedicated to a jurisdiction, and access easements are notable examples.

A driveway on a private parcel, may ripen into a private right-of-way if it is used to access one or more other parcels. Similarly, a shared driveway serving two homes may straddle the boundary line of the two properties. In this case, a private right-of-way may exist on each side of the boundary line as necessary for reasonable access. As before, even if this right is not explicitly called for in the deeds for the properties, unwritten rights are highly likely to exist.

### **Alleys**

An alley may take the form of a platted way, generally narrower than the adjacent streets, for the purpose of providing access to the rear of lots within a block. A platted alley is typically controlled by the local jurisdiction (i.e., the city or town).

Alleys may also be private, serving the same purposes of access and convenience as a platted lot.

Both public and private alleys are often used for the placement of both overhead and underground utilities.

### **Railroads**

For a multitude of reasons, railroads, and their rights-of-way, can be problematic for the surveyor. Among the problems encountered are sparse or nonexistent records, the frequent changing of ownership and names, and the lack of available monumentation.

Like public highways, railroad rights-of-way come in the form of easements and fee-simple ownership. It is important to note that even when a railroad right-of-way exists as an easement, it effectively functions as fee ownership in the sense that its use is exclusive for a singular purpose (rail travel) and as such, the servient tenant is extremely restricted in his or her enjoyment of the land, as if it had been conveyed entirely.

## **Water Rights**

Easements are oftentimes granted for access to water. In the past, before the prevalence of municipal and rural water systems, water was acquired from streams, ponds, lakes, streams, or wells. A landowner without access to adequate water on his or her own land may have required a right to cross the land of another in order to access a water supply. Similar needs for water access may apply to the watering of livestock or the irrigation of croplands. This access may have taken the form of a written easement or an unwritten right.

## **Drainage Easements**

Drainage easements are often found relating to urban and suburban settings. As land is developed and vegetation is replaced by pavement and rooftops, runoff is dramatically increased and must necessarily be addressed. Unnatural runoff may lead to erosion or damage to structures, and accordingly must be directed in an organized manner by way of swales, stormwater structures, and retention basins. Modern subdivision plats typically include drainage easements for this purpose, prohibiting landowners from erecting structures or any other items that may impede the flow of runoff.

## **Aviation Easements**

Aviation easements relate to airports and are unique in the fact that they are generally defined in three dimensions, having a vertical component. An aviation easement (also known as an avigation easement) grants the right to operate aircraft over nearby real estate for the purposes of approach and takeoff.

As it pertains to aviation, it is worthwhile to discuss the right that the operators of aircraft possess to fly above private land. A landowner possesses the right to use the space above his or her land, but only to the extent that is reasonably necessary for his or her enjoyment of the land. Furthermore, the right to the space above one's land is limited to the actual usage of said space. That is to say, a landowner may fly a kite over his or her land as high as he or she pleases, and while doing so has full rights to use that airspace. However, when the kite is reeled in, the limit of the airspace right does not remain at the highest altitude achieved by the kite.

Accordingly, the operator of an aircraft may freely travel over private lands, providing that the aircraft is operated at an altitude sufficient not to interfere with the enjoyment of the private land by its owners.

As it relates to the use of unmanned aerial vehicle technology, the Federal Aviation Administration has guidelines pertaining to the location and the maximum altitude at which a UAV may be operated to avoid interference with conventional aircraft.

## **Lateral Support**

An unwritten right that is a breeding ground for litigation is the right of lateral support or natural support. While an easement in the traditional sense, it is a well-established principal of law. Simply stated, it is the right of one owner to the natural support of his or her property by the property of the adjoining owner. For example, if Owner A excavates his own land right up to his

property boundary, causing a part of Owner B's land to give way and collapse into the excavation, the right of lateral support has been violated.

This principal also may apply to buildings. Consider a row of buildings with touching walls or common walls (an old-fashioned downtown area for example). If the owner of Building A alters his or her wall in a way that causes damage to Building B, the right of lateral support has likely again been violated.

### **Solar Easements**

As solar-generated electricity becomes more popular, the usage of solar easements is also becoming more common. The purpose of a solar easement is to prevent interference with the sunlight necessary to generate electricity. A solar easement typically restricts the height of structures and trees on adjacent properties.

### **Utility Easements**

Utility easements allow for the installation, operation, replacement, and maintenance of utility facilities, whether above or below ground. Utility easements are most often used for telecommunication lines, electrical power lines, sanitary and storm sewers, water pipelines, natural gas pipelines, and petroleum pipelines.

### **Conservation Easements**

A conservation easement restricts the usage of land in an attempt to preserve and protect natural and historic resources. A conservation easement may limit the harvesting of timber, the alteration of waterways, the removal of historically or geologically significant items, or any other activity expressly stated in the easement.

### **Wind Easements**

In areas where windmills are used to generate electricity, wind easements may be used as a way to grant the holder a right to construct, operate, and maintain the facilities necessary to utilize the wind across the landowner's property.

### **Scenic Easements**

Scenic easements exist specifically for the purpose of preserving scenic views. A scenic easement may prevent someone from obstructing the view of the easement holder, or in may prohibit the removal of anything such as vegetation that affects the view enjoyed by the easement holder.

## **Section 3 – The Creation of Easements**

The creation of easements may be classified as express, implied, or prescriptive. In brief, an express easement is created when the intent of the parties is specifically declared, usually in written form. An implied easement is created when necessity or other circumstances indicate that certain rights must exist. An easement by prescription arises from consistent use of a property for a particular purpose.

There are several ways by which easements are created. This section will define and expand upon the methods most commonly encountered in the surveying profession.

### **Easement by Express Grant**

The creation of an easement by express grant is the most familiar and straightforward means of creation. An express easement is created when the intent of all parties involved is explicitly declared, most often in writing in the context of a deed or a specific easement instrument.

Express easements may also be created by wills or other probate documents.

When an express easement is created, it is beneficial to all parties if the purpose, duration, and heritability of the easement are clearly stated upon the face of the document.

### **Easement by Reservation**

Another familiar style of easement is the easement by reservation. This normally occurs when the grantor in a land conveyance reserves an easement right unto himself or herself as part of the conveyance. This is often done as a way for the grantor to retain a right of ingress and egress over a property being sold. An example of ordinary easement by reservation language follows:

*“The grantor reserves unto himself a perpetual easement for the purposes of ingress and egress over and across the above-described parcel in the form of a 20-foot strip of even width across the north side thereof.”*

### **Easement by Agreement**

Easements are frequently created by agreement. The example most familiar to surveyors relates to the development of subdivisions. Most modern subdivisions are platted with easements for public utilities and drainage clearly shown upon the plat. Furthermore, any covenants and restrictions filed as part of the creation of a subdivision will likely contain further description of any such easements.

The lots in a subdivision accepted by the appropriate local authority are thereby conveyed subject to all easements set forth on the subdivision plat or within the associated covenants and restrictions.

### **Easement by Way of Necessity**

An easement by way of necessity may arise when the conveyance of part of a property cuts off the access to either the conveyed part or the retained part. In this case, there is an implied right-of-way across the remainder parcel to the conveyed parcel, or across the conveyed parcel to the remainder parcel.

The same principle applies here as it does in other examples of implied easements. In other words, when a property is conveyed, the conveyance must necessarily include whatever rights are needed to provide for the use and enjoyment of the property. Likewise, the grantor

must necessarily retain whatever rights are needed to maintain the use and enjoyment of the retained property.

A way of necessity may apply to the rights of ingress and egress, but may also apply to other categories of easements, such as utility lines and drainage ways.

For an easement by way of necessity to be created, prior unity of ownership of the dominant and servient estates must be demonstrated, which is to say the affected parcel must have first been owned by a single entity, and then divided in such a manner as to cut off the access to one or more of the newly created parcels. An easement by necessity may only be created when a unified parcel is divided.

Although an easement by way of necessity does not require a written conveyance. If and when an easement that arose out of necessity is specifically described and conveyed, it is considered from that point on an express easement. Also, an easement by way of necessity runs with the land and remains in effect for the future holders of the dominant and servient estates.

The same concept of the creation of easement by way of necessity applies to properties that are rented and leased. The tenant must have reasonable access to the rented or leased real estate sufficient for the purpose of the rental or lease agreement.

### **Easement by Implication**

An easement by implication may be created when a landowner conveys part of a property to another party. In this situation, the law is consistent in that the grantor conveys with the property, the implied rights that are reasonably necessary for the grantee to have full enjoyment of the real estate being granted.

Easements by implication often arise when a landlocked parcel is conveyed. Even though the right of access may not be stated upon the conveyance instrument, an easement by implication is necessarily created in favor of the grantee. Implied utility easements may also be created in this manner. Implied easements created in this way are called easements of necessity.

Implied easements may also be created by the principle of prior use. Consider a parcel with a long driveway providing access to a residence at the rear of the property. If the landowner divides the parcel, conveying a portion upon which the driveway exists, an implied easement by prior use may be created if the conveyance instrument did not include an express easement for the driveway. Associated utility easements may also be implied in this way. An important principle is that the prior use must be apparent in such a way that the grantee would have reasonable notice of it upon an inspection of the property.

There are generally accepted legal elements that must be present in order to create an implied easement by prior use. The first is the element of severance, meaning that the real estate must have first been owned by a singular entity before having been severed (in other words, divided with part of it being conveyed to another entity). It is also necessary to establish that prior to the severance, the use of the land that implies the easement must have been continuous and apparent to the extent that a reasonable person would be aware of the usage. Also, it must be



demonstrated that the easement is reasonably necessary for the use and enjoyment of the severed property.

Of particular importance to the surveyor is the fact that implied easements are not included within the public record and are unlikely to show up in a title search or in ordinary legal research. Oftentimes, legal descriptions conclude with a statement such as, “...*subject to all legal easements and rights-of-way.*” or something similar, which is used to cover the possible existence of unwritten easement rights but at the same time is not helpful in identifying the location or purpose of such rights. This is why it is important for surveyors to note any evidence of “use by others” when conducting a survey of property. Any driveway, trail, or utility line might represent the presence of an implied easement and might be the only indication of its existence that makes it into the public record.

An implied easement by necessity is created when it can be demonstrated that an easement is necessary for the reasonable use and enjoyment of a property owned by the party claiming the easement. Again, this most frequently applies to landlocked parcels where if access were to be denied, the property would become essentially useless to its owner. This concept differs from the concept of prior use in that it is not necessary to demonstrate that prior use had occurred, but rather that an easement has become necessary in maintain the usefulness of the severed property.

A claim for an easement by necessity may be denied in cases where a landowner willfully and knowingly landlocks his or her property or physically blocks the access to it, (perhaps with a pond or a building) without making the necessary provisions for access.

It is worthwhile to note that an implied easement by necessity is automatically terminated when the necessity ceases to exist, but it is not terminated simply because it is not used.

Additionally, an implied right-of-way is created by the filing of a subdivision plat. In other words, the purchaser of a lot within the platted subdivision is also, by implication, granted a right-of-way to use the streets in the subdivision, as necessary. If and when said streets are dedicated to the appropriate jurisdiction, they become public ways and the implied right-of-way is no longer necessary and therefore terminates.

An implied easement may also be created when a landowner sells items that are intended to be removed from the land, such as minerals, timber, fill dirt, etc. The sale of such items must necessarily include the right of access and the right to remove the items or material. The location and dimensions of such an implied easement are dependent upon the purpose of the easement. A reasonable route must be permitted, and it must also be sufficient to provide for the operation of whatever equipment or machinery is necessary for the purpose of the easement.

An interesting example of an implied easement is the platted street or roadway that is never developed. When a platted street or roadway is developed, it becomes a public way and is available for use by the public. However, when a street, road or alley is platted but not developed, an easement is implied to provide access to the lots sold according to the plat. That is

to say an adjoining landowner may make use of a platted but undeveloped street or alley, but the public may not.

Yet another means of creation of an implied easement occurs when a ditch or drainage way is constructed upon a parcel that is later divided, with a part of said parcel being conveyed without a written easement included to cover the ditch or drainage way. In this case, an easement is implied for the continued use of the ditch or drainage way.

### **Easement by Estoppel**

Estoppel is a legal principle that prohibits one party from asserting a right that contradicts what they previously said or agreed to by law. It is meant to prevent people from being unjustly wronged when in good faith they relied upon the words or conduct of another. An easement may be created by the doctrine of estoppel by deed, by record, or by conduct.

For example, if one party relies upon a false representation or a concealment of facts committed by another party to make improvements on a property, only to find out later that said improvements encroached upon the property of the second party, an easement by estoppel may be created to allow the continued use and enjoyment of the improvements. In this case it must be demonstrated that the first party was ignorant of the facts, and that the second party misrepresented or concealed facts.

### **Easement by Dedication**

Easements created by dedication are most frequently found in the case of streets within a subdivision. Dedication is the process by which land is given over to the public by an act of its owner with the intention that it would be accepted for public use. Dedication of a road or street confers the right of passage to the public, but it does not confer the responsibility of maintenance to the jurisdiction until the jurisdiction accepts the dedication. Interestingly, the owner of a dedicated property retains the ownership of the fee covered by the dedicated land. Only a right-of-way is granted by dedication.

While dedication most often applies to streets and roads, dedication may also be used to convey public squares, parks, and school lots.

### **Easement by Eminent Domain**

In the United States, eminent domain is the power of a government entity, (either state or federal) to acquire private land for public use in exchange for just compensation to be paid to the owner of the land. This power may be delegated by the government entities to government agencies, municipalities, and sometimes even to corporations or private parties when duly authorized to carry out specific functions affecting the public. Generally, real estate acquired by eminent domain is for use by the government itself, the use of the public, or for economic development. Eminent domain is commonly used to acquire the routes required for roadways, public utilities, and railroads.

The concept of eminent domain was introduced in a 1625 treatise by Dutch judge Hugo Grotius in which he coined the Latin phrase *dominium eminens*, meaning supreme lordship. Grotius wrote:

*“... The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.”*

Condemnation is the exercise of the power of eminent domain by which property is transferred from private ownership to a government entity or its delegate. Condemnation in this sense is not the same as condemnation as an acknowledgment that real estate is useless due to its condition. Condemnation in terms of eminent domain means that the government or its delegate is taking real estate or acquiring an interest in it, (such as an easement) and must pay just compensation to its owner. When a condemnation is filed, a court determines what constitutes the fair value of the property. One or more appraisals may be used and both parties may present their cases.

An interesting eminent domain case was tried in 1984, in which the question was whether the condemnee was entitled to compensation measured by the market value of the condemned property or the cost required to acquire a substitute property. The case of *The United States of v. 50 Acres of Land* relates to a federal flood control project in Duncanville, Texas, near Dallas. In 1978, the federal government condemned 50 acres that were owned by the City of Duncanville, which had been used for the past nine years as a sanitary landfill. As a result of this taking, the city purchased a nearby 113-acre parcel and constructed a larger sanitary landfill. In the condemnation proceedings, the city petitioned for reimbursement in the amount of 1.2 million dollars, which represented the cost of land acquisition and the development of their new landfill. The United States argued that the fair market value of the property was approximately \$4,000 per acre or around \$200,000 in total.

Prior to the trial, the United States filed a motion to exclude any evidence pertaining to the cost of the land and development for the new landfill site, claiming that it was not germane to the consideration of the fair value of the condemned property. The District Court denied this motion stating that “a complete factual record should be developed from which and independent determination of the appropriate measure of value can be made.”

At the trial, the jury found the fair market value of the condemned property to be \$225,000 and that the reasonable cost of a substitute facility was \$723,624. The District Court entered a judgment in the amount of \$225,000.

The Court of Appeals remanded this case for further proceedings, reasoning that the city’s loss due to the condemnation was equal to the amount of money reasonably required to establish an equivalent facility.

The Supreme Court opined that the Fifth Amendment to the Constitution does not stipulate that the federal government must pay a condemnee an amount quantified by the cost of acquiring a substitute facility when the fair market value of the condemned property is ascertainable and when there is no instance of manifest injustice in the taking. The Fifth Amendment reads as follows:

*“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”*

Section One of the 14<sup>th</sup> Amendment likewise guarantees due process:

*“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

The concept of eminent domain has been the subject of controversy, oftentimes pertaining to the definition of public use. The Supreme Court has been consistent in its deference to the states in making determinations of what constitutes public use. Many cases have been brought to court over the broadness of this determination.

In the 1954 case of *Berman v. Parker*, the Court unanimously affirmed the District of Columbia Redevelopment Act of 1945. This act was passed to address the problem of blighted properties in the District of Columbia. The act created a commission called the District of Columbia Redevelopment Land Agency, to whom was granted the authority to redevelop blighted areas and to eliminate any blighting factors or causes of blight. The act granted the DCRLA the power of eminent domain as needed to condemn properties to be redeveloped.

Controversy arose when a department store owned by Max Morris was identified as a property to be acquired and razed. The Morris store was not in blighted condition but was merely located in a blighted area that was proposed to be cleared and sold to a real estate developer. Morris argued that this plan was not covered by eminent domain since it was not for public use, but rather it amounted to the seizing of the property of one business owner for the benefit of another business owner. Mr. Morris died while the case was in progress but his executor, Samuel Berman, continued the case on behalf of the Morris Estate.

The Court held that the problem of urban blight must necessarily be addressed by a large-scale integrated plan and that if some landowners were allowed to resist redevelopment efforts on the grounds that their particular properties were not blighted, that large-scale integrated redevelopment plans would be difficult to implement. In this way, the greater public interest is served.

This case was affirmed in *Kelo v. City of New London* in 2005. Similar to the *Berman v. Parker* case, this case arose from a condemnation proceeding by the City of New London, Connecticut as part of a redevelopment plan. The case was appealed to the United States Supreme Court after a decision by the Supreme Court of Connecticut in favor of the City of New London.

In the case, lead plaintiff Suzette Kelo argued that the City of New London had abused its power of eminent domain by condemning her property for the purpose of economic development. Kelo asserted that this development did not constitute a public use as required by the Fifth Amendment. The Court ruled in favor of New London in a 5-4 decision. Justice Anthony Kennedy expanded upon this decision in his concurring opinion writing:

*A court confronted with a plausible accusation of impermissible favoritism to private parties should [conduct]... a careful and extensive inquiry into 'whether, in fact, the development plan [chronology]*

*[1.] is of primary benefit to... the developer... and private businesses which "may" eventually locate in the plan area...*

*[2.] and in that regard, only of incidental benefit to the city..."*

*[3.] awareness of... depressed economic condition and evidence corroborating the validity of this concern...*

*[4.] the substantial commitment of public funds... before most of the private beneficiaries were known...*

*[5.] evidence that [government] reviewed a variety of development plans...*

*[6.] [government] chose a private developer from a group of applicants rather than picking out a particular transferee beforehand and...*

*[7.] other private beneficiaries of the project [were]... unknown [to government] because the... space proposed to be built [had] not yet been rented...*

The *Kelo v. City of New London* case was important because it confirmed that a “public purpose” could be considered a “public use” as set forth in the Fifth Amendment.

Justice Sandra Day O’Connor issued her dissenting opinion stating concern that this use of eminent domain amounted to taking from the poor and giving to the rich and might become the norm instead of the exception. Justice O’Connor wrote:

*“Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”*

Justice O'Connor further argued that the decision eliminated "any distinction between public and private use of property – and thereby effectively deletes the words 'for public use' from the Takings Clause of the Fifth Amendment."

Public opposition to this ruling was intense and came from such diverse organizations as the AARP, the Libertarian Party, the NAACP, and the American Conservative Union. This decision was widely viewed as an overreach and a misuse of eminent domain. In the wake of the controversy following the Kelo case, forty-five states have modified their eminent domain laws.

In June of 2006, one year after the original Kelo v. City of New London decision, President George W. Bush issued an executive order restricting the use of eminent domain by the federal government. The text of this executive order follows:

**Executive Order: Protecting the Property Rights of the American People**

*By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen the rights of the American people against the taking of their private property, it is hereby ordered as follows:*

*Section 1. Policy. It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.*

*Sec. 2. Implementation. (a) The Attorney General shall:*

*(i) issue instructions to the heads of departments and agencies to implement the policy set forth in section 1 of this order; and*

*(ii) monitor takings by departments and agencies for compliance with the policy set forth in section 1 of this order.*

*(b) Heads of departments and agencies shall, to the extent permitted by law:*

*(i) comply with instructions issued under subsection (a)(i); and*

*(ii) provide to the Attorney General such information as the Attorney General determines necessary to carry out subsection (a)(ii).*

*Sec. 3. Specific Exclusions. Nothing in this order shall be construed to prohibit a taking of private property by the Federal Government, that otherwise complies with applicable law, for the purpose of:*

*(a) public ownership or exclusive use of the property by the public, such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation;*

*(b) projects designated for public, common carrier, public transportation, or public utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity;*

*c) conveying the property to a nongovernmental entity, such as a telecommunications or transportation common carrier, that makes the property available for use by the general public as of right;*

*(d) preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment;*

*(e) acquiring abandoned property;*

*(f) quieting title to real property;*

*(g) acquiring ownership or use by a public utility;*

*(h) facilitating the disposal or exchange of Federal property; or*

*(i) meeting military, law enforcement, public safety, public transportation, or public health emergencies.*

*Sec. 4. General Provisions.* *(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.*

*(b) Nothing in this order shall be construed to impair or otherwise affect:*

*(i) authority granted by law to a department or agency or the head thereof; or*

*(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.*

*(c) This order shall be implemented in a manner consistent with Executive Order 12630 of March 15, 1988.*

*(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.*

### **Easement by Prescription**

Long and continuous use of land in a manner consistent with the use of an easement may ripen into an easement by prescription, or a prescriptive easement. A prescriptive easement holds the same legal standing as an easement created by any other means. Similar to adverse possession, a principle familiar to surveyors, an easement by prescription requires use that is adverse, open, and notorious, continuous, exclusive, and for the statutory duration. The

difference between prescription and adverse possession is that prescription merely conveys an easement right while adverse possession grants legal title.

It is useful to understand the meanings of the requirements for prescription and adverse possession. The first requirement is that the use is adverse, meaning that it is not permissive use. If permission for the use had been granted, even if merely orally, an easement already exists, and prescription is irrelevant. The adverse use must have continued with the owner's knowledge and acquiescence, or at least have been open and notorious to the point where a presumption of knowledge and acquiescence can be demonstrated. This principle protects the landowner against adverse or prescriptive claims arising from usage of which he or she was unaware.

Open use must occur without concealment. A notorious use must be known to the owner or be of a nature which a reasonable inspection of the property would lead to the discovery of its existence.

The idea of prescription was born of the presumption of a lost grant, meaning that if land had been used continuously for a specific purpose for a lengthy period of time, it follows that the right must have originated from a past grant that was either destroyed or lost.

Continuous use may be constant, periodic, or occasional, but to be considered continuous, there may be no interruption in the use caused by the action of the owner. If at any time the landowner causes the use to be discontinued, that constitutes an interruption and resets the prescriptive time period. Likewise, if the adverse user abandons his or her usage, the prescriptive period resets.

The exclusivity of a prescriptive use means that the use is not dependent upon a similar right in others. It does not mean that the use must only be by one party.

The statutory time period varies considerably by jurisdiction and by the circumstances relating the nature and use of the right.

For the establishment of a public road or highway by prescription, the land must have been continuously used by the public with the knowledge of the landowner. This use must have existed adversely and not by the permission of the landowner for the necessary statutory period of the jurisdiction. There is a specific requirement for a prescriptive roadway that the jurisdiction must have conducted maintenance and upkeep on the roadway, treating it as if it were a public way throughout the statutory period.

### **Easement by Custom**

An easement by custom arises from the continuous use of land for a specific purpose for a lengthy period of time. An easement by custom differs from a prescriptive easement because it lacks the existence of a dominant tenement and most often favors the residents of a community.

For an easement to develop by way of custom, certain elements must be met.

1. Ancient: The use must be lengthy.
2. Continuous: The use must have existed without interruption.



3. Undisputed: The use must be free from dispute.
4. Reasonable: The use must be of a reasonable and appropriate nature relative to the land.
5. Bounded: Definable bounds to the right must exist.
6. Obligatory: The right must not be variably applied by individual owners.
7. Legal: The use must not be contrary to any laws or customs.

Examples of easements by custom include access to a spring, passage along the intertidal areas of beaches, and ancient roadways. In the eastern United States, it is quite common for public highways to have originated as mere trails or stagecoach roads. These public highways have no documentation, right-of-way plans, land grants, or any of the other items typically associated with modern highways.

## **Section 4 – The Extinguishment of Easements**

Just as there are numerous ways by which an easement may be created, there are numerous ways by which an easement may be extinguished or terminated. The extinguishment of an easement differs from the mere suspension of an easement. An extinguishment means the absolute and permanent end of the right.

### **Extinguishment by Expiration**

The most familiar way by which an easement may be extinguished is by expiration. While many easements are perpetual, some easements are granted for a definite period of time or for a specific purpose. In these cases, when the time has expired or when the specific purpose has been completed, the easement will be extinguished. Further, some easements are terminated upon a specific contingency, breach, or nonperformance of a condition.

Likewise, easements arising from necessity are extinguished when the necessity for it ceases. For example, temporary construction easements terminate upon the conclusion of the construction for which they were granted.

### **Extinguishment by Release**

An easement may be legally terminated by a release granted by its owner to the owner of the servient land, but only if both parties agree to the release.

### **Extinguishment by Merger of Title**

Merger of title is a common way by which easements are terminated. This concept originates from the principle that a party may not possess an easement in his or her own land. Accordingly, automatic extinguishment occurs when one party possesses both the dominant estate and servient estate simultaneously. This situation has been known to confound title professionals and surveyors alike since inadvertent mergers of title can occur and be severed again later, causing an extinguishment that can go easily undetected since it is automatic and does not require any documentation.

### **Extinguishment by Abandonment**

Easements may be extinguished by abandonment, which is similar to but not the same as nonuse. The principal of abandonment requires evidence of clear intent to abandon the easement. An easement, once granted, does not terminate due to nonuse itself. Nonuse may only lead to extinguishment if it is accompanied by and intention to abandon the easement, whether that intent is express or implied.

An example of implied abandonment is a case where an easement holder who has continuously used and maintained a stone driveway in an easement across an adjoining property, constructs a new driveway for access that does not cross the adjoining property. Further, let us consider that the easement holder has removed the stone driveway and now uses the newly constructed driveway exclusively. This easement could be considered extinguished by implied abandonment since the easement holder has taken obvious and decisive action to indicate that he or she intends to permanently cease using it.

### **Extinguishment by Estoppel**

Just as an easement may be created by estoppel, an easement may also be terminated by estoppel. For extinguishment by estoppel to occur, the servient owner must have altered his or her position relying upon the acts of the easement owner. Three elements must be present for an easement to be extinguished by estoppel. First, it is necessary that the easement owner must have behaved in a manner that could have led a reasonable person to believe that the easement was no longer wanted or needed. Second, the owner of the servient property must have taken action based on the belief that the easement holder had relinquished his or her easement right. Finally, it must be demonstrated that the owner of the servient property would suffer material loss if the easement rights were allowed to continue.

Consider a property owner who granted an electric utility an easement across his or her land for the installation of an electric transmission line, including the associated towers. Imagine that several years later, the need for this transmission line ceases and the electric utility removes their lines and towers, and furthermore, discontinues any mowing or trimming within their easement. If, reasonably believing the easement to have been abandoned, the landowner built a structure where the transmission line once ran, the electric utility may be prevented by estoppel from reclaiming their easement since their conduct was of such a nature that would have caused a reasonable person to believe that the easement had been abandoned. It is important to note that in cases where estoppel is claimed, the burden of proof lies with the owner of the servient property.

### **Extinguishment by the Destruction of the Servient Estate**

This form of extinguishment is fairly simple and self-explanatory, in that if the servient estate ceases to exist for any reason, so do any and all easements associated with it.

### **Extinguishment by the Cessation of Necessity**

As a general principle, an easement by way of necessity terminates when the necessity for it ceases. This principle applies only to easements by way of necessity. Easements created by

other means do not terminate when the necessity ceases. This is an important distinction as it must be ascertained whether the easement originated out of strict necessity in the first place.

### **Extinguishment by Eminent Domain**

An easement may be terminated by the process of eminent domain. This occurs most often as a result of highway development. New limited access highways and interstates frequently sever existing road rights-of-way causing them to be inaccessible and useless. As part of the eminent domain process, the holder of the existing right-of-way must be fairly compensated for their loss due to the extinguishment of their right.

### **Extinguishment by Frustration of Purpose**

When the enjoyment of easement rights has been rendered permanently impossible, the easement may be extinguished if the easement was created for a specific purpose. In other words, when the possibility for the enjoyment of an easement ceases to exist, the easement likewise ceases to exist. Frustration of purpose often occurs as the result of new construction or an act of nature. The distinctive quality of an extinguishment by frustration of purpose is that the use of the easement is inadvertently rendered impossible.

### **Extinguishment by Cessation of Purpose**

Similar to an extinguishment by frustration of purpose, extinguishment by cessation of purpose occurs when the purpose for which the easement was created is completed and the easement is no longer needed. With an extinguishment by cessation of purpose, it is understood that the creator of the easement intended for it to be temporary in nature and to have had a duration consistent with its stated purpose.

### **Extinguishment by Overburden**

The overburdening of an easement occurs when the dominant estate increases the burden of an easement upon the servient estate. This act can sometimes cause the original easement to be terminated. This generally occurs in the case of easements created by prescription when the dominant estate adds to the use of the easement beyond the use that had been enjoyed during the prescriptive period. For example, if a prescriptive easement for ingress and egress arises from the consistent use of land for ingress and egress only, the user is not then entitled to install utility facilities within said easement.

### **Extinguishment as the Result of Death**

This concept applies to easements in gross. Since an easement in gross is a strictly personal right that may not be assigned to another party, it terminates upon the death of the holder unless a provision for transfer upon death is explicitly stated.

## **SECTION 5 – DESCRIBING EASEMENTS**

Surveyors must possess a broad understanding of the legal aspect of easements. Furthermore, surveyors are often tasked with the duty of preparing the legal descriptions associated with easements. While the easement instrument itself is usually prepared by an

attorney, the legal description contained within the easement instrument is most often prepared by a surveyor.

The grant of an easement is the grant of an interest in real estate and as such, the surveyor should apply equal care in the writing of an easement description as he or she would apply in writing of a legal description for a conveyance. An easement description should be written in a way that makes the intent of the parties clear. It should also be written in a way sufficient that a competent land surveyor may confidently mark its correct location in the field.

The preparer of an easement description must always be mindful of the fact that the description will be interpreted by others, perhaps without the benefit of the knowledge of present circumstances, and accordingly should be prepared in such a way that interpretation is likely to be consistent among all parties reviewing it.

The main goal of an easement description, or any legal description, is to clearly convey the intentions of the parties relating to the location of the easement. It is important to realize that the intent of the parties will be understood by the courts to be the intent declared by the instrument and not necessarily what the parties meant to do if those matters differ. That is to say that the courts have consistently held that the intentions of the parties are stated on the face of the instrument. This is why it is critical for the preparer of descriptions to have total clarity of intention as his or her object.

Another concept the preparer of easement descriptions must be cognizant of is the understanding that the court system will view documents in terms of the circumstances present at the time of their writing. An example of this concept would be an easement from the 1800's providing ingress and egress by way of horse-drawn carriage. The question might arise as to whether automobiles may be used on this easement now. A modern court would be likely to rule that with horse-drawn carriages being the primary mode of transportation in the time of the easement's preparation, that the intent of the parties was to provide ingress and egress by the normal and customary means. The parties could not have reasonably anticipated the replacement of the horse-drawn carriage by the automobile as the normal and customary means of personal transportation in the 20<sup>th</sup> century. Accordingly, a court would likely find that such an easement does not prohibit the use of automobiles, or whatever means of transportation may become customary in the future.

Also noteworthy is the understanding that easements will be viewed by the courts in their entirety and not on an *a la carte* basis. The intention of the parties will be interpreted from the document as a whole. This includes any items that are referenced in the legal description. A reference to a deed, a plat, or a set of road plans has the legal effect of making the referenced item and inseparable part of the legal description.

In the preparation of legal descriptions for easements, the selection of the correct wording is of first importance in making the intent of the parties clear. The use of technical language where appropriate is helpful. For example, when preparing the legal description for an easement, the use of the words "easement" or "right-of-way" is a simple and certain way to clarify that the description does not relate to a fee conveyance.

It is also beneficial to differentiate between perpetual and temporary easements. If an easement is to be temporary in nature, it is necessary to state the purpose of the temporary easement so that the termination of it may be clear. As an example, a temporary easement for the purpose of construction will terminate automatically upon the completion of the construction that was the subject of the easement.

In the preparation of easement descriptions, the preparer should take care to clearly identify the location servient estate. This may be done by referring to the recording data (Book and Page, Instrument Number, etc.), the parcel identification number as assigned by the local jurisdiction, or both. Further clarification may be added in the caption of the legal description by making reference to a lot in a block or a subdivision, a city lot, or a part of a section (in lands divided by the Public Land Survey System). As a general rule, the more information that can be included in the identification of the location of the servient estate, the better.

Clearly stated provisions for maintenance, access, repair, replacement, and other activities necessary for the full enjoyment an easement should be included, however these matters are legal in nature and are generally left to the attorney preparing the instrument. Surveyors must be cautious to not produce language the falls under the definition of the practice of law. Following are some examples of the type of language often included in easements to state these provisions:

**Example 1:**

In this example, the grantors of the easement are granting a right-of-way easement to their County in the form of a 25-foot strip of even width off of one side of their property for the purpose of clarifying the width of a county road right-of-way.

*The purpose of this easement is to ensure that the total right of way of County Road 200 North, from County Road 950 East to County Road 1000 East will be 50 feet in width; 25 feet (more or less) north and south of the centerline of said road.*

*Permission is hereby granted to place power and telephone poles 25 feet from and parallel with the centerline of the road. Permission is also granted for the necessary cross-arm overhang. It is agreed that if the property owner constructs a fence or gives permission to construct a pole line in the future, it shall be places on or outside the right of way line. It is agreed that all earth or other materials excavated or removed from the premises shall become the property of the County, to be used in the construction of said roads. The County will give the grantors 30 days notice to move any fence or other obstructions that may be on said right of way. If said grantors do not move said obstructions within said 30 days, the County shall remove them. The grantors' successors and assigns hereby release said County from any liability and claims concerning said premises and grantor adjoining premises that may result by the construction of said road. The grantors also agree not to farm within said perpetual right of way without permission of the County Highway Department.*

The preparer has clearly stated the purpose of the easement and then went on to explain in detail the various rights granted and reserved.

### **Example 2:**

In this example, the grantors are granting an easement to the local water utility for the placement of a new water main.

*...the grantors do hereby grant, bargain, sell, transfer and convey to the grantee, its successor and assigns, a perpetual easement with the right to erect, construct, install, and lay and thereafter use, operate, inspect, repair, maintain, replace and remove any and all utility lines, and appurtenances deemed necessary by the grantee to insure the continued operation of the grantee's system over, across, and through the land of the grantor's situate in Daviess County, State of Indiana, and land being more particularly described as follows:*

The body of the legal description appears here. The easement then continues:

*The grantee covenants with the grantor that grantee, its heirs or assigns, will pay for any damages done to the crops of the grantor during the construction and installation of the pipeline and will restore all fences and repair or replace any existing tiling that might be damaged during construction, and will restore the surface of the ground in as good condition as when entered upon by grantee or its agents. Grantee further covenants with grantor that grantee, its heirs, or assigns, will pay for any damage done in the future to crops, fencing, or tiling, or mature trees, if it shall become necessary to go on the real property of the grantor for the purpose of repairing or maintaining the pipeline. It agrees that payment for any damage done to crops, fencing, or tiling or mature trees when so determined shall be made in cash, immediately and if grantor and grantee shall not by their mutual agreement determine the amount of such damages, all questions then existing as to the amount of damages shall be submitted to and be determined by the average amount of an appraiser picked by each party.*

*The grant and other provisions of this easement shall constitute a covenant running with the land for the benefit of the grantee, its successors, and assigns.*

The preparer has taken care to name all the potential future uses for the easement that may arise. Of interest is the mention of paid crop and field tile damage, which are normal concerns in agricultural areas.

### **Example 3:**

In this example, the grantors are conveying a wetlands conservation easement to the United States of America through its acquiring agency, the Natural Resources Conservation Service, under the United States Department of Agriculture. Being a federal program, the language is somewhat more detailed and complex than is the case with local agencies and jurisdictions. Following are pertinent excerpts:

*The purpose of this easement is to restore, protect, manage, maintain, and enhance the functional values of wetlands and other lands, and for the conservation of natural values including fish and wildlife and their habitat, water quality improvement, flood water retention, groundwater recharge, open space, aesthetic values, and the environmental education. It is the intent of NRCS to give the Landowner the opportunity to participate in the restoration and management activities on the easement area. by signing this deed, the Landowner agrees to the restoration of the Easement Area and grants the right to carry out such restoration to the United States.*

The purpose of this easement is explained in great detail in this paragraph.

*...the Grantor hereby grants and conveys with general warranty of title to the United States of America and its assigns, the Grantee, forever, all rights, title and interest in the lands comprising the easement area described in Part I and appurtenant rights of access to the easement areas, but reserving to the Landowner only those rights, title, and interest expressly enumerated in Part II. It is the intention of the Landowner to convey and relinquish any and all other property rights not so reserved This easement shall constitute a servitude upon the land so encumbered; shall run with the land in perpetuity; and shall bind the Landowner, (the Grantor(s)), their heirs, successors, assigns, lessees, and any other person claiming under them.*

Note the suitable selection of technical wording where appropriate, (servitude, appurtenant rights) as discussed earlier. This usage makes it clear that this is an easement and not a fee conveyance. The aforementioned Part II continues:

*Part II. Reservations in the Landowner Easement Area. Subject to the rights, title, and interest conveyed by this easement deed to the United States, including the restoration, protections, management, maintenance, enhancement, and monitoring of the wetland and other natural values of the easement area, the Landowner reserves:*

- A. Title. Record title, along with the Landowner's right to convey, transfer, and otherwise alienate title to these reserved rights.*
- B. Quiet Enjoyment. The right of the Landowner to enjoy the rights reserved on the easement area without interference from others.*
- C. Control of Access. The right to prevent trespass and control access by the general public subject to the operation of State and Federal law.*
- D. Recreational Uses. The right to undeveloped recreational uses, including undeveloped hunting and fishing, and leasing of such rights for economic gain, pursuant to applicable State and Federal regulations that may be in effect at the time. Undeveloped recreational uses must be consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area. Undeveloped recreational use may include hunting equipment, such as tree stands and hunting blinds that are rustic and customary for the locale as determined by NRCS.*

- E. Subsurface Resources. The right to oil, gas, minerals, and geothermal resources underlying the easement area, provided that any drilling or mining activities are to be located outside the boundaries of the easement area, unless activities within the boundaries are specified in accordance with the terms and conditions of Exhibit C, which is appended to and made a part of this easement deed, if applicable.*
- F. Water Uses and Water Rights. The right to water uses and water rights identified as reserved to the Landowner in Exhibit D, which is appended to and made a part of this easement deed, if applicable.*

The preparer has separated out and defined the specific rights retained by the landowner. The obligations assumed by the landowner are set forth in Part III.

*Part III. Obligations of the Landowner. The Landowner shall comply with all terms and conditions of this easement, including the following:*

- A. Prohibitions. Without otherwise limiting the rights of the United States acquired hereunder, it is expressly understood that the rights to the following activities and uses have been acquired by the United States and, unless authorized by the United States under Part IV, are prohibited of the Landowner on the easement area:*
  - a. haying, mowing, or seed harvesting of for any reason;*
  - b. altering of grassland, woodland, wildlife habitat or other natural features by burning, digging, plowing, disking, cutting or otherwise destroying the vegetative cover;*
  - c. dumping refuse, wastes, sewage, or other debris;*
  - d. harvesting wood products;*
  - e. draining, dredging, channeling, filling, leveling, pumping, diking, impounding, or related activities, as well as altering or tampering with water control structures or devices, except as specifically set forth in Exhibit D, if applicable;*
  - f. diverting or causing or permitting the diversion of surface or underground water into, within, or out of the easement area by any means, except as specifically set forth in Exhibit D, if applicable;*
  - g. building, placing, or allowing to be place structures on , under, or over the easement area, except for structures for undeveloped recreational use;*
  - h. planting or harvesting any crop;*
  - i. grazing or allowing livestock on the permanent easement area;*
  - j. disturbing or interfering with the nesting or brood-raring activities of wildlife including migratory birds;*
  - k. use of the easement area for developed recreation. These uses include but are not limited to, camping facilities, recreational vehicle trails and tracks, sporting clay operations, skeet shooting operations, firearm range operations and the infrastructure to raise, stock, and release captive raised waterfowl, game birds and other wildlife for hunting or fishing;*



- l. any activities which adversely impact or degrade wildlife cover or other habitat benefits, water quality benefits, or other wetland functions and values of the easement area, and*
- m. any activities to be carried out on the Landowner's land that is immediately adjacent to, and functionally related to the land that is subject to the easement if such activities will alter, degrade, or otherwise diminish the functional value of the eligible land.*

The preparer of this easement has laid out thirteen separate prohibitions by which the landowner must comply. Excerpts from Part III continue below:

- B. Noxious Plants and Pests. The Landowner is responsible for noxious weed control and emergency control of pests as required by all Federal, State, and local laws...*
- C. Fences. Except for establishment cost incurred by the United States and replacement cost not due to the Landowner's negligence or malfeasance, all other costs involved in maintenance of fences and similar facilities to exclude livestock shall be the responsibility of the Landowner. The installation or use of fences which have the effect of preventing wildlife access and use of the easement area are prohibited on the easement or easement boundary.*
- D. Use of Water. The Landowner shall use water for easement purposes as set forth in Exhibit D, which is appended to and made a part of this easement deed if applicable.*
- E. Protection of Water Uses and Water Rights. As set forth in Exhibit D, if applicable, the Landowner shall undertake actions necessary to protect any water rights and water uses for easement purposes.*
- F. Taxes. The Landowner shall pay any and all real property and other taxes and assessments, if any, which may be levied against the land.*
- G. Reporting. The Landowner shall report to NRCS any conditions or events which may adversely affect the wetlands, wildlife, and other natural values of the easement area.*
- H. Survival. Irrelevant of any violations by the Landowner of the terms of this deed, this easement survives and runs with the land for its duration.*

It can be seen that the preparer had the protection of the interests of the grantee in mind as evidenced by the lengthy and detailed list of reservations and obligations placed upon the grantor. Skipping ahead to Part V, we find the grantee's rights explained.

*Part V. The Rights of the United States*

- A. Management Activities. The United States shall have the right to enter unto the easement area and undertake, on a cost-share basis with the Landowner or other entity as determined by the United States, any activities to restore, protect, manage, maintain, enhance, and monitor the wetland and other natural values of the easement area...*
- B. Access. The United States has a right of reasonable ingress and egress to the easement area over the Landowner's property, whether or not the property is adjacent or appurtenant to the easement area, for the exercise of any of the rights of*

- the United States under this easement deed. The authorized representatives of the United States may utilize vehicles and other reasonable modes of transportation for access purposes. To the extent practical, the United States shall utilize the access identified in Exhibit B.*
- C. Easement Management. The Secretary of Agriculture, by and through the National Resource and Conservation Service (NRCS) may delegate all or part of the management, monitoring, or enforcement responsibilities under this easement to any entity authorized by law that NRCS determines to have the appropriate authority...*
- D. Violations and Remedies – Enforcement. The Parties, Successors, and Assigns agree that the rights, title, interest, and prohibitions created by this easement deed constitute things of value to the United States and this easement deed may be introduced as evidence of same in any enforcement proceeding administrative, civil, or criminal, as the stipulation of the Parties hereto. If there is any failure of the Landowner to comply with any of the provisions of this easement deed, the United States or other delegated authority shall have any legal or equitable remedy provided by law and the right:*
- a. To enter upon the easement area to perform necessary work for prevention or remediation of damage to wetland or other natural values; and,*
  - b. To assess all expenses incurred by the United States (including any legal fees or attorney fees) against the Landowner, to be owed immediately to the United States.*

The preparer has used this section to set forth the remedies for dealing with violations or noncompliance on the part of the grantor and future landowners. This sort of clarity goes a long way in preventing confusing legal battles that can ensue when easement conditions are violated. Part VI of this document lays out some additional provisions, excerpts of which follow below:

*Part VI. General Provisions*

- A. Successors in Interest. The rights granted to the United States shall accrue to any of its agents, successors, or assigns. All obligations of the Landowner under this easement deed shall also bind the Landowner's heirs, successors, agents, assigns, lessees, and any other person claiming under them. All the Landowners who are parties to this easement deed shall be jointly and severally liable for compliance with its terms.*
- B. Rules of Construction and Special Provisions. All rights in the easement area not reserved by the Landowner shall be deemed acquired by the United States. Any ambiguities in this easement deed shall be deemed acquired by the United States. Any ambiguities in this easement deed shall be construed in favor of the United States to affect the wetland and conservation purposes for which this easement deed is being acquired. The property rights of the United States acquired under this easement shall be unaffected by any subsequent amendments or repeal of the Wetlands Reserve Program. If the Landowner receives the consideration for this easement in*

- installments, the Parties agree that the conveyance of this easement shall be totally effective upon the payment of the first installment.*
- C. *Environmental Warranty. "Environmental Law" or "Environmental Laws" means any and all Federal, State, local or municipal laws, orders, regulations, statutes, ordinances, codes, guidelines, policies, or requirements of any governmental authority regulating or imposing standard of liability or standards or conduct (including common law) concerning air, water, solid waste, hazardous materials or substance, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and water courses, health protection, and similar environment health, safety, building and land use as may now or at any time hereafter be in effect...*
- D. *General Indemnification. Landowner shall indemnify and hold harmless, its employees, agents, and assigns for any and all liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suits, proceedings, actions, and cost of actions, sanctions asserted by or on behalf of any person or government authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees and attorneys' fees on appeal) to which the United States may be subject or incur relation to the easement area, which may arise from, but is not limited to, Landowner's negligent acts or omissions or Grantor's breach of any representation, warranty, covenant, agreements contained in this easement deed, or violations of any Federal, State, or local laws, including all Environmental Laws.*
- E. *Maintenance Requirement. The Landowner agrees to the maintenance of the easement area and all required restoration practices and measures, developed by NRCS.*

## **SECTION 6 – REVERSION**

Reversion is the process by which interest in real estate returns to its grantor. An easement may be subject to reversion as specified in its originating document or by law. When an easement is terminated, it reverts back to the land from which it was taken. Usually, the reversion of an easement is automatic upon its extinguishment but sometimes a reversionary clause is attached to the easement when it is created. Following is an example of a reversionary clause to an easement:

*If within 10 years following the initial issuance of an environmental permit for the Patoka Lake Regional Water and Sewer District (PLRWSD) has not acquired regulatory approval to discharge effluent water into Lost River from PLRWSD's wastewater treatment plant, or has not constructed an effluent pipeline within the pipeline easement granted on December 3, 2015, then PLRWSD shall relinquish said easement to the Town of Cuzco and shall provide the Town of Cuzco with a recordable release thereof.*

This kind of reversionary clause makes it clear that if the grantee does not satisfy the conditions set forth in the easement, that the easement is to revert back to the grantor.

When a reversion involves boundary lines, one of two situations may occur. In the first situation, the boundaries revert back to their original location prior to the creation of the easement. This process can prove to be difficult, particularly if considerable time has passed and the conditions in the field are much changed from the time of the creation of the easement. In the second scenario, new parcels may have been created and the boundary lines may be far different than they were when the easement was created.

An especially complex situation may arise when a reversion is made to the original grantor "or his heirs." It is easy to imagine how the passage of only a generation or two might see a deceased person's heirs become quite numerous and spread out to varied locations making contact difficult.

A public roadway may revert by means of abandonment, in which the governing jurisdiction relinquishes its right to the roadway. This may also be called discontinuance or vacation. Generally, when a public roadway is vacated, the reversion to the adjoining landowners is automatic, returning half of the roadway to the parcels adjoining on each side. An exception to this concept is when a roadway is located at the edge of a subdivision but is contained entirely within the subdivision. In this case, the entire roadway reverts to the adjoining landowners if the roadway is vacated.

When considering the reversion of a public roadway, it is important to consider how the road's right-of-way was created in the first place. Only then is it possible to understand how the boundaries may be returned to their locations as they were at the time of the roadway's creation. A public roadway may be created by dedication and acceptance, statutory layout, by deed, by an act of legislation, by prescriptive right, by court order, by layout over public lands, or by custom.

Several rules apply to the location of boundary lines affected by the process of reversion. The most basic of these rules is that, unless otherwise stated on a plat or deed, the sidelines of lots adjoining an abandoned street extend to the centerline of said street at right angles. Non-perpendicular sidelines are to bend at the right-of-way line of the street and proceed from there to the centerline of the street, terminating at a right angle. This technique prevents gaps and overlaps from occurring as the sidelines are extended.

If the vacated street is curved, the principle applies in the same way it does for a straight street, with the sidelines extending radially at right angles to a tangent line of the curved centerline.

## **SECTION 7 – THE LEGAL LANGUAGE OF EASEMENTS**

This section will examine and expand upon examples of legal language found in easements.

### **Recitals**

Recitals are statements contained in a deed relating to matters that affect either the subject transaction or the chain of title. Examples of recitals follow:

*Whereas, Grantor owns certain real property located in Martin County, State of Indiana, as more particularly described on Exhibit A (the Property") attached hereto and by this reference made a part hereof.*

*Whereas Grantee is proposing to construct and operate one 12-inch diameter pipeline for the transportation of natural gas liquids or upon written notice to Grantor any other products of crude petroleum by pipeline (hereinafter "Product") and related facilities a portion of which crosses under and upon the Property; and*

*Whereas Grantee desires to obtain certain easements and rights over the Property, and Grantor desires to grant such easements and rights, on the terms and conditions set forth herein.*

## **The Agreement**

The agreement declares the main points of the easement as follows:

*Now, therefore, in consideration of the mutual obligations and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, Grantor and Grantee (each, a "Party" and together, the "Parties") hereby agree as follows:*

### **Grant**

*Grantor does hereby grant, sell, and convey unto Grantee a nonexclusive easement, right-of-way and right of entry (the "Easement") solely for the purposes of laying, constructing, inspecting, maintaining, operating, repairing and removing one pipeline not to exceed 12 inches in diameter, together with all fittings, cathodic protection equipment, pipeline markers, and all other equipment, devices and appurtenances reasonably incidental to the construction, operation, marking and maintenance thereof (the "Pipeline"), for the transportation of the Product under the Easement Area, on the terms provided herein. Grantee shall have the right of ingress to and egress from the Easement over and across the Easement Area (defined below) and the access points identified on Exhibit C, or as otherwise agreed to by the Parties for access to the Easement and Grantee's Pipeline. The Easement granted herein shall not include the right to construct or install any pump, compressor, or valve stations on the Property; rather, the Parties shall execute a separate written agreement for any pump, compressor, or valve stations to be installed on the Property.*

### **Width**

*The Easement shall be fifty (50) feet, and no greater than fifty (50) feet, in width, as more particularly described on Exhibit B attached hereto and by this reference made a part hereof (the "Easement Area").*

### **Construction Easement**

*The construction of the Pipeline, the easement and right-of-way granted herein shall include areas necessary for construction, construction operations, equipment, and materials, as more particularly defined and set forth on Exhibit B attached hereto (the "Temporary Workspace"). Except as otherwise depicted on Exhibit B, the width of the*

*Temporary Work Space shall be in addition to the width of the Easement Area and shall be no greater than twenty-five (25) feet (i.e., a permanent easement fifty (50) feet in width and a temporary construction easement of twenty-five (25) feet in width), except that there shall be "Additional Temporary Workspace" at each bore location and each road, ditch, waterway crossing, buried utility crossing, turnaround and location of side slope or uneven terrain and any other work area that is in addition to the Easement Area and Temporary Work Space, as the same are depicted on Exhibit B. Grantee shall stake the outside boundary of the Temporary Work Space during construction. No construction or installation of the Pipeline, nor any other activities or operations of Grantee, including pipe storage, shall occur beyond or outside the boundaries of the Temporary Workspace and the Easement Area, unless otherwise agreed to by the Parties. Use of the Temporary Workspace shall permanently expire upon completion of construction of the Pipeline and reclamation of the Temporary Workspæ*

### ***Right of Entry***

*During construction and reclamation Grantee and its officers, agents, employees, contractors, and representatives shall have the right to use existing access roads, as outlined in Exhibit C, if any, for purposes of construction and reclamation. Right to access across the Property as specified under this Section 1.6 shall expire after two years. Upon expiration of access rights, access will be limited exclusively to the Right-of-Way or as otherwise agreed to in writing between the Parties. Permanent access if any shall be agreed to by the Parties in a separate written agreement.*

*Except in the event of an emergency or as required by applicable laws and or regulations, including but not limited to in response to a line locate (e.g., ONE Call), valve inspections and cathodic protection readings, Grantee shall make reasonable efforts to provide a minimum of twenty-four (24) hours prior notice to Grantor before entering the Property. To minimize risk of damages or operational impacts, however, Grantee shall provide as much advance notice to Grantor as is practicable. During continuous work activities such as construction projects, continuous notification is not required. Grantee shall notify Grantor upon completion of construction.*

### ***Emergency Access***

*Except in cases of emergency or as otherwise provided herein, Grantee shall not enter upon the Property beyond the boundaries of the Easement Area without Grantor's prior consent. The determination of what constitutes an emergency is within Grantee's absolute discretion but is subject to Grantor's right to compensation for all damages suffered as a result thereof. Grantee shall make reasonable efforts to advise Grantor of the emergency circumstances within twenty-four (24) hours following entry upon the Property.*

### **Grantor's Reserved Rights**

This portion of the easement sets forth the rights that are to be reserved by the grantor of the easement. Following is a typical example of a set of rights that might be found in an easement:

#### ***Grantor's Rights***

*Provided it does not materially interfere with or prevent the exercise by Grantee of its rights hereunder or create an actual or potential hazard to the Pipeline or its appurtenances, Grantor reserves for himself, his successors, heirs and assigns, the right to use the Easement Area for any purpose, including agriculture, ranching, farming, grazing of livestock, or any other use which is necessary and incidental thereto; developing surface or subsurface mineral, oil, or gas resources, or any other use which is necessary and incidental thereto; cutting timber; drilling and development of water for commercial or private use; hunting, fishing, and other recreational activities; and to otherwise fully use and enjoy the Easement Area.*

*Notwithstanding the foregoing, Grantor shall not drill wells, excavate, alter the ground elevation or grade, construct any dam, building, or structure, plant any trees or shrubs, or otherwise create a water impoundment within or over the Easement Area without prior written authorization of Grantee, which shall not be unreasonably withheld. Withholding of authorization shall be deemed reasonable if important to maintain the safety or integrity of the pipeline or if required by applicable laws and/or regulations. Grantee shall make reasonable efforts not to disturb Grantor's use of and activities on the Easement Area to the extent such use and activities are consistent with Grantee's rights under this Agreement.*

*Grantor hereby reserves the right to cross the Easement Area and Pipeline at any time with agricultural equipment necessary to conduct normal and customary farming and ranching of the Property.*

*Grantor hereby reserves the right to cross the Easement Area with fences and roads and to maintain the same provided that (i) the crossings are as close to ninety (90) degrees as is practicable, (ii) Grantor makes appropriate One Call notifications, (iii) cover is not removed from over top of the Pipeline, (iv) any fence posts are installed at least five feet (5') from the centerline of the Pipeline, and (v) Grantee is provided reasonable access to the Easement Area for routine activities.*

*Grantor hereby reserves the right to cross the Easement Area with waterlines and other utility lines ("Other Lines"), provided that (i) the Other Lines cross the Pipeline as close to ninety (90) degrees as is practicable, (ii) Grantor makes appropriate One Call notifications, (iii) any cover removed from overtop of the Pipeline shall be promptly replaced following construction of Other Lines, and (iv) Grantor ensures that a representative of Grantee is present during the construction of the Other Lines.*

*Grantee acknowledges and agrees that Grantor's use of the Easement Area as of the Effective Date is compatible and will not interfere with Grantee's intended use of the Easement Area, subject to the provisions hereof. Further, Grantee agrees that the Pipeline will be constructed in a manner that allows the crossing of the Easement Area by livestock and agricultural equipment.*

### **Consideration or Payment to the Grantor**

*In consideration of the Easement and rights granted in this Agreement (including temporary access), Grantee shall pay to Grantor those amounts set forth in that certain*

*Payment Addendum between Grantor and Grantee, dated as of the Effective Date (the "Payment Addendum"), which shall not be recorded herewith. Until such time that Grantee receives actual notice of the foregoing, Grantee may continue to make any applicable payments to the owner to which it last made payment, or it may suspend payment if there is a disagreement as to whom the then current owner is until such disagreement is resolved to Grantee's reasonable satisfaction. Without written notice of an ownership change described above, Grantee shall not have liability for payments made or withheld, as provided herein, and under no circumstances will Grantee be required to make duplicate payments.*

### **Grantee's Obligations**

*Before, during, and after construction, Grantee will provide Grantor with a contact number, so that Grantor can inquire about specifics concerning the Pipeline, including its construction, operation and all mitigation and restoration efforts associated with the Pipeline.*

*Grantee shall, at all times, keep the Property free and clear of all claims for and/or liens for labor and services performed, and materials, supplies or equipment furnished in connection with Grantee's use of the Property; provided, however, that if such a lien is filed against the Property, Grantee shall indemnify and hold Grantor harmless against the consequences thereof.*

### **Compensation and Indemnity**

*Grantee shall reasonably compensate Grantor for loss or damage to crops, pastures, fences, structures, improvements, waterlines, diversions, irrigation ditches, terraces, tile lines, tanks, timber, pipelines or any other damages to the Property or other lands owned by the Grantor, improvements, personal property or livestock caused by or resulting from Grantee's use or occupancy of the Property, including damages due to installation, construction, operation, location, use, testing, repair, maintenance, removal or abandonment of the Pipeline.*

*(i) Should either (1) a growing crop, hay, grass, forage, rangeland or any cropland be damaged or destroyed, or (2) the agricultural capability of the lands encompassing the Easement Area or the Temporary Work Space be reduced or eliminated by Grantee during the construction, installation, use, operation, maintenance or replacement of the Pipeline, Grantor or tenant shall be reasonably compensated for the loss thereof by multiplying the current market price for the crop by the reduced production as evidenced by comparing yields with adjacent lands within the same growing season or most recent full production from the impacted lands.*

*(ii) Grantee shall compensate Grantor or its tenant for any injury or loss to Grantor's or Grantor's tenant's livestock resulting from construction or Grantee's operations and/or activities on the Property, at the then current replacement price plus reasonable transaction costs for such livestock to make the Grantor and/or its*



tenant whole.

(iii) In the event that Grantee's activities or omissions cause fire on the Property or other lands owned by Grantor, Grantee shall promptly pay to Grantor (1) the reasonable costs of all fire suppression incurred by Grantor, (2) replacement costs for Grantor's fences and any other improvements, including structures, destroyed or damaged by fire, and (3) all other actual damages, including all costs associated with the prevention and control of cheat grass, cactus, or noxious weeds to Grantor as a result of such fire. In addition to the foregoing, Grantee agrees to pay to Grantor One Hundred Twenty Dollars (\$120.00) per acre for all rangeland burned for immediate lost grazing as full and complete satisfaction for said lost grazing for a period of two (2) growing seasons.

### **Assignment**

*Grantor, as used herein, shall mean [landowner], together with his/her/its heirs, executors, personal representatives, successors, and assigns. With respect to Grantor's covenants and agreements under this Agreement, the term Grantor shall be limited to mean and include only the owner or owners of the fee title to the Property at the time in question and any successors, assigns or heirs.*

*The rights granted herein to Grantee may be assigned freely by Grantee in whole, but not in part. In the event of an assignment by Grantee, Grantor shall be provided notice of the assignee within ninety (90) days thereafter. Any such assignment, conveyance, transfer, lease, or sublease of this Agreement made for the purpose of avoiding any obligations of Grantee, including but not limited to financial obligations, indemnification, and reclamation obligations, shall be void.*

### **Termination and Removal**

*Upon the termination or surrender of the rights and privileges provided for in this Agreement, Grantee shall, as soon as practicable thereafter, or within any period prescribed by applicable law or regulation, unless otherwise mutually agreed upon, (a) remove from the Property all above-grade improvements and other personal property owned, located, installed or constructed by or on behalf of Grantee, (b) leave the surface of the Property free from debris arising from the foregoing or from the operations or activities of Grantee, and (c) otherwise reclaim any portion of the Property disturbed by Grantee to a condition reasonably similar to its original condition.*

*Upon the termination or surrender of the rights and privileges provided for in this Agreement, Grantee shall, at Grantor's request, execute, acknowledge, and record a Release of Easement, to Grantor or Grantor's successor in interest. If Grantee determines that it no longer needs the rights granted herein because of a reroute of the Pipeline, or for any other reason, Grantee shall provide notice thereof to Grantor and Grantee, at Grantor's request, shall execute, acknowledge, and record a Release of Easement.*

*Abandonment of the Pipeline and the Easement shall occur if Grantee fails to complete construction and installation of the Pipeline within five (5) years of the Effective Date. Abandonment of the Pipeline and the Easement shall also occur if Grantee ceases to operate or maintain the Pipeline for the transportation of the Product for a period of five (5) consecutive years. Abandonment of the Pipeline shall not under any circumstance entitle Grantee to a refund of all or part of any compensation previously paid to Grantor. Grantee shall notify Grantor as soon as practicable of any intent to abandon the Pipeline. Upon the abandonment of the Pipeline, Grantee shall either: (i) remove the Pipeline with full reclamation of the Property; or (ii) abandon the Pipeline in place in accordance with all applicable regulations and laws. If Grantee elects to remove the Pipeline as opposed to abandoning the Pipeline in place, Grantee shall seek prior consent from Grantor, which consent shall not be unreasonably withheld or denied but may be conditioned upon Grantee providing a reclamation bond or other form of financial assurance to cover the costs of reclamation. The indemnity provisions hereof shall survive the expiration or termination of this Agreement and shall not be construed to relieve any insurer of its obligations to pay claims consistent with the provision of a valid insurance policy and shall inure to the benefit of Grantor and any successor and assignee of Grantor and shall be binding upon Grantee, its successors, and assigns.*

### **Force Majeure**

*If performance of this Agreement or of any obligation hereunder (other than an obligation to pay any compensation as set forth in the Payment Addendum) is prevented or substantially restricted or interfered with by reason of an event of Force Majeure, Grantee, upon giving written notice to Grantor, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference. Grantee shall continue performance hereunder whenever such causes are removed. Force Majeure shall mean causes beyond the reasonable control of and without the fault or negligence of Grantee, and in any case whereby exercise of due foresight Grantee could not reasonably have expected to avoid, and which, by the exercise of due diligence, it is unable to overcome.*

### **SECTION 8 – PROBLEMATIC EASEMENTS**

A practicing land surveyor is certain to come across easements that are problematic. Sometimes the problems are due to faulty legal descriptions containing incorrect captions, typographical errors, blunders, or simply legal descriptions that do not plot the intended area. Oftentimes these issues can be resolved by identifying the source of the problem and making a reasonable determination of the scrivener's intent.

Some problematic easements are not the result of any particular faults in their preparation but are instead problematic by their very style. A commonly encountered problematic easement style is the blanket easement. Following is an example of typical language in the description of a blanket ingress and egress easement:

*“...together with an easement for the purposes of ingress and egress, over and across the land of the Grantor.”*

This type of undefined easement may also be called a floating easement or a roving easement. A blanket easement is problematic in one sense because it places a burden upon the entire servient estate. It also can be problematic because it grants the dominant estate tremendous freedom to choose the location of its usage.

Complicating matters for surveyors is the fact that blanket easements cannot be depicted definitively on a survey plat. Evidence of use by others can be shown and associated with a blanket easement, but this uncertainty has been known to cause difficulties with financing and title insurance.

Another type of problematic easement is the hidden easement. This may come in the form of an unwritten easement, which is legally binding but is undiscoverable in the course of normal legal research or title examination. Easements of which no observable evidence exists are also a source of problematic hidden easements. Underground utility pipelines are a notorious cause of hidden easement issues. A long-buried pipeline which has no visible evidence on the surface of the ground and for which there exists no written evidence in the public record are virtually undiscoverable, however a surveyor may be blamed for failing to show such a pipeline on his or her plat of survey. Especially if the pipeline is found to interfere with development or construction.

Additionally, several other types of easements are problematic for surveyors because they are undefined in location, dimension, or both. Easements by implication, necessity, prescription, estoppel, and custom are a few examples where this is often the case.

## **SECTION 9 – EASEMENT DESCRIPTION EXAMPLES**

### **Example 1**

#### **An as-built description with a limiting factor in the metes and bounds style:**

Following is an example of an easement description that is defined by the as-built location of a pipeline, with the condition that the pipeline is limited to a specific location. In this case, the condition states that the pipeline is to be located within 50 feet of the line that is described by a metes and bounds style legal description. At the moment the pipeline is installed in accordance with the conditions set forth, the surface location of its centerline becomes the centerline of a 20-foot-wide easement. If any part of the pipeline is installed outside the limit, which is in this case 50 feet from the line described, the easement is void and trespass has occurred.

Note that language for additional easement rights is included following the body of the description for the perpetual easement. A temporary construction easement and an easement for underground boring operations are included. The temporary easement for underground boring operations is intentionally vague because part of this project requires the placement of a large steel casing beneath a State Highway. This generally requires a large and irregular operating space for the excavation of bore pits, the operation of equipment, and the placement of material.

Also, there is a clause at the end of this description excluding any land occupied by a building. This clause is a good protection for the landowner.

**LEGAL DESCRIPTION  
FOR A  
UTILITY RIGHT-OF-WAY EASEMENT**

*Grantor: The Board of Commissioners of Warrick*

*Grantee: City of Boonville*

*Reference Deed: Deed Record 11, Page 603*

*Subject Parcel No. 87-09-36-200-007.000-002*

*A perpetual easement situated in part of the east half of the northeast quarter of Section 36, Township 5 South, Range 8 West, in Warrick County, Indiana, being more particularly described as follows:*

*A 20-foot strip of even width, centered upon the water pipeline as installed with the condition that said pipeline is installed within 50 feet of a line commencing at the southeast corner of the east half of the northeast quarter of Section 36; thence along the south line said east half, north 88 degrees 42 minutes 01 seconds west a distance of 678.80 feet to the point of beginning; thence along the following courses:*

*north 00 degrees 00 minutes 27 seconds west, a distance of 887.65 feet;  
thence south 86 degrees 22 minutes 24 seconds east, a distance of 80.05 feet;  
thence south 76 degrees 58 minutes 15 seconds east, a distance of 146.90 feet;  
thence south 69 degrees 06 minutes 42 seconds east, a distance of 165.90 feet;  
thence south 67 degrees 12 minutes 24 seconds east, a distance of 273.30 feet;  
thence north 90 degrees 00 minutes 00 seconds east, a distance of 20.55 feet;  
thence north 01 degrees 12 minutes 17 seconds east a distance of 1425.95 feet;  
thence north 36 degrees 06 minutes 50 seconds east a distance of 33.59 feet;  
thence north 01 degrees 55 minutes 50 seconds east a distance of 210.75 feet;  
thence north 08 degrees 31 minutes 41 seconds west a distance of 87.34 feet;  
thence north 00 degrees 00 minutes 00 seconds east, a distance of 85.40 feet;  
thence north 38 degrees 00 minutes 46 seconds west a distance of 52.99 feet;  
thence north 00 degrees 00 minutes 00 seconds east, a distance of 43.64 feet to the point of terminus.*

*Together with:*

*A temporary easement for the purpose of construction in the form of two 20-foot strips parallel with and adjoining each side of the above-described perpetual easement.*

*Also:*

*A temporary easement as necessary for the purpose of underground boring operations.*

*Note: The above described perpetual and temporary easements shall exclude any land presently occupied by a building.*

## **Example 2**

### **An as-built description of multiple locations on one parcel:**

This example description is for an easement required for the location of a network of electrical conduits and other electrical facilities on one property. This easement involved two public entities as the local city sought to install electrical facilities across the county's courthouse property. Permission to install the facilities was granted by the county government with the understanding that a written easement would be executed after the completion of construction.

In this case, the language sets the actual location of the utility lines as the controlling factor, with general locations given in the metes and bounds style. Allowing the physical location to control eliminates the chance for discrepancies that might occur due to incorrect utility marking or misunderstanding of the underground location of the electrical facilities. Where underground utilities are involved, uncertainty of actual location is a given.

### ***LEGAL DESCRIPTION FOR A PERPETUAL UTILITY EASEMENT***

*Grantor: The Board of Commissioners of Warrick County*

*Grantee: City of Boonville*

*Reference Deed: Deed Drawer 3, Card 1069*

*Subject Parcel No. 87-09-26-400-186.000-003*

*A perpetual easement situated in the Courthouse Square of the original plat of the Town, Now City of Boonville, Warrick County, Indiana, in the form of a group of 5-foot strips of even width centered upon the location of electrical facilities, both below ground and above ground, as installed, with the centerlines of said strips being generally described as follows:*

*Commencing at the southeast corner of the Courthouse Square in the original plat of the Town, now City of Boonville;*

*thence N 36°54'39" E a distance of 20.99 feet to the point of beginning;*

*thence N 01°16'52" E a distance of 100.71 feet;*

*thence N 04°57'42" W a distance of 12.28 feet;*

*thence N 03°02'19" E a distance of 67.10 feet;*

*thence N 14°05'41" E a distance of 12.93 feet to the point of terminus.*

*Also:*

*Commencing at the southeast corner of the Courthouse Square in the original plat of the Town, now City of Boonville;*

*thence N 47°17'49" W a distance of 21.91 feet to the point of beginning;*

*thence N 14°43'29" W a distance of 71.87 feet;*

*thence N 10°47'58" W a distance of 22.63 feet;*

*thence N 06°28'07" W a distance of 15.92 feet;*

*thence N 01°54'32" E a distance of 30.44 feet;*

*thence N 21°28'33" W a distance of 9.87 feet;*

*thence N 48°02'10" W a distance of 28.34 feet;*

*thence N 57°22'46" W a distance of 14.05 feet;*

*thence N 33°53'55" W a distance of 21.20 feet;*

*thence N 12°15'19" W a distance of 19.79 feet;*

*thence N 02°57'32" W a distance of 21.38 feet;*

*thence N 27°08'07" W a distance of 16.54 feet;*

*thence N 87°21'32" E a distance of 30.71 feet;*

*thence S 88°41'46" E a distance of 62.54 feet;*

*thence N 67°20'48" E a distance of 9.70 feet to the point of terminus.*

*Also:*

*Commencing at the southeast corner of the Courthouse Square in the original plat of the Town, now City of Boonville;*

*thence N 47°17'49" W a distance of 21.91 feet to the point of beginning;*

*thence N 89°56'11" W a distance of 68.62 feet;*

*thence N 84°17'02" W a distance of 46.57 feet;*

*thence S 87°42'54" W a distance of 62.35 feet;*

*thence N 87°52'04" W a distance of 36.84 feet;*

*thence N 71°38'36" W a distance of 39.33 feet to the point of terminus.*

*Also:*

*Commencing at the southeast corner of the Courthouse Square in the original plat of the Town, now City of Boonville;*

*thence N 47°17'49" W a distance of 21.91 feet;*

*thence N 14°43'29" W a distance of 26.90 feet to the point of beginning;*

*thence N 47°25'49" W a distance of 65.23 feet;*

*thence N 34°34'22" W a distance of 8.81 feet to the point of terminus.*

*Also:*

*Commencing at the southeast corner of the Courthouse Square in the original plat of the Town, now City of Boonville;*

*thence N 47°17'49" W a distance of 21.91 feet;*

*thence N 89°56'11" W a distance of 68.62 feet;*

*thence N 84°17'02" W a distance of 22.43 feet to the point of beginning;*

*thence N 75°45'01" E a distance of 4.11 feet;*

*thence N 56°32'04" E a distance of 9.06 feet;*

*thence N 23°46'17" E a distance of 34.58 feet;*

*thence N 19°19'35" E a distance of 31.99 feet;*

*thence N 46°11'30" E a distance of 22.36 feet;*

*thence N 36°40'43" E a distance of 24.59 feet to the point of terminus.*

Note that this description includes no language for any temporary construction easements or any other rights relating to the installation of the electrical facilities. This is because the installation had been completed prior to the preparation of this description.

### **Example 3**

#### **A perpetual easement for drainage in the metes and bounds style:**

This example represents a straightforward metes and bounds style legal description that is familiar to surveyors. Unlike the previous examples, this easement does not refer to an as-built location. Rather, it specifically identifies a 20-foot corridor in which a drainpipe is to be installed.

Notice in this case that a spatially undefined temporary construction easement is included. This is due to the fact that this property was on a steep and wooded hillside where construction was certain to be more complicated than usual.

#### ***LEGAL DESCRIPTION FOR A PERPETUAL DRAINAGE EASEMENT***

*Grantor: Michael J. Brown*

*Grantee: Morgan County Rural Water Corporation*

*Reference Deed: Instrument 202001616*

*Subject Parcel No.: 55-09-19-400-017.000-014*

*A 20-foot-wide perpetual easement situated in part of northeast quarter of the south half of Fractional Section 19, Township 12 North, Range 1 East, in Morgan County, Indiana, being more particularly described as follows:*

*Commencing at the southeast corner of the northeast quarter of the south half of Fractional Section 19; thence along the south line of the subject parcel, south 89 degrees 18 minutes 29 seconds west, a distance of 197.04 feet to the southwest corner thereof; thence along the west boundary line of the subject parcel, north 11 degrees 12 minutes 17 seconds east, a distance of 175.25 feet to the point of beginning; thence continuing along said boundary line, north 11 degrees 12 minutes 17 seconds east, a distance of 20.33 feet; thence south 68 degrees 24 minutes 38 seconds east, a distance of 87.16 feet; thence south 21 degrees 35 minutes 22 seconds west, a distance of 20.00 feet; thence north 68 degrees 24 minutes 38 seconds west, a distance of 83.50 feet to the point of beginning, containing 0.04 acres, more or less.*

*Together with:*

*A temporary easement over and across the subject parcel as necessary for the period of construction, excluding therefrom any land occupied by a building.*

#### **Example 4**

#### **A description of a strip for ingress and egress in the metes and bounds style:**

The following example is a legal description for a 20-foot-wide ingress and egress easement describe in terms of its centerline.

Notice the clause following the main body of the legal description. It is important when dealing with strip-style descriptions to consider how that strip terminates at the boundary lines of the subject parcel. If the strip is defined by a centerline terminating at a boundary line in a non-perpendicular manner, sidelines established at an offset of the centerline will create a triangular overlap on one side and a triangular gap on the other side. A statement clarifying that the sidelines of the strip are to terminate at the boundary is beneficial. Similarly, when the centerline of a strip contains bends, the sidelines, if placed at a true offset, are subject to gaps and overlaps. A statement declaring that the sidelines are to meet at angle points is a useful clarification.

#### ***EASEMENT DESCRIPTION FOR AN INGRESS AND EGRESS EASEMENT***

*Grantor: Edinburgh, LLC*

*Grantee: Eastern Bartholomew Water Corporation*

*Reference Deed(s): Instrument 200400020491*

*Subject Parcel No.: 03-05-15-000-000.216-009*

*Part of Lot Numbered One-B (1-B) in Market Place Industrial Park, Phase One, Replat of Lot 1, as recorded in Plat Book P, Page 344B, in the Office of the Recorder of Bartholomew County, Indiana, in the form of a continuous 20-foot-wide strip, the centerline of which is described as follows:*

*Commencing at the northeast corner of Parcel 03-05-15-000-000.216-009; thence south 87 degrees 46 minutes 56 seconds west, a distance of 359.55 feet to the point of beginning; thence south 2 degrees 18 minutes 27 seconds east, a distance of 29.40 feet; thence north 87 degrees 46 minutes 56 seconds east, a distance of 313.95 feet; thence south 2 degrees 23 minutes 23 seconds east, a distance of 354.55 feet; thence along a non-tangential curve which is concave to the northwest, a distance of 156.24 feet to the point of terminus, (said curve has a radius of 424.28 feet, a chord length of 155.40 feet, and a chord bearing of north 38 degrees 51 minutes 40 seconds east).*



*Note: The sidelines of the above-described easement shall be lengthened or shortened as required in order to conform to the limits of the subject property and to meet at angle points.*

### **Example 5**

#### **An as-built description for a strip limited by a distance from a roadway:**

In this example, consider an easement required by a utility company installing an underground pipeline. Even though engineering has been done and the best possible route for the pipeline has been selected, unforeseen conditions associated with construction may be discovered and because of this, it is not always practical to limit the easement to a narrow corridor prior to excavation. Unknown utility facilities, the presence of underground rock and the discovery of artifacts are but a few reasons why such routes may need to be modified. In these situations, it is often wise to prepare a description that uses the as-built location of the facility to control the location of the easement, but with a limitation placed upon the location. In the case of this example, for the easement to be valid the pipeline must be installed within 85 feet of the center of the adjacent roadway. This style of description offers flexibility to the easement holder while offering a level of protection to the landowner.

#### ***LEGAL DESCRIPTION***

#### ***FOR A***

#### ***UTILITY RIGHT-OF-WAY EASEMENT***

*Grantor: Merlin Jay Wiggins with transfer on death to Elizabeth Ann Hunt*

*Grantee: Gwaltney Natural Gas Distribution*

*Reference Deed(s): Instrument 2013R-02314*

*Subject Parcel No.: 74-17-08-200-021.000-017*

*A perpetual easement situated in part of the south half of the southwest quarter of the northwest quarter of Section 8, Township 8 South, Range 6 West, in Spencer County, Indiana, being more particularly described as follows:*

*A 20-foot strip of even width centered upon a pipeline as installed, with the condition that said pipeline is installed within 85 feet of the physical centerline of County Road 350 South.*

*Together with:*

*A temporary easement for the period of construction, being 20 feet in width, parallel with and adjoining the above-described perpetual easement and a temporary easement as necessary for*

*the purpose of underground boring operations, excluding therefrom any land occupied by a building.*

*Note: The sidelines of all strips described above shall be lengthened or shortened as necessary in order to conform to the limits of the subject property.*

### **Example 6**

#### **An easement in the form of a strip of even width off a specific part of a parcel:**

This style of easement description is quite simple and effective. Only questions regarding the location of the parcel boundaries can confuse the location of this sort of easement, with the intent being obvious.

*Grantor: Daniel Joseph Fields and Beverly Kay Fields*

*Grantee: Southern Indiana Gas and Electric Company*

*Reference Deed(s): Instrument 2001-00004577*

*Subject Parcel No.: 42-17-091200-020.000-002*

*A perpetual easement situated in part of the southeast quarter of the southwest quarter of the northwest quarter of Section 7, Township 5 South, Range 7 West, in Knox County, Indiana, being more particularly described as follows:*

*A 10-foot strip of even width off of the north side of the subject parcel, identified as Parcel 42-17-091200-020.000-002.*