Law of Easements

This document is a review of the law of easements. You may also be interested in our video discussion on Easements and Well Sharing.

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I.

Overview

Easements differ from estates in land in that they are nonpossessory interests. An easement does not give the holder a right of possession but rather a right to use something from the possessory estate of another. This presentation is meant to give a general overview of the law of easements, beginning with some definitions and moving on to explain the

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ways in which easements may be created and enforced.[1]

II. Definitions
a. Easement
An easement is a nonpossessory interest in the land of another that entitles the easement holder to limited use of another’s land without interference. ORS 105.170 (1). An easement holder is a person with a legal right to use the easement and may include the owner of the land across which the easement passes. ORS 105.170 (2).[2] Because the land crossed by the easement is burdened by the easement, it is referred to as the “servient estate.”
An easement, unless specified otherwise, creates an unlimited reasonable use of the servient estate. Verzeano v. Carpenter, 108 Or.App. 258, 815 P.2d 1275 (1991). The scope of an easement is not defined by its physical characteristics, but by its purpose, and it has been stated that, [A]n easement holder can make only such use of an easement as is reasonably necessary to accomplish the purpose for which the easement is granted and the remaining dominion over the land upon which the easement lies continues with the servient landowner. Clark v. Kuhn, 171 Or.App. 29, 33, 15 P.3d 37 (2000) (emphasis added). Further, in order for any easement agreement to satisfy the Statute of Frauds, it must be in writing. Oltmanns v. Lewis, 135 Or.App. 35, 38, 898 P.2d 772 Or.App. (1995). In certain instances, partial performance of an oral agreement, coupled with adequate equitable grounds, may be sufficient to take the agreement out of the Statute of Frauds. Id. at 39.

An easement may be prescriptive, implied, or explicitly agreed upon. Foster Auto Parts, Inc. v. City of Portland, 171 Or.App. 278, 15 P.3d 573 (2000) (prescriptive easement created by a 10 year period of certain use). Further, an easement may be affirmative, which permits an easement holder to do certain acts on the servient estate, or negative, in which the landowner is prohibited from making a particular use of his or her land. Duester v. Alvin, 74 Or. 544, 145 P. 660 (1915).
Easements can be further broken down into easements appurtenant and easements in gross. The characterization of an easement as appurtenant or in gross is important because certain rights transfer with one and not the other. There is an extremely strong constructional preference for the finding of an easement appurtenant rather than in gross. Sunset Lake Water Service Dist. v.
1. **Appurtenant**

Easements appurtenant are adjacent to the servient estate. If the dominant estate is sold or otherwise transferred to another, the easement over the servient land is transferred with it. See, *Cappelli v. Justice*, 262 Or. 120, 496 P.2d 209 (1972); *Steelhammer v. Clackamas Co.*, 170 Or. 505, 135 P.2d 292 (1943); *Parrott v. Stewart*, 65 Or. 254, 132 P. 523 (1913); see also *Scott v. Curtis*, 103 Or.App. 389, 798 P.2d 248 (1990). There is a strong preference for finding that an easement is appurtenant *Verzeano v. Carpenter*, 108 Or.App. 258, 815 P.2d 1275 (1991).

2. **In Gross**

Easements in gross are unrelated to the easement holder’s possession of a dominant estate and do not ordinarily transfer with title to an adjacent property. In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances, giving effect, as far as possible, to the legally ascertained intention of the parties. *Ruhnke v. Aubert*, 58 Or. 6, 113 P. 38 (1911). There is a strong preference for finding that easement is appurtenant. See *Verzeano v. Carpenter*, supra.

As a general rule, easements in gross are not transferable unless transfer is specifically authorized in the instrument creating the easement. However, if the easement has commercial value, unless there is an express intent to limit alienability, the commercial easement in gross has the same attributes of alienability as other interests in property. *Sunset Lake Water Service Dist. v. Remington*, 45 Or.App. 973, 609 P.2d 896 (1980).

b. **License**

A license is a privilege granted by a landowner to a person allowing use of the landowner’s property for a particular purpose. *Dority v. Hiller*, 162 Or.App. 353, 357, 986 P.2d 636 (1999). A license need not be in writing to satisfy the Statue of Frauds. *Sproul v. Gilbert*, 226 Or. 392, 359 P.2d 543 (1961). Generally, a license is personal to the individual who received it, is not transferable, and is freely revocable. *Hanscam v. Sousa*, 56 Or.App. 117, 641 P.2d 86 (1982). However, a license may become irrevocable if the landowner’s promise to allow a use of the land for an unlimited time induces the other party to make significant expenditures for permanent improvements that are consistent with the consented use. *Dority v. Hiller*, 162 Or.App. 353, 357, 986 P.2d 636 (1999). An irrevocable license is paramount to an easement.

c. **Profit a Prendre**

A profit a prendre is the right to take a profit from land. *Jackson County v. Compton*, 289 Or. 21, 609 P.2d 1293 (1980). Examples of a profit a prendre include a grant to allow (1) a hunter to remove trapped or shot game from another’s land, *Forsyth v. Nathansohn*, 139 Or. 632, 637, 11 P.2d 1065 (1932); (2) a rancher to graze livestock on the land of another, *Sproul v. Gilbert*, 226 Or. 392, 359 P.2d 543 (1961); or (3) a person to remove rock or minerals from another’s land, *Jackson County v. Compton*, 289 Or. 21, 609 P.2d 1293 (1980). A profit a prendre confers two rights upon the grantee - a license which authorizes the grantee to enter upon the landowner’s real property and authorization to the grantee that he or she is permitted to carry away certain things from those lands. *Forsyth v. Nathansohn*, 139 Or. 632, 637, 11 P.2d 1065 (1932). A profit a prendre necessarily operates as an easement to allow a person onto another’s land for the purpose described in the grant. *High v. Davis*, 283 Or. 315, 322, 584 P.2d 725 (1978). Therefore, it must satisfy the
Statute of Frauds. *Id.* Unless an exclusive profit is granted, the owner of the servient estate also retains the right to take profits from the land. Herman H. Hahner, *An Analysis of Profits a Prendre*, 25 OR.L.REV. 217 (1946).

**III. Creating Easements**

There are numerous ways of creating easements. The manner in which the easement is created will necessarily dictate the scope of the easement and the extent of the encumbrance on the underlying real property. For example, the grantor of an express easement can specify the nature, extent and precise location of the easement. In defining the scope of an implied or necessary easement, the nature, extent and location must be reasonable under the circumstances. In the case of a prescriptive easement based upon historic use, the easement will be limited to the nature, extent and location of the prior use. In drafting an express easement, the parties should clearly define the scope and location of the allowable use at the time of creation. Otherwise, it may be left to the courts to determine the original intent of the parties, in hind-sight, when problems arise regarding the use of the easement.

**a. Federal Law.**

1. **Public Land Law**

   1. **Right of Way Act of 1891.**

Certain federal laws have granted easements for activities that benefit the public interest. Congress enacted the Right of Way Act of 1891, which regulated easements across the public domain. This Act granted to ditch and canal companies a right-of-way across the public lands and reservations. 43 U.S.C. § 946. The sole authorized purpose of such rights-of-way, initially, was irrigation, but the Act was later amended to include a number of “subsidiary” purposes such as domestic uses, transportation and water power. *Id.*

The Right of Way Act of 1891 creates a clear easement extending to 50 feet on either side of the actual banks of the canal or ditch, and authorizes the holder to use “material, earth and stone” from adjacent public lands for construction of the ditch or canal. *Id.* Easements under both the 1894 Carey Act and the Right of Way Act of 1891, are subject to forfeiture for nonuse. *E.E. Eggebrecht, Inc. v. Waters*, 704 P.2d 422 (Mont. 1985).

1. **Carey Act**

In August, 1894 Congress enacted the Carey Act, which formally granted the right to water conveyance easements across the public domain. The Act provides:

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued ... the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed....


The effect of the Carey Act was to grant an easement across federal land to the holder of any vested
water right. Once the U.S. government conveyed the land, no new easements could be created through the Carey Act, but all existing ones were effectively “grandfathered.” These easements can be lost or forfeited by nonuse regardless of the intent of the appropriator. Smith v. Hawkins, 10 Cal. 122, 42 P. 453 (1895)

Noland construed Oregon law to state that water rights held abandoned for one year or more are open to relocation and possession by another locator. Noland v. Coon, 1 Alaska 36 (1890). Some states, such as California, had their own version of law concerning easements across state land prior to the Carey Act. Jennison v. Kirk, 98 US 453, 25 L. Ed. 240 (1878). Carey Act easements are typically among the older easements in a district’s portfolio, and the actual water delivery system may be correspondingly out of date. Districts may wish to modernize certain features of these older systems - for example, a district may wish to line an unlined ditch to prevent leakage. Courts outside of Oregon have occasionally held such action is not authorized under current law. See Krieger, 119 Cal. App. 3d 137 (1981).

Case Law Update:
Krieger v. PGE, 119 Cal. App. 3d 137 (1981). The holder of a Carey Act ditch easement wanted to line its irrigation ditch with gunnite to prevent leakage, but the court refused to allow it. The court held that the ditch had to be maintained in the condition it was in at the time the land was patented. The court reasoned that the easement holder could not now “expand” the scope of the easement by changing the nature of the ditch.

Case Law Update:

The court in Hutcheson granted a preliminary injunction to prevent Tulare Irrigation District (TID) from going forward with any aspect of its project to line a canal unless the district had a fee simple interest in the property traversed by the canal. The nature of the plaintiffs’ enjoyment of the servitude consisted of increased property value and aesthetic pleasure resulting from the canal. The easement granted to TID did not give it the right to line the canal, thereby expanding the easement and increasing the burden upon the servient estates. This issue has not been addressed in Oregon.

Finally, Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976. Unlike the Carey Act and the Right of Way Act of 1891, which were direct easement grants to people utilizing the public domain, FLPMA only authorizes the executive department to grant easements for the transportation of water. 43 U.S.C. § 1761(a). Vested rights-of-way were grandfathered under FLMFA (43 U.S.C. § 1769(a)), but federal regulations apply to those preexisting rights-of-way to the extent that the regulations do not diminish or reduce any rights conferred by the preexisting grant. 43 CFR § 2801.4. Easements granted under FLPMA have a finite term and must be renewed before expiration. 43 CFR § 2801.1-1(h). Further, failure to use the right-of-way for a period of five years creates a rebuttable presumption of abandonment. 43 CFR § 2803.4(c).

b. State Statutory Law.
In addition to private contractual or common law easements, Oregon has adopted statutes governing easements for public benefit and easements across state lands. Under these laws, for example, private property may be encumbered by easements for protection of natural resources, or public
property may be encumbered by easements for irrigation purposes. These materials address a few of the statutory provisions regarding public easements over private lands and private easements over public lands.

1. **Conservation and Highway Scenic Preservation Easements**

ORS 271.715-271.795 provides for the creation of conservation and highway scenic easements, creating nonpossessory interests in real property that impose limitations and affirmative obligations to protect natural resources, including land, air, water, cultural, historic and scenic values. The “holder” or “grantee” of these kinds of easements can be the state or any county, metropolitan service district, city, or park and recreation district, a charitable entity with the purpose to protect natural resources and scenic values, or an Indian tribe. While not mandatory, the “holder” of the conservation easement may make and enforce reasonable rules, regulations, orders or ordinances governing the care, use and management of its conservation or scenic highway easements. ORS 271.775.

A property owner who grants a conservation or scenic highway preservation easement is entitled to a reduction in tax assessed value based upon the existence of the easement. The easement shall be exempt from assessment and taxation the same as any other property owned by the particular “holder.” ORS 271.785. This tax advantage creates a valuable incentive for the tax payer to protect the natural resources on the land.

Other Oregon statutes also look to conservation easements to protect natural resources on private property. For example, in siting destination resorts, ORS 197.467 requires the developer to grant a conservation easement sufficient to protect the resource, if a site is designated for protection under an acknowledged comprehensive plan pursuant to open space, scenic and historic areas and natural resource goals in an acknowledged comprehensive plan.

2. **Public Easement for Oregon Shore**

ORS 390.610 recognizes the legislative policy to keep Oregon beaches accessible to the public. It is the policy of the state to protect the public interest in unrestricted access to the entire Oregon coast. The State Parks and Recreation Department is charged with promulgating rules for public use of beach property subject to public rights or easements declared under ORS 390.610. This includes property that is available for public use, whether the public easement is obtained by dedication, prescription, grant, state-ownership, permission of a private owner, or otherwise. ORS 390.660. Again, the statute acknowledges the encumbrance of private property for public benefit.

3. **Public Easement for Willamette River Greenway**

ORS 390.310-390.368 recognizes the existing uses along the river, as well as the public interest in preservation of the natural, scenic, historical and recreational qualities of such lands. The State Parks and Recreation Department has the authority to acquire easements in the Willamette River Greenway for exclusive public use for scenic and recreational purposes. The state can acquire these public easements through voluntary agreements or by eminent domain. However, if eminent domain is used, the easement is limited to a scenic easement and will not provide public access to the land for recreational purposes. Furthermore, eminent domain cannot be used to acquire easements...
Water companies organized under an 1891 act are granted an easement across state lands for the ditches, canals, flumes, distributing ditches, and feeders of any corporation appropriating water under the provisions of the Act of 1891, across all lands belonging to the State of Oregon and not under contract of sale, is granted. ORS 541.030.

Similarly, and more inclusively, the State granted an easement across school, submerged and swamp lands “for construction of a water ditch to be used for irrigation, manufacturing or mining purposes, ditches or water pipes for conveying water to political subdivisions for domestic purposes, or for the extinguishment of fires, is granted for a distance of 25 feet on each side of such ditches or water pipes to any person who may construct such water ditches or water pipes over any submersible, swamp or school lands.” ORS 273.761.

Irrigation districts have been given broad statutory authority for the acquisition of easements necessary for the district’s irrigation system. If a landowner is unwilling to grant a right of use for irrigation purposes, the district has condemnation authority to acquire easements that are necessary for the conveyance and distribution of water. ORS 545.239. These statutory provisions protect the private interests of irrigation districts with respect to acquiring easements across public lands.

5. Other Statutes

Other statutory easements include:

- Condominium unit easements, ORS 100.520;
- Solar energy easements, ORS 105.880 to 105.895;
- Wind energy easements, ORS 105.900 to 105.915;
- Scenic waterway easements, ORS 390.805 to 390.925.

c. Private Easements

1. Express Easements

Generally, easements are created by express grant or reservation. Easements are perpetual unless they are expressly limited, or terminated by agreement, abandonment, implication (e.g. necessity ceases to exist), adverse possession, or another means of formal termination. Furthermore, because an easement is an interest in land, the statute of frauds requires that it be in writing to be enforceable. ORS 41.580 (1) (e).

Express easements can be created by additional grants in deeds, by reservations in deeds, or by separate documents. They must be properly acknowledged before a notary in order to be recorded. ORS 93.710 (1). While recording is not necessary for validity, the recorded easement provides constructive notice to third parties that the easement exists. ORS 93.710 (1).

It is essential to define the exact location and scope of the allowable uses in the document creating the easement. If the language is unambiguous and clearly defines the location, nature and extent of the easement, the document will stand on its own, and a court will not have to look to the intent of
the original parties in resolving a subsequent dispute. *Tipperman v. Tsiatsos*, 327 Or. 539, 964 P.2d 1015 (1998) (court first looks to the written instrument, then, only if there is uncertainty or ambiguity, the court will look beyond the wording to the intent of the original parties).

## 2. Easements by Implication

Easements can also be created by implication, through prior use, necessity, or inclusion on a plat. An implied easement is created when an interest in land is conveyed that does not contain an express easement but one is implied as an intended part of the transaction. *Tyska v. Prest*, 163 Or. App 219, 928 P.2d 392 (1999), citing, *Hayward v. Ellsworth*, 140 Or. App 492, 498, 915 P.2d 483 (1996).

The factors that are important in determining whether an implied easement exists are found in 5 *Restatement of Property* § 476: “(a) whether the claimant is the conveyor or the conveyee, “(b) the terms of the conveyance, “(c) the consideration given for it, “(d) whether the claim is made against a simultaneous conveyee, “(e) the extent of necessity of the easement to the claimant, “(f) whether reciprocal benefits result to the conveyor and the conveyee, “(g) the manner in which the land was used prior to its conveyance, and “(h) the extent to which the manner of prior use was or might have been known to the parties.” See *Thompson v. Schuh*, 286 Or. 201, 212, 593 P.2d 1138 (1979).”

### 1. Apparent or Prior Use

If an owner of property sells part of the land to another and there was a previous, apparent use that is important for the enjoyment of the parcel that the common owner sold (e.g. access to water on the adjoining parcel or use of a roadway for access), the courts may imply that the purchaser received an easement, measured by the pre-existing use, over the parcel that the common owner retained. The primary factor is whether a reasonable purchaser would be justified in expecting the easement under the circumstances. There must be a reason for assuming that a right to continue using the quasi-easement is part of the bargain. *Garrett v. Mueller*, 144 Or.App. 330, 927 P.2d 612 (1996), citing, *Dressler et al v. Isaacs et al*, 217 Or. 586, 596-99, 343 P.2d 714 (1959).

The intent of the parties is inferred from the circumstances under which the conveyance was made. Implied easements are not favored by the Courts, and the party claiming the easement has the burden to prove its existence by clear and convincing evidence. *Cheney v. Mueller*, 59 Or. 108, 485 P.2d 1218 (1971); *Jack v. Hunt*, 200 Or. 263, 264 P.2d 461(1953).

### 1. Necessity

If a grantee has no other access to property other than across the grantor’s land, a common law easement by necessity may arise through implication. If an easement is implied based solely on necessity (e.g. access to a landlocked parcel), the easement terminates as soon as the need for it expires (e.g. alternate access is acquired).

If a grantee has no common law remedy available, there is a statutory “way of necessity” under ORS 376.150 to 376.200. ORS 376.150 (2) provides that “[w]ay of necessity” means: (a) A road established under ORS 376.150 to 376.200 to provide motor vehicle access from a public road to land that would otherwise have no motor vehicle access; or (b) A route established under ORS 376.150 to 376.200 to provide utility service access from an existing service location to a service point that would otherwise have no utility service access.
Statutory easements by necessity are disfavored and difficult to establish because the grantee must prove that there is no existing, enforceable access to the subject property and such access could not be obtained by some other legal action. Chambers v. Disney, 65 Or.App. 684, 672 P.2d 711 (1983) (way of necessity may not be established if petitioner could acquire easement through other legal action).

1. Plat Reference

When property is conveyed by reference to lots on a recorded plat, the purchaser acquires an implied easement for the use of the dedicated streets, parks, or other open areas shown on the plat. See Carter and Mason v. City of Portland, 4 Or. 339 (1873); see also Nodine v. City of Union, 42 Or. 613, 72 P. 582 (1903).

3. Prescription

The requirements for establishing a prescriptive easement are similar to those for adverse possession. To obtain a prescriptive easement, a plaintiff must show use of the land as though it were an easement for ten years in an open and notorious manner that is continuous and adverse to the rights of the servient owner. Nice v. Friday, 149 Or.App. 667, 945 P.2d 559 (1997), review denied 327 Or. 82, 961 P.2d 216 (1998), citing Thompson v. Scott, 270 Or. 542, 546, 528 P.2d 509 (1974). ORS 12.050 establishes the 10-year period.

When a prescriptive easement claimant has established open and continuous use for a 10-year period, a presumption arises that the use was made under a claim of right or in a manner that was “hostile” to the interest of the owner of the underlying property. See R & C Ranch, LLC v. Kunde, 177 Or.App. 304, 33 P.3d 1011 (2001), citing Feldman v. Knapp, 196 Or. 453, 250 P.2d 92 (1952). The burden of proof then shifts to the property owner to rebut the establishment of a prescriptive easement by showing that the use was permissive. The presumption of hostility or adversity may be rebutted by proving that the claimant was merely using an existing road that did not interfere with the defendant’s use or by proving that the use was permissive in some other way. Beebe v. DeMarco, 157 Or.App. 176, 180, 968 P.2d 396 (1998); Arana v. Perlenfein, 156 Or.App. 15, 20-21, 964 P.2d 1125 (1998); House v. Hager, 130 Or.App. 646, 651, 883 P.2d 261, 320 Or. 492, 887 P.2d 793 (1994).

The prescriptive easement is “created,” by operation of law, once all the elements have been satisfied, including the open, notorious, continuous and adverse use for a 10-year period. However, if the servient estate holder is unwilling to recognize the right of use, the holder of the prescriptive easement may have to file a law suit to have a court declare that all the mandatory criteria have been satisfied.

IV. Characteristics of Easements

a. Exclusivity of Use

(See Section IIC OWRCW – pages 4-5)

Unless the instrument creating an easement expressly creates an exclusive easement, the rights of the easement holder are nonexclusive. The owner of the underlying land (the “servient owner”) may make any use of the land that is consistent with and does not unreasonably interfere with the rights of the easement owner. Ericsson v. Braukman, 111 Or. App. 57, 62, 824 P.2d 1174 (1992) (servient estate owner may place gate across road easement).

The rights of the easement holder and the servient landowner are relative to each other, not
absolute. If the use by the servient landowner was or should have been contemplated by both parties when the easement was created, it is considered a type of use that is reasonable and should be allowed. The courts look to the express words used in the easement to determine what respective uses were contemplated. *Minto v. Salem Water, Light & Power Co.*, 120 Or. 202, 250 P. 722 (1926) (deed restricted water company to underground improvements, and court refused to allow surface water intake facilities like pump house, pond and ditches).

The servient owner can also authorize others (e.g., lessees) to use the land subject to the easement if there is no interference with the rights of the easement holder. This means, for example, that the underlying property owner theoretically could authorize use of a canal right-of-way for a power line or other utilities without the consent of the irrigation district if there was no interference with the canal. It also means the land owner could subdivide his or her land for residential development, but only if that could be accomplished without unreasonable interference with the purpose of the easement.

**Case Law Update:**


Chevron owned an easement for an interstate petroleum products pipeline. The pipeline was buried at depths varying from 1.5 feet to 3.5 feet. DeRoest acquired the servient estate and placed fill on it until the pipeline was 10.5 to 22.5 feet deep. DeRoest also parked heavy equipment on the easement. The court noted that a rider to the easement recognized that the servient estate was used as a sawmill and lumber was stored on the easement. In light of this, the court refused to enjoin the fill and equipment parking even though it increased Chevron’s “costs, access time, safety risk and liability exposure.” DeRoest’s use did not interfere with Chevron’s use in any way not contemplated when the easement was granted. One factor swaying the court was that DeRoest’s infilling of the pipeline took place gradually over a long time, during which Chevron did not complain. Thus, one lesson of the case is that districts should monitor potential encroachments and not “sleep on their rights.”

**b. Duration**

(See Section IIC OWRCW – page 5)

Unless expressly limited in time, an easement continues until terminated by abandonment or one of the other termination methods discussed below. Irrigation districts should make sure when they acquire new easements that the written agreement specifically states that the term is perpetual and states, as clearly as possible, the types of conditions that would constitute abandonment.

**c. Permitted Uses and Modification of Use**

(See Section IIC OWRCW – pages 5-6)

An easement does not convey the unlimited right to use the covered property. The rights of the easement owner are measured by the purpose and character of the easement. The use of the easement is limited to the use that is reasonably necessary and convenient for the intended purpose of the easement. Of course, the intended purpose is not always clear from the easement language itself. Interpreting an easement often requires an investigation of the intentions and circumstances of the parties at the time of the original grant or reservation. These interpretative problems are particularly difficult with irrigation easements since many of them are very old and the character of the areas where they exist has changed dramatically in recent years.

Generally, unless the easement contains an express statement to the contrary, use of an easement may be adjusted to conform to newly arising needs that the parties reasonably should have expected
to develop in the natural use of the land under the easement. This principle is limited, however, by the rule that an easement owner may not materially increase the burden or impose new burdens on the underlying landowner. Balancing these concerns is not always easy.

**Case Law Update:**


The Jewells owned property for which a spring supplied irrigation water. A prior owner granted a neighbor the right to use 500 gallons per day from the spring. The spring was located in a ravine; its water was retained by a rock and earthen dam that was three feet high. The Kroos bought the neighboring property and wanted to use the spring under the terms of the earlier agreement. To do so, they removed the rock dam and replaced it with a much taller concrete dam, all without the Jewells’ permission. The court found that a larger reservoir was required to enable full use of the 500 gallons per day, and the changes made on the Jewells’ land were consistent with and necessary for the Kroos’ use.

**Case Law Update:**


A property owner filed a quiet title action, claiming that a neighbor’s conversion of a garage structure terminated the written easement agreement covering the garage. The court held that the written easement agreement did not automatically terminate if the garage owner converted the space to a different use. Written easement agreement would terminate only on removal of garage, not upon its different use.

State courts are split on whether an irrigation district acts within the scope of its easement when it upgrades its ditches by lining them with concrete or gunnite to reduce leakage. Compare **Krieger v. Pacific Gas & Electricity**, 119 Cal. App. 3d 137, 173 Cal. Rptr. 751 (1981) (outside scope of easement) with **Papa v. Flake**, 503 P.2d 148 (Ariz. Ap. 1972) (within scope of easement); see **Sierra Club v. Hodel**, 848 F.2d 1068, 1083 (10th Cir 1988) (holding that county may widen road under vested federal road right-of-way because widened road was “reasonable and necessary for the type of use” to which road had been put at time of vesting).

In sum, all the circumstances surrounding the creation of an easement will be examined before a variation will be permitted. Technological and economic changes may well provide a basis for enlarging permitted uses, but irrigation districts should carefully analyze the situation before taking any action.

d. **Location of Easement**

(See Section IIC OWRCW – pages 6-7)

When the location of an easement is not specified in the document creating it, the location may be determined by how the parties have actually used the land since the easement was created. The guiding principle in such cases is that an ambiguous instrument will be interpreted in light of the practical construction given to it by the parties.

Sometimes the instrument creating the easement simply describes the land that it affects with no attempt to specifically locate the easement. This is called a “blanket” easement. See **Spear v. Cook**, 8 Or. 380 (1880). Reserved easements in federal patents were always blanket easements. The rule in such cases is that unless the owner of the underlying servient estate locates the easement, the owner of the easement may do so in a manner that will accomplish the intended purpose with reasonable, minimum levels of damage or interference to the servient estate.
Spear v. Cook, 8 Or. 380.
Spear sold to Cook all the water in Spear Creek, along with an easement to convey the water across Spear’s land. The easement deed gave Cook the right to build, maintain and operate “all claims, ditches pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of [Cook].” Cook initially built a six-inch wood flume on small trestles across Spear’s property that could carry only a portion of the waters of Spear Creek. Spear had no problem with this. Three years later, however, Cook built a much larger flume with a walkway wide enough for people to walk along, nailed in places to Spear’s trees. Cook began floating wood down the new flume. The wood often jammed in the flume, causing water to spill over and damage Spear’s property. Spear sued and lost. On appeal, the Oregon Supreme Court affirmed. The main reason for the affirmance was the very broad easement language, which contained no limits on the location, type or use of the water conveyance. The court held that Spear had to live with the new flume and was entitled to an award only for actual damage caused to his trees and property.

Access, Maintenance and other Secondary Rights

Irrigation ditch owners typically need to enter onto the property across which the ditch flows to inspect it and, if necessary, repair it. Such rights are sometimes referred to as “secondary easements,” see Clesson S. Kinney, A Treatise on the Law of Irrigation and Water Rights§ 990 at 1750 (1912), and their nature and scope are generally matters of common law.

The right and duty to maintain and repair an easement generally rests on the party receiving the benefit from the easement. Unless expressly forbidden, easements are presumed to include the right to enter the landowner’s property for purposes of inspection, maintenance and repair of the easement. Carson v. Gentner, 33 Or. 512, 52 P. 506 (1898). Such rights are subject to the limits discussed in the preceding section on “permitted uses.” The servient owner may be required to aid in the maintenance of the easement as well.

The court held that an owner of land through which a creek flowed could reasonably be required to construct a second water gap in a riparian fence as well as a second access corridor running from adjacent land to water gap. This was based on a 1909 deed which reserved to the adjacent owners’ predecessors in interest the right of “free access” for livestock pasturing on their land to waters of creek.

The easement holder’s failure to maintain and repair an easement violates the rights of the servient owner. If both a servient owner and an easement holder contribute to the damage of the easement, contribution for the costs of repair and maintenance is allowed. A frequent problem in allocating maintenance and repair obligations between several users arises when the easement is damaged by casualty and not by any party’s particular fault.

Carson v. Gentner, 330 Or. 512.
In 1876, Carson took control of a ditch across state-owned “school” lands and used it to divert water for mining purposes. In 1883, Gentner settled on the property and subsequently obtained a homestead patent from the state. The patent did not contain an express reservation of water and/or ditch rights. In 1892, Gentner refused to let Carson on Gentner’s property to repair the ditch.
Carson sued to enjoin Gentner from interfering with Carson’s ditch rights, and won. On appeal, the Oregon Supreme Court affirmed. The court held that Carson had a vested ditch right under an Oregon statute similar to the Carey Act (see present-day ORS 273.761) and held that the right was not dependent on any express reservation in a deed to the patentee.

f. Transfer of Easement Rights
(See Section IIC OWRCW – page 8)
A transfer of the servient property to a third party does not free the property of the burden of the easement unless the grantee is a bona fide purchaser without knowledge or actual constructive notice of the servitude. A purchaser of the servient property and other third parties automatically have constructive notice of easements properly recorded in the deed records. ORS 93.710. A purchaser also will be considered to be on notice of any existing servitudes that would be apparent from a physical inspection of the property. Silvernale v. Logan, 252 Or. 200, 206-07, 448 P.2d 530 (1968) (parties are charged with constructive knowledge of easement if they should have known, “by using reasonable observation and intelligence,” that property was subject to easement). Thus, a purchaser would likely take title subject to unrecorded easements for such things as pipelines or ditches when the existence of such easements might be inferred from inspecting the property. Recording is a crucial step in protecting easement rights.

An easement appurtenant is automatically transferred by a transfer of the estate, or portion thereof, to which it is appurtenant. Such an easement cannot be transferred independently of the dominant estate.

Case Law Update:
The petitioner was granted a perpetual right of way through a gateway, and was concerned that if the gateway were restricted to a perpetual right of way, it would terminate on his death or upon a sale of the property. The statute, ORS 376.115, provides that orders granting a way of necessity shall ‘declare the road or gateway to be a public road or a perpetual right of way.’ A perpetual right of way is an easement of perpetual use. Such a right one which is appurtenant to the land, and if the dominant estate is sold or otherwise transferred to another, the easement over the servient land is transferred as well.

When a dominant estate is subdivided, each grantee is given a right to all appurtenances. Therefore, an easement that was appurtenant to the entire property will continue to be appurtenant to each of the subdivided parcels. An increase in the burden on the servient estate that might unreasonably interfere with the servient owner’s rights, however, would not create easements identical to the underlying easement. In such instances, unless specifically provided otherwise, the underlying easement is apportioned between the grantees in proportion to the conveyance to each. See Ruhnke v. Aubert, 58 Or. 6, 113 P. 38 (1911) (water right passes in same proportion as land sold bears to entire tract).

g. Easements as Collateral
(See Section IIC OWRCW – pages 8-9)
Like other property interests, easements may be used as collateral for loans and other financing arrangements. For instance, an irrigation district may wish to assign a security interest in its easements, along with other property, in order to secure financing for project improvements. Such agreements usually give the holder of the security interest a right to take possession of the collateral in the event of a default under the loan. Sometimes districts actually transfer title in easements to the financing institution, under an agreement allowing the district to continue to use the easement
and providing that upon full repayment of the loan the easements will be reconveyed to the district. Because such conveyances may not be automatic, districts should always be aware of any parties that may have a lien, security interest, or title in their easements, and should seek to extinguish such interests as soon as the underlying loans are repaid.

h. Amendments and Termination

1) Written Agreement

Generally, abandonment occurs only when an easement holder manifests the intent to relinquish the servitude by affirmative conduct. An oral or written statement by an easement holder that the holder intends to give up the servitude does not satisfy the affirmative conduct standard. However, expressions of intent may be introduced to interpret other conduct by an easement holder. Moreover, an easement holder’s statement relinquishing the holder’s rights may serve as a basis for terminating an easement on an estoppel theory if the servient owner detrimentally relied on the statement. In addition, the holder’s statement of an intent to abandon may constitute a release of the servitude if it meets the requirements of the Statute of Frauds for conveying an interest in land. Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land, 10-43 – 10-45, (West Group 2001).

2) Permanent, Temporary and Renewable rights

(See Section IIC OWRCW – page 9)

An easement is extinguished when its stated duration has expired or when the specific purpose for which it was granted no longer can be served by its continued existence. In addition, certain easements may be canceled by the landowner if the easement holder has breached a material term of the easement document.

An easement by prescription will not be extinguished as a result of a change in its use alone, but the prescriptive easement will be extinguished when the change in use puts too great a burden on the servient estate, when it is too different in nature and character from the original use, or when the purpose that the easement serves for the easement holder is greatly changed. An easement can be extinguished by a conveyance, similar in form to a conveyance granting an easement, in which the easement holder releases his or her interest in the servient estate. Because an interest in land is being conveyed, the release should be written and should comply with the formalities of the statute of frauds. If, however, an easement holder orally releases the servient estate and the owner of the servient estate, in reasonable reliance, substantially changes his or her position to his or her detriment, then the oral release will be binding on the easement holder. The easement holder in that event is equitably estopped from denying the release.

3) Merger

If the dominant owner obtains title to the servient estate, the easement will end through the doctrine of merger. The marketability of the property may be reduced unless the easement is renewed or retained.

4) Forfeiture and Abandonment (See Section IIC OWRCW – page 9)

An easement ceases to exist when it is abandoned. This does not mean, however, that a person must make continuous use of an easement once the interest is created. Abandonment occurs only if there is evidence of an intent to permanently abandon the easement. A variation in the use made of the servient estate by an easement holder does not necessarily indicate that intent. Nonuse, alone, is insufficient evidence of an intent to abandon.

Case Law Update:

Curb and bushes installed by neighbors did not demonstrate an intention to abandon an easement across landowner’s property as it did not render access to easement impossible or so impractical as to be virtually impossible. There was testimony that vehicles could drive through the bushes and use the easement, and that neighbor’s service vehicles had in fact used the easement on several occasions to spread bark-dust and perform maintenance on the rear side of their building. In order to show abandonment, easement holders must have expressed or manifested an intent to make no further use of the easement.

If the need to use an easement has not yet arisen, the easement will not be deemed abandoned by the mere passage of time. However, nonuse is relevant evidence of intent to abandon, unless the nonuse is due to forces beyond the easement owner’s control. Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* ¶ 905 [2] at 9-32 (1988). Nonuse of substantial duration may give rise to the inference of an intent to abandon. A greater degree of evidence will probably be required to establish abandonment when such a finding may result in forfeiture of a valuable right.

5) **Vacation**
ORS 368.326 to 368.366 establish vacation procedures by which a county governing body may vacate a public easement or any other public property or public interest in property under the jurisdiction of the county governing body.

6) **Ending of Necessity**
An easement of necessity is extinguished when the necessity on which it is based ends. The concept of an easement of necessity is designed to further the public policy of favoring productive use of land by providing access to landlocked parcels. Once other adequate access becomes available to the parcel in question, there is no public policy reason for the continued existence of the easement of necessity. Consequently, the servitude expires by operation of law. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, 10-18 – 10-19, (West Group 2001).

Case Law Update:
The owner of an easement initiated an action to enjoin the owner of the servient tenement from interfering with the continued use of the easement for ingress and egress. The servient owner counterclaimed for a declaration that the easement was no longer necessary due to the pavement of an alternative route. The court held that lack of necessity did not terminate the express easement, and that paving of a public way did not render continued vehicular use of the easement unreasonable. The alternative public route had existed in unpaved form since the existence of easement. Therefore, the easement for ingress and egress was not limited to an easement by way of necessity because the easement had never been the sole means of ingress and egress.

7) **Eminent Domain**
An easement is terminated when a public authority condemns the fee to the servient estate for a purpose that conflicts with the continued existence of the servitude. Condemnation of an easement or other interest in the servient estate also extinguishes an existing easement to the extent that the easement or other interest created by condemnation is inconsistent with utilization of the existing servitude. For example, an easement may be condemned for a limited access highway that bisects an existing private roadway easement. Further, a public authority may own land subject to an easement and simply condemn the easement itself in order to rid the servient estate of the burden of the servitude. Similarly, a governmental entity may exercise its power of eminent domain to acquire an existing easement in order to use the easement for public purposes.
Whenever an easement is terminated by condemnation, the easement holder is entitled to just compensation. However, controversy often arises as to the value of the easement for purposes of determining the amount of compensation due the easement holder. Courts must consider a variety of issues in litigation over the amount of compensation to which an easement holder is entitled. Special compensation problems arise with respect to the condemnation of existing easements of access to public roads.

The Oregon Department of Transportation (ODOT) has the power to regulate access to a highway in the interest of the public for the protection of the highway or road and the traveling public. ORS 374.305 to 374.325. ODOT’s powers shall not be exercised so as to deny reasonable access to any property adjoining the highway or road. ORS 374.310(3). ODOT has adopted administrative rules governing access management. OAR 734-50-0010, et seq.

Case Law Update:
The court affirmed a summary judgment in favor of ODOT in a condemnation case where a guardrail eliminated the existing highway access to a property. The court held: “Generally, any act by the state that affects the use of a highway for legitimate ‘highway’ purposes does not result in a taking of access rights to the highway that is compensable under Article I, Section 18, even if that action interferes with the abutting property owner’s access to the highway from the property.” The court noted, however, that several Oregon Supreme Court cases support a taking claim where the interference with access was not intended to serve a legitimate highway purpose. The case was not ripe for adjudication because plaintiffs had only applied for one access permit (that was denied) to reopen the old road. They had not shown that ODOT had denied them all reasonable access, nor that alternative applications would be futile. The court left open the issue of whether eliminating all reasonable access would amount to a compensable taking, however, it characterized highway access control as a regulation of the State’s own property, rather than an acquisition of private property. Thus, the case suggests that denial of a highway-access permit from an easement, based on “a legitimate highway purpose,” generally would not be a compensable taking. However, if the only purpose of an easement is for access between the highway and the dominant estate, and there is proof that no other access from that easement could be obtained, there may still be a claim for taking all economically viable use of the property interest in the easement. (See Hanson, below).

Case Law Update:
This condemnation case reaffirmed Curran, and held that a reduction in value of abutting property attributable to legitimate restrictions on highway access is not a compensable taking. This case weighs against the likelihood of success of a takings claim based on the State’s denial of highway access from an abutting easement. (But see Hanson, below).

Case Law Update:
State ex rel. Dept. of Transportation v. Hanson, 162 Or. App. 38 (1999).
The State owned property along a highway subject to an easement, reserved to Hanson’s estate for highway access. When the State condemned part of Hanson’s property to widen the highway, Hanson applied for a permit for access at the easement location, which was denied. The court upheld a jury award to Hanson for inverse condemnation on the theory that Hanson had lost a property right “to a particular route of access.” The court held that the state’s denial of Hanson’s application for a permit to use their easements effectively rendered the easement valueless, which constituted a taking. The court noted the difference between a common-law right of access at an
unspecified location and an easement for access at a specified location.

8) **Discontinuation of Public Rights of Way**

In Oregon, one governmental entity may not generally condemn property already devoted to a public use if the proposed use destroys or so interferes with the existing use of the property that it functionally destroys the existing use. The condemnation of public property in such situations is permitted only where the legislature has expressly or implicitly authorized the acquisition. *See Little Nestucca Road Company v. Tillamook County*, 31 Or. 1, 6, 48 P. 465, 465 (1897); see also *Emerald People’s Utility District v. P.P. & L.*, 302 Or. 256, 729 P.2d 552 (1986) (PUD could condemn a privately owned hydroelectric facility already dedicated to public use where statutory language expressly vested PUDs with that power); and *Pacificorp v. city of Ashland*, 88 Or. App. 15, 744 P.2d 257 (1988).

There is an exception to this rule where the sovereign itself is seeking to acquire public property for its own purposes. In such cases, courts have found that no legislative authority is required for the State to exercise its power of eminent domain. *See State v. Mohler*, 115 Or. 562, 577, 237 P.690, 695 (1925) (distinguishing exercise of inherent power of eminent domain by sovereign from exercise of power by a third-party to whom it has been delegated).

Where condemnation of public property by a governmental entity other than the sovereign is permitted by statute, the original owner is generally entitled to receive compensation. The entitlement to such compensation arises under the constitutional protections of Article I Section 18, which have been extended to certain categories of public property or improvements upon the property by the owner. *See Little Nestucca Road Company v. Tillamook County*, 31 Or. 1, 6-7, 48 P. 465, 466 (1897) (County may not condemn toll road from toll company for county road without first paying fair value for the road).

These same constitutional protections are not generally extended when the sovereign acquires public property used strictly for public use. *See Portland & Willamette Valley Railroad Co. v. City of Portland*, 14 Or. 188, 193, 197, 12 P. 265, 267, 269 (1886) (property for which compensation is required does not include public streets or public places which the city could not sell or use for other than public purposes). However, public property held in a proprietary capacity is subject to constitutional protections due to its quasi-private character. Other jurisdictions have found that this category of property includes that used to supply a municipality with necessities such as water, gas, and electricity. *See e.g., Reclamation District v. Superior Court*, 171 Cal. 672, 680-681, 154 P. 845 (1916).

Under this line of cases, an irrigation district is arguably protected under Article I, Section 18 from uncompensated condemnation of its easements and rights of way by ODOT or other government entities (other than the sovereign itself), since it holds such easements in a quasi-private capacity. The condemning entity would have to compensate the irrigation district for the taking.

9) **Release or Renunciation**

An easement terminates when its holder releases all rights in the servitude to the owner of the servient estate. It also has been held that a profit holder may extinguish the profit by unilaterally surrendering the interest to the owner of the servient estate. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, 10-30, (West Group 2001).

Because an easement is an interest in land, a release of the easement must be in writing in order to comply with the Statute of Frauds. Although an oral release is unenforceable, it may play a role in terminating the easement under the abandonment doctrine by providing some evidence of the holder’s intent to abandon. *Id* at 10-31. Similarly, an oral release may be significant in
extinguishing the easement on an estoppel theory if it is detrimentally relied on by the servient owner. *Id.*

**10) Transfer of Title to Bona Fide Purchaser Without Notice**

The recording system may operate to terminate an unrecorded easement when the servient estate is conveyed to a bona fide purchaser without notice. Whether a prior unrecorded easement is terminated in such a case depends in large measure on whether the servitude was created by express provision, by implication, or by prescription. *Id* at 10-74.

i. **Tort Liability**

(See Section IIC OWRCW – page 10)

Easement holders have certain duties toward third parties who enter lands covered by the easement. The scope of these duties depends upon whether the third party has been invited for some business purpose of the easement holder (i.e., a party constructing a new diversion structure) or is merely allowed or not prohibited from crossing the land (i.e., where a commonly used path follows an irrigation ditch). Generally speaking, an easement holder’s only duty of care toward licensees is not to willfully injure them; on the other hand, for invitees the easement holder must take precautions to avoid any reasonably foreseeable injury. *Martin v. Houser*, 299 F.2d 338 (9th Cir 1962). Irrigation districts are advised to be aware of any third parties who use the land subject to the easement, to determine whether these parties are invitees or not and to take appropriate steps if there are any potentially dangerous features of the irrigation ditch or other facility.

**Case Law Update:**


Houser owned an easement across Martin’s farm and had constructed an irrigation ditch upon it. Martin’s son was chasing a stray cow on a path along the bank of the ditch, tripped and fell into the diversion structure, injuring himself. Martin sued the easement holder and lost. The court held that Martin and his son were not “invitees” of the easement holder; rather, at most, the easement holder simply did not forbid them to travel in the easement on the path above the ditch. Martin and his son were thus mere “licensees,” and as such, Houser owned them only a duty not to willfully injure them. As that clearly had not occurred in this case, Houser was not liable.

j. **Effect of Subsequently Enacted Law and “Reasonable Regulation”**

(See Section IIC OWRCW – pages 10-11)

Easements on private lands are governed by state law and are subject to state regulation. An irrigation district’s use of such easements may be regulated in the same way its use of any of the rest of its property is regulated. The main limits to such regulation are the takings clauses of the Oregon and U.S. Constitutions and the limits on unreasonable agency action found in the state and federal administrative procedures acts. As many districts are aware, these limits are not illusory, and they are not particularly stringent.

A somewhat more complex problem arises when federal agencies attempt to regulate irrigation district’s use of rights-of-way granted by the federal government. In such cases, districts argue that they have vested or “grandfather” rights to continue to operate the easement exactly as they did at the time it vested. Unfortunately, this overstates the case. Courts that have considered the matter have held that federal right-of-way holders are subject to “reasonable regulation” by federal agencies, regardless of when the right-of-way was acquired. *See, e.g., Adams v. United States*, 3 F.3d 1254 (9th Cir 1993) (holding that “Forest Service still has the authority to reasonably regulate” a vested Carey Act water easement); *Grindstone Butte Project v. Kleppe*, 638 F.2d 100 (9th Cir 1981);
In Elko County the court added that regulations that prohibit the use of an easement, or are so stringent as to amount to prohibition, are not “reasonable.” 909 F. Supp. at 764 (citing United States v. Doremus, 888 F.2d 630, 632 (9th Cir 1989)).

Case Law Update:
Elko County Bd. of Supervisors v. Glickman, 909 F.Supp 759.
A group of landowners and ranchers in Elko County Nevada sued the U.S. Forest Service, seeking to enjoin its interference with the landowners’ use of 1866 Act ditch rights across national forest land. The landowners had attempted to maintain and improve century-old diversion facilities at springs located in the Humboldt National Forest. The government brought misdemeanor charges against some landowners and allegedly threatened others with criminal prosecution. The U.S. District Court for Nevada denied the irrigators’ requested injunction and held that even assuming the ranchers had valid 1866 Act rights-of-way, they were still required to obtain a special use permit from the Forest Service before performing any ditch maintenance or improvement in the national forest. The court did note, however, that the U.S. Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to regulate them so strictly that a de facto prohibition was imposed.

V. Drafting Tips and Forms for Express Easements
(See Section IIF OWRCW – page 23-26)
Irrigation districts are advised to consult with counsel before entering into easements and related agreements. The following list of issues should, however, allow district managers to do an initial review of proposed easement documents and to spot important issues that need the attention of legal counsel.

a. Selection of General Form of Document
Decide whether an easement or a fee conveyance is desired. Use of the word “easement” will support a finding that the conveyance is of an easement rather than a fee. Use of the word “grant” rather than the word “convey” will avoid implying a fee conveyance.
The signature of the grantor of an easement must be acknowledged for the document to be recorded. Inserting an acknowledgment blank into the draft easement will assist in meeting this requirement.
Consider creating exceptions for encumbrances against the servient estate or excepting all existing rights and matters of record if the easement is granted without a title examination.

b. Statement of Purpose of Easement
This can be accomplished in “recitals” or in a separate “Purpose” section. These statements can be helpful in dealing with unforeseen situations that may arise in the future. See Minto v. Salem Water, Light & Power Co., 120 Or. 202, 205 P. 722 (1926).

c. Type of Easement: Appurtenant or in Gross
The easement should state whether it is intended to be appurtenant (and therefore inseparable from the land in subsequent transfers) or in gross (separable from the land, but subject to restrictions on subsequent assignments). If appurtenant, the dominant estate should be described; for irrigation districts, this may be as broad as the district boundaries.
If the easement is intended to be personal and nontransferable, the document should state this. Irrigation easements are generally more useful if transferable.

d. Use of Easement
What use is permitted by the easement and by whom?
What is the extent of rights retained by the owner of the servient estate? Are timber or farm
activities allowed? May livestock graze in or near the easement?
Is the easement exclusive or nonexclusive? If nonexclusive, what are the limits on the rights of
others to use the easement?
If several parties (e.g., more than one irrigation district) use the same easement, how are conflicts in
use to be resolved?
e. Location of Easement
If reference is to a map or plat, attach or incorporate the document or determine that it is a matter
of record. A diagram drawn to scale and attached to an easement is generally a useful aid in
locating the easement.
Easements covering strips of land are often described as a given width on each side of a described
centerline. What width? Enough width should be included for construction and maintenance of the
water conveyance. In addition, the full legal description of the servient land should be set forth.
If any relocation of the easement is to be allowed, the document should describe its scope and the
authorized process for so relocating it.
f. Consideration
Was any cash or other consideration given for an easement? If so, specify this in the document (the
exact price need not be given if that is of concern). The extent of consideration may affect a court’s
willingness to construe an easement broadly or strictly in the future.
g. Duration
The easement should state whether it is permanent or for a limited duration and should list all acts
that may constitute abandonment of the easement.
h. Maintenance and Repairs
The easement should state which party has the obligation to maintain and repair the easement area.
If damage will occur to the servient estate by initial construction contemplated by an easement, the
document should describe which party has the obligation to pay for the damage. Generally,
irrigation districts will want to assume full responsibility for keeping their ditches in good condition
and will want unlimited access rights to be able to do so.
i. Taxes
Easements are not taxed separately. The parties should decide whether the landowner will continue
to pay taxes for the land covered by the easement or whether the district will pay a pro rata share of
those taxes.
j. Remedies
If not specifically stated otherwise, remedies for misuse are probably limited to injunctive relief and
damages, but not termination of the easement. If additional remedies such as a right of termination
for breach or a duty to arbitrate disputes or disagreements, are desired, they should be included
expressly.
k. Parties
Include all parties who are giving or receiving any benefits under the easement. Consider obtaining
subordination agreements from any lenders holding existing liens against the servient estate.
VI. Easement and Right of Way Record Management
(See Section III OWRCW – page 26)
It is not possible to maintain or protect rights one does not know one has. Therefore, the most basic
step in protecting easement rights is to perform an accurate inventory of such rights. This may
require a review of an irrigation district’s own files as well as of relevant county and federal
records. Then a comprehensive record-keeping system should be established to allow districts to
monitor and maintain their rights.

**a. Obtaining Copies of Conveyance Documents**

(See Section IIF OWRCW - page 26-31)

This section advises irrigation districts on how to work with their own records, county records, federal agency records and archival materials. It also discusses the appropriate use of title companies and others to assist in searches. Some consideration is also given to searching federal records in Washington, DC. The search strategy and available resources will vary depending upon whether the property interest is on private, state or federal land. These different situations are summarized in the following diagram.

<table>
<thead>
<tr>
<th>FEE/PRIVATE LANDS</th>
<th>FEDERAL LANDS</th>
<th>STATE LANDS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STEP 1</strong></td>
<td><strong>STEP 2</strong></td>
<td><strong>STEP 3</strong></td>
</tr>
<tr>
<td>District Records</td>
<td>Title Company Records</td>
<td>Clerk and Recorder</td>
</tr>
</tbody>
</table>

- **FEE/PRIVATE LANDS**
  - District Records
  - Title Company Records
  - Clerk and Recorder
  - BLM (Oregon State Office)
  - Division of State Lands

- **STATE LANDS**
  - In-House Indexes
  - State Agency Ownership Rights

- **FEDERAL LANDS**
  - Title Insurance Policies
  - Treasury/Assessor
  - Department of Administrative Services

- **STEP 1**
  - Patents
  - Tract Indexes
  - Grantor/Grantee Index
  - Master Title Plat
  - Maps

- **STEP 2**
  - Conveyances of Water Right
  - Recorded Document Searches
  - Historical Indexes
  - Indexes of Conveyance Documents

- **STEP 3**
  - Easements
  - Customer Service Reports
  - Serial Register Pages

- **STEP 4**
  - Deeds
  - Title Insurance Policies
  - Treasury/Assessor
  - Department of Administrative Services

- **STEP 5**
  - Maps
  - Real Property Ownership Index
  - State Agency Ownership Rights

STEPS 1-3 apply to fee or private lands, STEP 4 applies to federal lands and STEP 5 applies to state lands. Each step is discussed in detail below.

1. **Step 1 – District Records**.
Irrigation districts should begin by reviewing their own records for patents, conveyances of water rights, easements, deeds, title insurance policies and maps covering the irrigation system. If an in-house index of documents is available, use it as a reference source.

Ideally, easement documents should be indexed by location (section, township and range). If your district does not have an index, you should consider creating one. As an effective means of creating an index, organize your easements in the following format:

<table>
<thead>
<tr>
<th>Name of Grantor</th>
<th>Tract (Lateral &amp; Map No.)</th>
<th>Location (Section, Township &amp; Range)</th>
<th>Recordation (Book/Page or Document No.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applegate, Larry</td>
<td>N4B, 379</td>
<td>15, 5N, 1W</td>
<td>95-0514920</td>
</tr>
</tbody>
</table>

Ideally, the index would be kept in a computer spreadsheet program, and each entry would have additional information about the easement terms, such as its size, exclusivity, and any limits on its use.

2. **Step 2 – Title Company Records.**

3. **Tract Indexes.**

Title company records are normally maintained by a systematic compilation of recorded documents (a “plant”) that are organized and referenced in tract indexes. The most ideal tract index would contain a history of ownership and encumbrances covering each parcel of real property from the U.S. Patent to present (a “chain of title”). However, in many cases, title companies only have partially completed tract indexes, which consist of chains of title spanning a certain period (e.g., the last 40 years). You should determine which title company in your district has the most complete plant and the most thorough tract indexes and which can provide the most cost-effective service. Not all title companies were established at the same time, and therefore they do not have the same historical data.

1. **Customer Service Reports.**

To obtain cursory information about a particular parcel or tax lot you can request an ownership report from the customer service department of a title company. This report is commonly referred to as a “trio” because it contains three items: (1) an assessment map; (2) a tax assessment statement; and (3) the most recent conveyance document record. The customer service report is usually provided without charge.

1. **Recorded Document Searches.**

For more in-depth services a title company will conduct a comprehensive document search for all instruments recorded during a broad scope of time (e.g., a patent-to-present search) or a limited search for specific types of documents recorded during a certain timeframe (e.g., easements and deeds recorded in the last 10 years). You will be charged for this service. Plant service rates are
commensurate with the length of the search; for instance, a patent-to-present search would be more expensive than a title search covering 10 years.

3. **Step 3 – County Clerk and Recorder**

4. **Grantor/Grantee Index.**

The office of the county clerk and recorder maintains a filing system for all recorded documents. These documents are arranged alphabetically by the name of the grantor and grantee and are collectively included in the grantor/grantee index. The clerk’s filing system differs significantly from a title company’s plant because the grantor/grantee index is organized by name rather than by property description. The title company tract index is arranged geographically by section, township and range. The grantor/grantee index is a useful tool to supplement conveyance document information obtained from the title company tract books if the tract books are limited to a particular time frame (e.g., 40 years). However, searching the grantor/grantee index for conveyances made by John Smith, for example, can be very time consuming. It is more cost effective to use the title company records first and to consult the county grantor/grantee index only if necessary.

1. **Real Property Ownership Index and Assessment Maps.**

The county assessor has a tax index (or tax roll) of current real property surface owners. The index is usually arranged alphabetically by owner name and also geographically by property location (section, township and range). Assessment maps showing property boundary lines and tax lot numbers correspond with the information in the tax index. Because parcels are identified by tax lot number in many conveyances and also in regulatory contexts, this can be important information to have.

4. **Step 4 – BLM**

5. **Master Title Plats – Historical Index – Serial Register Pages.**

The BLM maintains copies of all patents granted by the United States. Patent numbers are listed on official maps called master title plats. The master title plats are indexed by township and range. In addition, all patent numbers and orders affecting the disposal or use of federal lands are shown on the master title plat and are indexed chronologically in the corresponding historical index. The BLM historical index is the chain of title, arranged chronologically from patent to present, listing all actions having to do with federal lands. The BLM organizes historical indexes by township and range, normally including all sections of a township. To obtain information about a patent or to search for encumbrances that affect federal land, begin by reviewing the master title plat and follow up by searching the historical index and by requesting serial register pages for patents or encumbrances. The serial register contains all the documents referred to in the indexes, arranged by designation and usually by a corresponding number (e.g., Patent No. 43-64-1219 or Executive Order 5470).

The following is the office for all Oregon federal lands;
Bureau of Land Management (Oregon State Office)
333 SW First Avenue
Portland, Oregon 97204
5. **Step 5 – Division of State Lands.**

6. **Maps and Index.**

An initial search of state lands should be made at the Division of State Lands (“DSL”), which has copies of maps showing the original conveyances from the federal government to the State of Oregon. DSL also maintains an index of easements encumbering state lands.

1. **Department of Administrative Services.**

The State of Oregon has 20 agencies that may own land. To determine which state agency owns a particular parcel or owns property in a given area, initial contact can be made with the Department of Administrative Services (“DAS”), which will direct you to the appropriate agency.

The following are some key state agencies and contacts:

**Division of State Lands**

775 Summer Street, NE, Ste 100
Salem, Oregon 97301-1279
Contact: Stephen J. Purchase,
Assistant Director Field Operations
Telephone: (503) 378-3805 ext. 279

**Department of Administrative Services**
Telephone: (503) 378-3104

**Department of Forestry**
Telephone: (503) 945-7200

**Department of Fish and Wildlife Realty**
Telephone: (503) 872-5310

**Parks and Recreation Public Services**
Telephone: (503) 378-4168, ext. 311

b. **Recording Easements and Rights of Way**

(See Section IIF OWRCW – page 31-32)

1. **Benefits of Recordation.** Recordation is the official means by which interests in real property are made a matter of public record. Everybody is charged with “constructive notice” of all recorded documents. Unrecorded easements and other interests are subject to challenge if a subsequent purchaser of the land subject to the easement buys it with no actual notice of the easement. Districts should record easements and similar interests as soon as possible after acquiring them. The following sections provide information that will help districts through the recording process. If a district’s easements were not recorded when acquired, they still can be
recorded now.

2. **The Recording Process in Oregon**. Recording is a simple process that can be accomplished at the county recorder’s office. There are two keys: The documents to be recorded must conform to certain formal requirements, and the proper fee must be presented.

**VII. Protection of Easements**
Interference with an easement is a form of trespass. Consequently, an easement holder is entitled to equitable relief against a servient owner’s unlawful interference with the easement holder’s enjoyment of the servitude, particularly when the obstruction of an easement is of a permanent character. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, 8-63, (West Group 2001). Courts frequently enjoin the obstruction of an easement and order the removal of encroaching structures at the servient owner’s expense. *Id* at 8-64 – 8-65. The fact that such removal may be costly is not ordinarily a consideration; however, a court of equity may balance the relative hardships of the parties and refuse an injunction when the expense of removing an innocent encroachment would be disproportionate to the injury suffered by the easement holder. Likewise, a court may impose equitable restrictions on the easement holder as a condition of granting relief from interference. *Id* at 8-65 – 8-66. A court may compel the easement holder to contribute part of the cost of removing an innocent encroachment, and may also deny injunctive relief on the ground that monetary damages constitute an adequate remedy for the easement holder. *Id* at 8-66.

An easement holder, as the owner of a property interest, is entitled to protection from acts of third parties that interfere with enjoyment of the easement. Such protection is available against third parties to the same extent that it is available against the servient estate owner. *Id* at 8-68. For example, an easement holder may recover damages from or obtain an injunction against third parties who construct a building encroaching on the easement area, use the easement without authorization, or impede travel by parking cars on the easement area. *Id*.

The owner of the servient estate is also to be protected from encroachments by the easement holder, who is not often permitted to exceed the scope of his easement via major changes or expansions.

**VIII. Enforcement of Easements**
(See Section IV OWRCW – page 32)
This section provides districts with an overview of the legal tools available to them when they face problems with particular easements. The first part of the section reviews the various forms of civil lawsuit that districts may bring to protect their rights. The second focuses on the land use process. The section concludes with a model land use ordinance designed to use set backs and other tools to protect irrigation district water delivery systems. The ordinance could be presented to local governments as a proposed legislative change to the zoning code.

a. **Contractual Remedies**
A party to a contract for the grant of an easement may seek a court order of specific performance of the contract to establish the easement or she may seek monetary damages in event of a breach.

b. **Legal Actions**
(See Section IVA OWRCW – pages 32-34)
The following sections briefly review the most common forms of legal actions that irrigation districts might use to resolve disputes over easement rights. This section gives districts a basic understanding of their rights and of potential legal means of protecting those rights. Directs involved in actual or threatened litigation should always consult with counsel at the earliest possible stage.
1) **Quiet Title**

A quiet title suit is a suit in equity in which the court determines the ownership of and right to possess a parcel of real property.

When the landowner is an agency of the United States, an easement owner may bring suit under the Quiet Title Act, 42 USCA § 2409a (1994). This statute provides a limited waiver of federal sovereign immunity by allowing a private plaintiff to name a federal agency as a defendant in an action to “adjudicate a disputed title to real property in which the United States claims an interest.” *Id.; see* Adams *v. United States*, 3 F.3d 1254 (9th Cir 1993) (quiet title suit brought by holder of Carey Act easement crossing U.S. Forest Service land). Potential plaintiffs should be aware of the 12-year statute of limitations under this act. The period runs from the first time the plaintiff knew or should have known of the claim of the United States. *See Overland Ditch*, slip op at 11 (citing Michel *v. United States*, 65 F.3d 130 (9th Cir 1995)).

In Oregon, a suit to quiet title is a statutory civil action. *See* ORS 105.605. The statute requires that the defendant *not* be in possession of the disputed land. This substantially limits the usefulness of quite title actions for irrigation districts in disputes over easements, because generally the landowner *is* in possession of the land across which the easement travels. Easement holders typically bring suits for injunctive relief, as discussed below.

2) **Declaratory and Injunctive Relief**

Due to the statutory form of the quiet title action in Oregon, irrigation districts and other easement holders typically seek to resolve disputes through suits for declaratory and injunctive relief. *See, e.g., Wood v. Woodcock*, 276 Or. 49 554 P.2d 151 (1976); *Hall v. Meyer*, 270 Or. 335, 527 P.2d 722 (1974); *Ericsson v. Braukman*, 111 Or. App 57 824 P.2d 1174 (1992). A declaratory judgment is an enforceable statement of the rights and duties between the parties to the suit. An injunction is an enforceable prohibition of certain action. These forms of relief are appropriate for a district seeking, for example, a determination that a particular easement is valid and an injunction prohibiting the landowner from interfering with the district’s use of the easement.

This type of action is brought as a suit in equity and does not require the plaintiff to allege that any actual damage has yet occurred – only that there is a substantial threat that it will occur. For instance, such a suit may be appropriate where residential development is gradually encroaching on an irrigation canal or where a landowner has sent the district a letter stating that the owner plans to lock his gates and not permit the district access to maintain or repair its canal.

3) **Trespass**

Trespass is a legal action that affords the plaintiff damages and injunctive relief for defendant’s unauthorized entry onto real property in which the plaintiff has exclusive rights. An easement holder generally does not have an exclusive interest in the land covered by an easement. A trespass action generally does not lie against the landowner (instead, quiet title, declaratory and injunctive relief are appropriate, as discussed above). But trespass actions may be brought against third parties with no claim to the land. *Bileu v. Paisley*, 18 Or. 47, 21 P. 934 (1889) (owner of sheep that fouled mining water ditch liable in trespass to owners of mining water ditch).

4) **Private Nuisance**

Nuisances are divided into “private” and “public” nuisances. In either case, the touchstone of liability is whether the defendant has “unreasonably interfered” with the plaintiff’s enjoyment of a public or private property right. Irrigation districts will usually employ the private nuisance theory but should not rule out the public nuisance approach since irrigation district activities typically serve
a substantial portion of the public. Under ORS 105.505, any person whose property or personal
enjoyment of his or her property is affected by a private nuisance may maintain a claim for damages.
As this is the case for trespass, nuisance actions are generally not the most direct or appropriate
means of resolving disputes with landowners, but nuisance actions can be effective when third-party
actions interfere with an irrigation district’s rights under an easement. For instance, nuisance may
be appropriate where third parties not subject to the terms of the easement itself are polluting an
irrigation ditch, interfering with access to the ditch or endangering the lateral support for the ditch.

5) Challenge to Agency Action
As discussed in Section IV. k., above, government agencies will sometimes attempt to regulate an
irrigation district’s use of easement rights in a way that substantially interferes with the district’s
goals. If such matters cannot be resolved by informal negotiation with the agency, litigation may be
pursued under the state or federal administrative procedures acts. The district’s claim is typically
that the agency’s regulatory decision or action is unreasonable (i.e., “arbitrary and capricious”) or
unauthorized by statute. More rarely, districts assert that the agency’s action has resulted in a
compensable taking of the district’s property right.
Administrative litigation usually involves a number of technical issues such as ripeness, exhaustion
and choice of forum. Districts that believe informal negotiations with the agency are unlikely to
succeed and those that are considering litigation should consult with counsel before taking further
steps.

c. Land Use Action
(See Section IVB OWRCW – pages 34-36)
In Oregon, the use of private land is subject to extensive public regulation. While districts pursuing
their own land uses may sometimes find this level of regulation onerous, they can turn it to their
advantage in protecting their water delivery systems.

1) Individual Cases
Land use requests that might affect irrigation district easement rights include subdivisions,
partitions, applications for lot of record dwellings and planned unit developments. Districts can
participate in these processes from the earliest stages. Indeed, districts will often have the chance
to be at the “preapplication conference” before a formal application has been filed.

1. Notice

The key to participating in a land use case from the start is being on the local government’s “notice
list.” The notice list typically includes all property owners within a set distance (e.g., 500 feet) from
the proposed land use, as well as other parties who have expressed an interest in the proceeding.
Irrigation districts face a unique problem if their only interest within 500 feet of the proposed action
is an easement or other canal right. The notice list usually is prepared based on the local
government tax assessor’s records. Easements do not generally show up on such records, and
districts therefore may not be on the notice list for land use cases that have a real potential to affect
their interest.
Districts should contact all the local jurisdictions through which their easements run and ask to
automatically be put on the notice list for all land use applications affecting the areas around the
easements. The district will have to briefly scan a relatively large number of applications, but doing
so will make it far less likely that the district will be left “out of the loop” on any really important
ones.
1. Participating

Land use proceedings are by design less formal than court proceedings, and districts may choose to participate either at a low level, by simply giving written or oral comments on an application, or more intensively, by hiring counsel to file motions, work with local planners and pursue necessary appeals. Because of the many technical requirements of state and local land use law, local governments often make mistakes or omissions in their handling of cases, and experienced counsel is often able to exploit these oversights to help clients gain greater bargaining power. Generally, districts can have a much greater impact by making it known they will be a “player” at the earliest possible stage of the proceeding. During the early stages the applicant, opponents, local government personnel and other participants are busy forming coalitions needed to support their position. At the early stages potential opponents, like irrigation districts, can often win concessions in the form of setbacks and other needed conditions by agreeing to support the proposed land use action.

2) Annexation Proceeding

Districts in developing areas may be annexed to a growing city and potentially subject to city water supply monopolies. In addition, district members within the expanded city boundaries may be subject to local laws limiting irrigation practices. Early participation in annexation proceedings can help to avoid these outcomes.

As an example of some of the problems that can arise when an irrigation district property is brought within a city’s urban growth boundaries, some local jurisdictions in Oregon have rules requiring property owners to withdraw from any irrigation district as a condition of approving an application to a partition or subdivide land creating parcels below a certain size. These jurisdictions argue that municipal water is of a higher quality than, and can be provided at the same cost as, district water. The constitutionality of such rules has not yet been challenged.

3) Legislative Changes

In addition to participating in individual land use application proceedings initiated by other parties, irrigation districts can take the initiative and propose changes to the local land use laws themselves. This step is called the amendment process.

1. The Amendment Process

Local government land use is controlled at the local level by the “comprehensive plan” and the “zoning and development ordinance.” Each of these documents is implemented by maps that designate each area of the local jurisdiction for a certain type of development, and then apply specific zoning to each area that allows the preferred type of development. These documents can be modified in two ways: by changing the maps so that a particular area gets a new designation or a new zone (a map amendment), and by changing the text so that the development allowed in a given zone is expanded or limited (a text amendment). Generally speaking, irrigation districts should protect their canals and laterals from encroaching development on the private lands across which district easements run. The primary means of achieving this goal would be to make sure the local zoning ordinance contains “setback” limits that forbid any development within a set distance of any irrigation district water conveyance. A proposed ordinance to this effect is included below. Such an ordinance is normally adopted by the local jurisdiction via the text amendment process.
The text amendment process is a public process that generally results in a decision by the county planning commission or city council. The process generally costs less than $1000 to initiate and takes one to three months to complete.

1. **Model Ordinance to Protect Irrigation District Canal, Ditch and Pipeline Rights.**

“All residential structures and all subsurface sewage disposal systems shall observe a minimum setback of 100 feet from the mean high water level of any ditch, canal or other conveyance of irrigation water. Existing dwellings and residential lots of record unable to meet this requirement shall be exempt from this setback.”

[1] The following materials reference the materials of the September 1997 Oregon Water Resources Congress Easement Protection Workbook (OWRCW). Reference to the appropriate section and page number of the older material is provided, and new or additional information is also set forth where appropriate.

[2] For example, the owner of the servient estate may qualify as a “holder” where the easement is for a roadway and both the servient estate and dominant estate owners have the right to use the roadway.

[3] ORS 271.715 (1) provides: “[c]onservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, archaeological, or cultural aspects of real property.

[4] ORS 271.715 (2) provides: “[h]ighway scenic preservation easement” means nonpossessory interest of a holder in real property imposing limitations or affirmative obligations of the purposes of which include retaining or protecting natural, scenic or open space values of property.