WATER DELIVERY
CANALS, DITCHES, AND PIPELINES
THE LAW OF EASEMENTS IN IDAHO, OREGON, AND WASHINGTON

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INTRODUCTION
Delivery of water for irrigation in Idaho, Oregon, and Washington depends on complex systems developed over many years. The canals, laterals, ditches, and pipes that make up these systems often cross land owned by many persons other than those providing or receiving water. To build, operate, and maintain their water delivery systems, water users must secure and maintain the right to use the property of affected landowners. Without the necessary easements and rights-of-way, water suppliers cannot fulfill their function of delivering water to their end users.

Water delivery systems are currently threatened from within and without. The external threats include encroachments by new development and restrictive environmental regulations. There are also internal threats arising from water users’ own failure to adequately understand and maintain the legal rights provided by their easements. This article provides an outline of the potential issues facing water suppliers’ easements for irrigation in Idaho, Oregon, and Washington.

OVERVIEW OF CANAL, DITCH, AND PIPELINE RIGHTS
To protect the right to use canals, ditches, and pipelines to deliver water for irrigation purposes, it is important to understand what an easement or right-of-way is, and what it is not. Landowners have a possessory interest in land; they are entitled to exclude others from it. In contrast, most easements only authorize the use of property for specific purposes. The underlying land, and any related right not conveyed in the easement, is someone else.

Easements and Rights-of-Way
An easement is a nonpossessory interest in the land of another that entitles the owner of the easement to limited use of another’s land without interference. The land crossed by the easement is referred to as the “servient estate” because it is burdened by the easement. The land that benefits from the easement, such as land irrigated from a ditch easement, is know as the “dominant estate.” Because an easement is an interest in land, to be binding it must generally be in writing. See IC 9-503; ORS 93.020; RCW 64.04.010. Frequently, however, irrigation ditch easements are not memorialized by a written agreement (see discussion below).

A right-of-way is a specific type of easement that allows the holder of the right-of-way to pass over, through, or across another’s land. Most easements for canals, ditches, and pipelines are rights-of-way. In some cases, the easement authorizes such broad use of the land that all other uses are excluded. In these situations, the holder of the easement may actually be the owner of the land itself and maintain the right to exclude others completely. Early irrigation developers sometimes acquired full “fee simple” title (i.e. title to the land)
Easements

Infomral Agreements

Transfers

License Revocable

Conveyance

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rather than an easement (i.e. rights-to-use only) for major canals. When there is any doubt, however, ditch and canal rights are interpreted to be mere easements, not fee estates. See Hall v. Meyer, 270 Or 335, 527 P2d 722 (1974); Little-Wetzel Co. v. Lincoln, 101 Wash 435, 172 P 746 (1918).

Ditches were not always developed by any formal written agreement between the parties. Sometimes either an oral agreement or an informal letter authorizing a neighbor to use another’s land for his or her personal purposes were employed. For example, in Shaw v. Proffitt, 57 Or 192, 109 P 584 (1910), Shaw wrote a letter to Failing asking for an irrigation right-of-way across Failing’s land. Failing wrote back, saying, “go ahead, the more ditches you build the better it will suit me.” 57 Or at 197. In a subsequent suit by the buyer of Failing’s property, the court held that Failing’s letter had granted Shaw a legal right-of-way.

Generally, a license acquired by one individual to transport water across another’s property is personal to the individual who received it and is not transferable. However, over time, ditches created by oral agreement or license have sometimes become part of a broader, regional delivery system. In Oregon and Idaho these licenses may become irrevocable and transferable if a substantial amount of money and labor is spent to improve them. See McReynolds v. Harrigfeld, 26 Idaho 26, 140 P 1096 (1914) (court refused to quiet title [i.e. settle scope-of-rights] to an irrigation ditch built pursuant to landowner’s permission when the ditch builder failed to show any investment dependent upon landowner’s permission); Shaw, 57 Or 192. Under these conditions, the licenses are essentially treated as easements.

In Washington, however, a parol (i.e. oral, unwritten) license does not become irrevocable even if the licensee invests a substantial amount of money on improvements. Rhoades v. Barnes, 54 Wash 145, 102 P 884 (1909). In this case, Barnes had received permission to lay 300 feet of pipe across Hornibrook’s property in order to tap a preexisting pipeline. Hornibrook later sold his property to Rhoades, and when water supplies were insufficient, Rhoades stopped the flow of water to Barnes. Barnes then sued for injunctive relief, but the court rejected his claim, holding that a parol license “may be revoked by the licensor at any time, irrespective of the performance of acts under the license, or the expenditure of money in reliance thereon.” 54 Wash at 147-48.

Easements: Appurtenant and In Gross

An appurtenant easement is one that benefits a specific parcel of land. In such cases, the easement is inseparable from the land to which it appurts. Typical examples of appurtenant easements are easements for driveways and utilities, and for conveying water to a specific place of use such as a house or farm. The right to use the appurtenant easement is conveyed when the benefited property itself is conveyed. Appurtenant easements benefit all the landowners in an irrigation district, for example, and the right to the use of the system is conveyed when the land itself is conveyed. Easements in gross, on the other hand, are easements unrelated to possession or ownership of any particular parcel of property. Irrigation easements are typically appurtenant, but those granted directly to an irrigation district may be in gross. See, e.g., Abbott v. Nampa School District No. 131, 119 Idaho 544, 808 P2d 1289 (1991).

The characterization of an easement as appurtenant or in gross is important because easements in gross often cannot be assigned. The courts generally construe easements as appurtenant, but ultimately the intent of the parties controls the interpretation of the type of easement created. Nelson v. Johnson, 106 Idaho 385, 679 P2d 662 (1984) (easement appurtenant in nature because the parties clearly intended for the easement to benefit cattle ranch); Tone v. Tillamook City, 58 Or 382, 114 P 938 (1911) (pipeline right-of-way was appurtenant easement); Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 102 Wash 608, 618, 173 P 508, 511 (1918) (“It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant.”).

Hall, 270 Or 335, provides an example of a situation in which the use of an irrigation easement turned on whether it was appurtenant or in gross. In that case, Peterson sold the west portion of his property to Meyer, but reserved for himself an easement for a pipeline to convey water from a spring on the west parcel to the east parcel. Peterson later sold the east parcel and the easement to Markham. Markham kept the land but sold the easement to Gibson, who owned a parcel directly to the south. Hall bought Gibson’s land and the easement, and extended the pipeline to bring water to the south parcel. Meyer then cut the pipeline. Hall sued and lost. The Oregon Supreme Court held that the easement language was not specific enough to create an “easement in gross” that could be transferred from the east parcel to Gibson’s land to the south, which Hall had purchased. 270 Or at 339. Instead, it was an “easement appurtenant” to the east parcel owned by Markham and could be used only to convey water to that parcel. Id.

Creating Easements

Numerous federal and state laws allow easements to be granted by the federal government, state governments, and private parties. Easements granted under different laws often differ in the scope of the rights they convey. This section reviews the laws authorizing the major classes of easements and describes the scope of rights for each class.
Federal Law

Most of the easement rights held by irrigation districts derive from federal grants. The variety of federal statutes authorizing easements and rights-of-way can be divided into those relating to public land law and those relating to reclamation law.

Public Land Law

In the second half of the 19th century, the United States (US) recognized that much of the land west of the 100th meridian would not be valuable without irrigation and that developing irrigation systems required rights-of-way for water delivery systems. For this reason, most deeds from the US (called “patents”) reserved rights-of-way for irrigation. The reserved rights-of-way were held by the US until otherwise conveyed. The conveyance of the irrigation easement to water users was often made automatically by statute to any person whose rights to use the water had been legally established (i.e. “vested”).

RS 2339 Rights-of-Way

During early western settlement, persons desiring to appropriate water from the public domain and to construct ditches for its conveyance simply did so. Although the US Supreme Court relatively quickly recognized the property rights of these early water users, it was not until 1866 that Congress enacted a law formally granting the right to water conveyance easements across the public domain.

The 1886 statute, as amended, provides:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, 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; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.” 43 USC § 661.

The effect of this provision was to grant an easement across federal land to the holder of any vested water right. The public domain remained open for this use until the United States conveyed or otherwise reserved federal lands. Any patent of the land was made subject to these ditch and canal easements, which are now referred to as RS 2339 rights-of-way. The language of reservation in the patent typically reads, “Subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.” 43 USC § 661.

The 1891 Act’s key provision reads as follows:

“The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals, and fifty feet on each side of the marginal limits thereof; and, upon presentation of satisfactory showing by the applicant, such additional right-of-way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right-of-way shall be so located as to interfere with the proper operation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.” 43 USC § 946.

The effect of this provision was to grant to duly organized ditch and canal companies rights-of-way across public lands and reservations. The sole authorized purpose of such rights-of-way was at first
irrigation, but the 1891 Act was subsequently amended to include a number of “subsidiary” purposes, such as domestic uses, transportation, and water power.

The 1891 Act also required the mapping of easements:

“As any canal or ditch company desiring to secure the benefits of sections 946 to 949 of this title shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.” 43 USC § 947.

Because of this requirement, even today the master title plats maintained by the Bureau of Land Management (BLM) have clearer information on easements under the 1891 Act than on those created under RS 2339. It is important to remember, however, that failure to comply with this filing requirement does not necessarily invalidate the easement. Roth v. United States, 326 F Supp 2d 1163, 1174 (D Mont 2003) held that the 1891 Act easement across unsurveyed land vests upon construction.

Federal Land Policy and Management Act

With the exception of the reclamation laws, which are discussed below, no statute departed from the basic framework of RS 2339 and the 1891 Act until Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976. The fundamental difference between FLPMA and the earlier acts is that the earlier acts were direct grants from the federal government to those using the public domain, whereas FLPMA only authorizes the Executive Department to make such grants if, in its discretion, it determines that is the appropriate course of action. With FLPMA, Congress repealed RS 2339 and the 1891 Act and transitioned to a permit-based system.

As it relates to water delivery, FLPMA provides:

“The Secretary [of the Interior], with respect to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for: (1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water.” 43 USC § 1761(a).

The US Department of the Interior has issued regulations implementing this provision. See 43 CFR § 2800. Today, anyone wishing to acquire an easement across federal lands must complete environmental and other reviews before the government will grant the easement.

Reclamation Law

The policy embodied in RS 2339 and the other public land statutes discussed above was one of granting easements over unimproved federal land to encourage private development of the land. The policy underlying the reclamation laws contemplates a different scenario, in which the federal government builds large, capital-intensive projects to attract whole groups of settlers and thereby develop entire areas of the arid west. Because of this basic policy difference, the easements based on the reclamation laws involve a higher degree of federal control than those based on the public land laws.

Unlike public land laws, the reclamation laws do not make outright easement grants. Instead, they authorize the US Bureau of Reclamation (Reclamation), in its discretion, to reserve to the United States easement rights across public land needed for reclamation projects (43 USC § 417), and to acquire such rights from private land owners (43 USC § 421). Reclamation project works such as water distribution canals, were often constructed by private or quasi-municipal parties, such as irrigation districts, acting under federal contracts rather than directly by the United States. Through such partnerships, easements reserved under 43 USC § 417 eventually accrue to the benefited of irrigation districts and their member landowners.

The reclamation laws also apply to land patented out of the public domain after August 30, 1890. The act of that date reserves rights-of-way for reclamation project water conveyance systems across lands patented to private parties under the public land laws: “In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States.” 43 USC § 945. Interestingly, this provision was enacted 12 years before the Reclamation Act first authorized the construction of ditches and canals for federal projects.
Finally, Reclamation is authorized to grant discretionary rights-of-way for purposes not directly related to a particular project. These discretionary rights are described as follows:

“The Secretary, in his discretion, may . . . (b) grant leases and licenses for periods not to exceed fifty years, and easements or rights-of-way with or without limitation as to period of time affecting lands or interest in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project: Provided, That, if a water users’ organization is under contract obligation for repayment on account of the project or division involved, easements or rights-of-way for periods in excess of twenty-five years shall be granted only upon prior written approval of the governing board of such organization. Such permits or grants shall be made only when, in the judgment of the Secretary, their exercise will not be incompatible with the purposes for which the lands or interests in lands are being administered, and shall be on such terms and conditions as in his judgment will adequately protect the interests of the United States and the project for which said lands or interests in lands are being administered.” 43 USC § 387. This provision is implemented by regulations that set out a detailed application, approval, and payment process to obtain these easements. See 43 CFR part 429.

State Law

Following the federal government’s example, Idaho, Oregon, and Washington all enacted laws granting rights-of-way over state lands for ditches and canals to encourage the construction of irrigation systems. See, e.g., IC 42-1104, 58-601; ORS 273.761, 541.030; RCW 79.36.540. For the most part, these state laws track federal law. For example, Washington’s law provides: “A right of way through, over and across any state lands is hereby granted to any irrigation district, or irrigation company duly organized under the laws of this state, and to any association, individual, or the United States of America, constructing or proposing to construct an irrigation ditch or pipe line for irrigation…” (RCW 79.36.540).

Like the 1891 Act, all three states require the filing of a map or field notes of a survey, or both, of the proposed easement. See, e.g., IC 58-601; ORS 273.761(4); RCW 79.36.550. Washington also requires payment of the “full market value” of the easement, RCW 79.36.560, while Idaho may require reasonable compensation. IC 58-601.

By Conveyance

The most common way to create an easement is by express grant or reservation. Typically, a landowner grants an easement to an irrigation district, for example, in a written easement agreement that is then recorded with the county clerk.

An easement can create or convey full ownership or only a nonpossessory right of use. Conveyance of a strip of land that does not limit the use in any way may convey full fee title. This type of conveyance would be unusual for irrigation easements, but such easements undoubtedly do exist, especially for main canals. When there is uncertainty about whether the strip of land is held only as an easement or in full fee title, courts tend to find that it is an easement to avoid separating ownership of isolated strips of land.

The extent of the rights granted or reserved by an easement should be carefully described in the easement agreement. If the terms used in the easement are unambiguous, the words of the easement control the uses that can be made. See, e.g., Fox v. Miller, 150 F 320 (9th Cir 1906) (because Idaho easement was for “logging purposes,” the easement holder was not restricted to transporting logs by road, flume, or tram and could float logs down a stream located within easement). Oral testimony contrary to the unambiguous terms of the easement will not be allowed. See Minto v. Salem Water, Light & Power Co., 120 Or 202, 250 P 722 (1926). Because easements are perpetual and may one day be held by parties not alive today, an oral agreement on the main points of the easement is insufficient and could lead to litigation in the future.

In Minto, 120 Or 202, 250 P 722, the water company acquired an easement from Minto authorizing it to lay city water supply pipes across his property and to build certain filtration cribs and other devices. As the city’s water needs grew, the water company expanded its operations on Minto’s land, building a storage pond above the filtration cribs and constructing certain aboveground facilities. Minto sued in trespass. The water company acknowledged that the easement document itself did not expressly grant the right to these expanded operations, but argued that the circumstances surrounding the signing of the easement and the intentions of the parties at the time showed that the purpose of the easement was to allow the company to do whatever was necessary to provide clean water to the city. The court held that none of this “parol evidence” (i.e. oral, unwritten) could be considered. Focusing on the text of the easement, the court concluded that the expansion was not allowed and that the water company was liable for trespass.

Washington state law requires easements to be conveyed by deed. RCW 64.04.010. In Kesinger v. Logan, 113 Wash 2d 320, 779 P2d 263 (1989), Kesinger, the owner of the servient estate, brought an action to quiet title to a 20-foot-wide strip of land that an irrigation district claimed was part of its canal easement.
across one side of Kesinger’s property. The district relied on the terms of the easement contract, which stated that the easement included the disputed area, and to Kesinger’s chain of title, which referenced the same contract. The court, however, held that Kesinger could not be estopped from asserting ownership of the disputed 20-foot-wide area when the easement had not been conveyed by deed pursuant to RCW 64.04.010. Since the property’s legal description encompassed the disputed area, the court quieted title in favor of Kesinger. Courts have, on occasion, quieted title to easements that were not conveyed by deed (see Kirk v. Tomulty, 66 Wash App 231, 831 P2d 792 (1992) where quiet title was obtained to a road easement not conveyed by deed, because there had been partial performance by one side and acceptance of benefit by other). However, water suppliers in Washington should ensure that easements are conveyed by deed.

Because an easement is an interest in land, the document creating the easement may be recorded in the county deed records if the document satisfies the state’s statutory recording requirements. See IC 55-801 through 55-818; ORS 93.600–808; RCW 65.08.030–180. Recording is crucial because it gives constructive notice of the easement to third parties (other parties who are not part of the agreement). After recording, anyone who deals with the servient estate will be legally held to know that the easement exists, even if the easement itself is undeveloped.

Private Parties

Irrigation districts in all three states have broad powers to acquire easements and other rights from private parties by lease, purchase, and eminent domain. See IC 43-304; ORS 545.239; RCW 87.03.010. Idaho, for example, gives irrigation districts “the right to acquire, either by purchase, condemnation, or other legal means all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works.” IC 43-304.

By Eminent Domain

If negotiations with private landowners prove unsuccessful, some special districts, such as irrigation districts, are authorized to acquire easements and other interest through the power of eminent domain. IC 43-304; ORS 545.239; RCW 87.03.140. Oregon’s statute provides an example of these three states’ nearly identical provisions.

The Oregon statute provides:

“The board of directors and its agents and employees have the right to enter upon any land in the manner provided by ORS 35.220 to make surveys, and may locate the necessary irrigation or drainage works and the line for any canals and the necessary branches for the works or canals on any lands that may be considered best for such location. The board also has the right to acquire, by lease, purchase, condemnation or other legal means, all lands, water, water rights, rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canals and works proposed to be constructed by the board. The board also has the right to so acquire lands, and all necessary appurtenances, for reservoirs, and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of the district.” ORS 545.239(1).

All three states have also granted the right of condemnation to individuals in order to secure easements for irrigation ditches. IC 42-1106; ORS 772.305; RCW 90.03.040. Idaho, for example, provides that “[i]n case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain.” IC 42-1106.

Irrigation districts and landowners in these states may also condemn and then use another’s canal. IC 42-1102; ORS 772.310; RCW 90.03.040. To secure an easement on another’s canal by eminent domain in Idaho and Washington, the use of the canal must be necessary. Canyon View Irrigation Co. v. Twin Falls Canal Co., 101 Idaho 604, 619 P2d 122 (1980); State ex rel. Ballard v. Superior Court, Kittitas County, 114 Wash 663, 195 P 1051 (1921). In Ballard, Richards irrigated his land with water from the Richards’ ditch, which started at a common point with the Lund ditch, both of which crossed Ballard’s property. To irrigate another part of his property, Richards sought an easement to carry 50 inches of water through the Lund ditch and extend the Lund ditch nearly 400 feet. Ballard argued that Richards could irrigate the other part of his property using the existing Richards’ ditch simply by constructing a 2,000-foot-long flume elevated 10-to-20 feet above the ground. The court held that because the flume “would hardly be feasible or practicable,” a reasonable necessity existed for the easement to be condemned. 114 Wash at 664.

Condensation suits are instituted in local courts having jurisdiction over the land being condemned. IC 7-706; ORS 35.245; RCW 8.20.010. The primary issue, assuming the irrigation district’s condemnation authority is not contested, is the determination of “just compensation” for the needed easement.
### Easements

#### Prescription Requirements

**Prior Use**

**Necessity**

**Dedication**

**Contemplated Uses**

**Monitor Actions**

**“Servient” Rights**

#### By Prescription

It is possible to create easements by prescription. The requirements are similar to those for adverse possession. If the prescriptive actions (i.e., use of the property for water delivery) are open, notorious, and adverse to the rights of the underlying landowner, and continuous and uninterrupted for the statutory period, the owner of the delivery system may acquire an easement. The statutory period in these three states differs: Oregon and Washington require 10 years, but Idaho now mandates 20 years. See IC 5-203; ORS 105.620; RCW 4.16.020.

#### By Implication

Easements can also be created by implication either through prior use or by necessity. Prior use applies to situations in which a landowner conveys a portion of a tract of land without addressing the buyer’s right to continue to use easements across the portion retained by the seller. When a parcel of land could not otherwise be physically accessed from a public right-of-way, ways of necessity can be created through a statutory procedure in Oregon and Washington. ORS 376.150-.200; RCW 8.24.010-.050. Idaho common law similarly allows for the creation of easements by necessity. Cordwell v. Smith, 105 Idaho 71, 665 P2d 1081 (Idaho App 1983). Easements may also be implied through the platting of property on which roads and utility easements are dedicated to the public.

### RIGHTS AND DUTIES UNDER EASEMENTS AND RIGHTS-OF-WAY

#### Exclusivity of Use

Unless the instrument creating an easement expressly creates an exclusive easement, the rights of the easement holder are nonexclusive. See Hayward v. Mason, 54 Wash 649, 652, 104 P 139, 140 (1909) (ditch easement was nonexclusive because there was no language in the deed indicating “that the right of way granted was an exclusive one”). 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. Reynolds Irr. Dist. v. Sproat, 69 Idaho 315, 206 P2d 774 (1949). In that case, an irrigation district sought to enjoin the Sproats from using the district’s Pyke & Roscoe ditch, which crossed the Sproats’ property. The court affirmed the trial court’s decision that the district owned the irrigation ditch. On rehearing the case, however, the court held that this did not prevent the Sproats from using the ditch. Although the Sproats had not expressly reserved the right to use the ditch in the easement document, they had the right to use it so long as their use did not “interfere with the dominant estate.” 69 Idaho at 333.

The rights of the easement holder and the servient owner 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 uses were contemplated.

In Chevron Pipe Line Co. v. De Roest, 122 Or App 440, 858 P2d 164 (1993), modified 126 Or App 113 (1994), Chevron owned an easement for an interstate petroleum products pipeline. The pipeline was buried at depths varying from 1.5 to 3.5 feet. De Roest acquired the servient estate and gradually placed fill on it until the pipeline was 10.5 to 22.5 feet below ground. De Roest also parked heavy equipment on the easement. The court noted that a rider to the easement recognized that the servient estate was used for a sawmill and that lumber was stored on the easement. In light of this fact, the court refused to enjoin De Roest’s actions even though it increased Chevron’s “costs, access time, safety risks and liability exposure.” 122 Or App at 446. De Roest’s use did not interfere with Chevron’s use in any way that was not contemplated when the easement was granted. One factor that influenced the court’s decision was that De Roest’s infilling of the pipeline took place over a long period of time, during which Chevron did not complain. Thus one lesson from this case is that easement holders should monitor potential encroachments and not “sleep on their rights.”

The lesson that past inaction may inhibit future use of the easement is reinforced by Nampa & Meridian Irr. Dist. v. Washington Federal Sav., 135 Idaho 518, 20 P3d 702 (2001). In that case, the irrigation district’s historic maintenance practices resulted in the servient owner’s expanded use of the district’s easement. The easement document granted the district an easement for a lateral ditch crossing the servient estate and a 40-foot easement for maintenance purposes. As part of Washington Federal’s attempt to subdivide the servient estate, it began constructing a sidewalk and fence along the north side of the lateral. The district sued to stop construction, arguing that it would interfere with its ability to repair and maintain the lateral using heavy equipment. The court held that since the district had used only a pickup truck to maintain the lateral for the past 20 years and could maintain the lateral from the lateral’s south side, the sidewalk and fence would not unreasonably interfere with the district’s easement rights.
Easements

Perpetual Term

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

Location of Easement and Changes
When the location of an easement is not specified in the document creating it, the location may be determined by how the parties have used the land since the easement was created. For example, in *White Bros. & Crum Co. v. Watson*, 64 Wash 666, 117 P 497 (1911), the White Brothers’ predecessor had appropriated the waters of a creek on federal property and carried the water by a ditch and flume to his property. Watson then acquired his land subject to the White Brothers’ RS 2339 right-of-way. Five years later, a flood destroyed the ditch and flume and made it impossible to divert water from the creek at the original location. The White Brothers then sought to construct a cement dam and lay a pipeline 76 feet above the original location. The court refused to permit the White Brothers to proceed, holding that “[t]he manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way — in short, the easement — became fixed and determined by the facts as they existed when [Watson’s] homestead entry was allowed.” 64 Wash at 669-70.

A “blanket,” “floating,” or “roving” easement is produced when the instrument creating the easement simply describes the land that it affects with no attempt to specifically locate the easement. Reserved easements in federal patents, such as in *White Bros.*, were always blanket easements. The guiding principle is that an ambiguous instrument will be interpreted in light of the practical construction given to it by the parties. Unless the owner of the 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. *McCue v. Bellingham Bay Water Co.*, 5 Wash 156, 31 P 461 (1892).

This principle guided the court in *Quinn v. Stone*, 75 Idaho 243, 270 P2d 825 (1954). Quinn obtained an easement from Stone’s predecessor in interest to construct two ditches from a pump. Originally, one ditch was to run in a northerly direction and one was to run in a northwesterly direction. Quinn quickly built a ditch running to the north, but it was unsatisfactory and was quickly discarded. Quinn then built a second ditch running to the northeast. Use of this ditch over the years caused sink holes to develop, rendering it ineffective, so Quinn began building a third ditch running to the northwest, to which Stone objected, as it would interfere with his farming operations. The court held that a ditch running to the north and then the west would be feasible and would not unreasonably interfere with Stone’s use of the property.

In *Spear v. Cook*, 8 Or 380 (1880), 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].”  *Id.* at 380. 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 court’s decision 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.

Idaho gives servient owners the right to change the location of irrigation channels, provided the change does not “impede the flow of the water therein, or...otherwise injure” the dominant estate. IC 42-1207. In *Simonson v. Moon*, 72 Idaho 39, 237 P2d 93 (1951), the servient owner cut off one lateral ditch and extended another ditch to the point at which the prior ditch had entered the dominant estate. Because the newly lengthened ditch lacked the capacity to simultaneously serve both landowners, the court held that this change impeded the flow of water to the dominant estate and violated the statute authorizing the servient owner to change the lateral’s location.

Another common issue associated with locating easements is determining the width of the easement. If the width is not specified, it is constrained by “the line of reasonable enjoyment,” which is what is “reasonably necessary and convenient for the purpose for which it was created.” *Everett Water Co. v. Powers*, 37 Wash 143, 152, 79 P 617, 621 (1905). The original width of the easement can be expanded “if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash 2d 873, 884, 73 P3d 369, 374 (2003) (relying on *Patterson v. Chambers’ Power Co.*, 81 Or 328, 340-41, 159 P 568, 572 (1916)).
Easements

Secondary Easements

Repair

Liability Issues

Contribution to Maintenance

Limitations of Right to Use

Intent Evidence

Future Adjustments

Access, Maintenance, and Other Secondary Rights

Irrigation ditch owners typically need to enter the property across which the ditch flows to inspect and, if necessary, repair the ditch. Such rights are often referred to as “secondary easements” and their nature and scope are generally matters of common law. See Clesson S. Kinney, A Treatise on the Law of Irrigation and Water Rights § 990 at 1750 (2d ed 1912). In Idaho, the common law precept of secondary easements for irrigation systems has been codified. See IC 42-1204.

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 servient landowner’s property for purposes of inspection, maintenance, and repair of the easement. Gorrie v. Wiser Irr. Dist., 28 Idaho 248, 143 P 561 (1915); Carson v. Gentner, 33 Or 512, 52 P 506 (1898); Baskin v. Livers, 181 Wash 370, 43 P2d 42 (1935). For example in Carson, Carson had taken control of a ditch across state-owned lands and used it to divert water for mining purposes in 1876. Seven years later, Gentner settled on the property and subsequently obtained a homestead patent from the state. The patent did not contain an express reservation of water 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 court held that Carson had a vested ditch right under an Oregon statute similar to RS 2339, and held that the right to clean and repair was not dependent on any express reservation in a deed to the patentee.

The easement holder’s failure to maintain and repair an easement violates the rights of the servient owner and could be a liability should the servient owner’s property be harmed. In Coulson v. Aberdeen-Springfield Canal Co., 47 Idaho 619, 277 P 542 (1929), the servient owner’s pure-bred bull died after falling into “a gulch of considerable dimensions” created by the canal company’s failure to maintain a waste ditch. 47 Idaho at 623. The canal company argued that the 1891 Act gave it the right to exclusive possession of the right-of-way, which meant that the bull had trespassed. The court rejected this argument, holding that the company “was under the duty of maintaining its waste ditch in substantially its original condition...The failure of [the company] to repair or guard amounts to actionable negligence.” Id. at 631.

Oregon and Idaho have different approaches regarding contribution from the servient owner and easement holder for the costs of repairing and maintaining an easement used by both parties. In Oregon, such costs can be apportioned equitably based on use of the easement by the servient and dominant estates. Van Natta v. Nys, 203 Or 204, 234, 278 P2d 163, 177 (1954). In Idaho, however, the easement holder has the duty of maintaining the easement even if the servient owner uses it, but this “does not mean that the easement owner is required to maintain and repair the easement for the benefit of the servient estate.” Walker v. Boozer, 140 Idaho 451, 456, 95 P3d 69, 74 (2004). Contribution for maintenance costs incurred by the servient owner is available if the easement owner’s level of maintenance creates “an additional burden on the…servient estate.” Id. Courts in Washington have yet to directly address this issue.

Permitted Uses and Modification of Use

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. As noted above, in Fox v. Miller, 150 F 320 (9th Cir 1906), the easement language broadly described the use of the Idaho right-of-way as “logging purposes.” The court therefore held that the right-of-way holder was not restricted to transporting logs by road, flume, or tram and could float logs down a stream located within the easement. Of course, the intended purpose is not always clear from the easement language itself. Interpreting an express easement often requires an investigation of the intentions and circumstances of the parties at the time of the original grant or reservation. These interpretive issues are particularly problematic for irrigation easements, because many of them are very old and the character of the areas where they exist has likely changed dramatically over the years.

In Jewell v. Kroo, 268 Or 103, 517 P2d 657 (1973), 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 three-foot-high rock and earthen dam. 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 that the changes made on the Jewells’ land were consistent with and necessary for the Kroos’ use.

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. See, e.g., Boydstun Beach Assoc. v. Allen, 111 Idaho 370,
Easements

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Needed Repairs

723 P2d 914 (Idaho App 1986); Logan v. Brodrick, 29 Wash App 796, 631 P2d 429 (1981). 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.

The use of prescriptive easements may also be adjusted. Just as with express easements, adjustments to use of prescriptive easements cannot place an unreasonable burden on the servient estate. See Firebaugh v. Boring, 288 Or 607, 607 P2d 155 (1980); Gibbens v. Weissaupt, 98 Idaho 633, 570 P2d 870 (1977).

Improvements

In general, an easement owner has the right to improve an easement, but only to the extent that the improvement does not increase the burden on the servient owner. Guillet v. Livernois, 297 Mass 337, 8 NE2d 921 (1937). “It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance.” Wright v. Austin, 143 Cal 236, 239, 76 P 1023 (1904). State courts across the country are split on whether an easement holder acts within the scope of its easement when it upgrades its irrigation ditches. For example, in Papa v. Flake, 18 Ariz App 496, 503 P2d 972 (1972), the court held that lining an existing ditch with concrete was within the scope of the easement. A California court, however, has held that lining a ditch with Gunite (to limit leakage) was outside the scope of the easement. Krieger v. Pacific Gas & Elec. Co., 119 Cal App 3d 137, 173 Cal Rptr 751 (1981).

Of the three states examined herein, easement holders in Idaho have the clearest right to improve the water delivery systems located on easements. An easement holder (and the servient owner) has “the right to place [a ditch, canal, lateral, or drain] in a buried conduit within the easement or right-of-way on the property of another…so long as the pipe and the construction is accomplished in a manner that the surface of the owner’s property and the owner’s use thereof is not disturbed and is restored to the condition of adjacent property as expeditiously as possible, but no longer than thirty (30) days after the completion of construction.” IC 42-1207.

In addition, Idaho courts have held that other improvements can fall within the scope of secondary easements. In Abbott, 119 Idaho 544, a school district sought to bury an irrigation ditch running across its property in order to construct a new elementary school. The easement owner approved the burial of the ditch, provided that a concrete inlet structure and safety/trash screen were constructed within the easement but on the adjacent property owner’s land. Abbott, the adjacent property owner, sued after construction began, alleging that the new features would increase the burden on his property. The Idaho Supreme Court affirmed the trial court’s conclusion that the improvements “were within the scope of the easement and did not enlarge the use of the easement or constitute an unreasonable increase in the burden of the easement on the servient estate.” 199 Idaho at 550. See also Reynolds Irr. Dist., 69 Idaho at 334, 206 P2d at 786 (suggesting that easement holder could improve its ditch if improvement is done to increase effective use of water or to prevent waste).

Although irrigation districts in Oregon lack the statutory authority to bury preexisting ditches and canals, a federal District Court in Oregon recently issued an unpublished decision holding that a canal easement secured under the 1891 Act can be converted to a buried pipeline. In Swalley Irrigation Dist. v. Alvis, No. Civ. 04-1721-AA, 2006 WL 508312 (D Or Mar. 1, 2006) (unpublished), the irrigation district sought declaratory relief when landowners objected to its plans to replace five miles of a canal with a pipeline buried within the original easement. The irrigation district stressed that in replacing the canal with a pipeline the easement is still used for irrigation, and it promotes water conservation, clean water supplies, and the efficient delivery of irrigation water. Focusing on the language of the 1891 Act, the court noted that even though it only referred to canals and ditches, the right-of-way granted was expressly for irrigation purposes. Relying on Oregon common law, the court held that the irrigation district’s method of use was not limited to open canals and ditches. A pipeline would be used for the same purpose as the existing ditch and would not increase the burden on the servient estates. Although this decision is unpublished and nonbinding as precedent, it may be indicative of the judiciary’s current perspective.

Other Oregon cases pertaining to easement uses also suggest that improvement is allowed. In Baumbach v. Poole, 266 Or 154, 511 P2d 1219 (1973), the Oregon Supreme Court indicated that Oregon courts had adopted the general rule that the grant of an easement includes the right to do whatever is necessary for repairs. In that case, easement owner (Poole) wanted to subdivide his property, but needed a “better road” to meet local ordinances. 266 Or at 156. He constructed an improved road over a 50-foot easement he had purchased from the plaintiff. The court held that the road expansion had damaged the plaintiff’s property, but only because Poole inadvertently pushed dirt outside his 50-foot right-of-way and had removed several small trees. However, the construction of an improved road over what was likely a dirt or gravel 50-foot easement was not deemed to be outside the scope of the easement owner’s rights. See
Martin v. Houser, 199 Or 579, 248 P2d 341 (1952), the plaintiff landowners attempted to extinguish an easement across their land that had been granted to a railway company for the purpose of transporting logs by rail. Over time, the easement owner had begun transporting logs along the easement by logging trucks instead of railways. The plaintiffs argued that the use had changed because the means of transportation had changed. The court held that “[e]asements, which are one of the numerous instrumentalities by which the day’s work is done, would thwart progress instead of facilitating it unless those who have easements can avail themselves of the newer and improved methods in the use of the easements.” 199 Or at 592. The court relied heavily on the historical shift from horse-drawn conveyances to the automobile. Case law resoundingly supports the proposition that an easement originally intended for transportation of person or property is not extinguished merely because the mode of transportation changes due to technological advancement. By analogy, piping or lining of ditches could be considered a technologically advanced way of transporting water and may not represent a substantially different use of the easement.

The situation is murkier in Washington, if for no other reason than the dearth of relevant case law. The closest case is Logan v. Brodrick, 29 Wash App 796, 631 P2d 429 (1981), in which the scope of an express easement was at issue. In 1965, the Brodricks granted the Logans, who operated a lakeside resort, a perpetual easement for a road across their property. The Logans gradually expanded the resort, resulting in increased traffic on the road, until the Brodricks placed posts in the road to reduce access. This action resulted in an initial court decision limiting increases in the volume of traffic using the easement to “increases in population and use” in the surrounding area. 29 Wash App at 798. After several years of increasing traffic, the Brodricks partially blocked the road with a fence, causing the Logans to sue. In affirming the trial court’s decision that the increased volume did not overburden the servient estate, the appellate court held that “[n]ormal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement” and relied on the assumption that “[c]hanges in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated.” Id. at 800. By analogy, Washington courts could assume that changes and improvements to water delivery systems should be reasonably contemplated by the parties unless the easement contains limiting language.

A case about prescriptive easements also sheds some light on how a Washington court might interpret the scope of an express irrigation easement. In Benis v. Shoreridge Water Cooperative Co., No. 41153-0-1, 1998 WL 466665 (Wash App 1998) (unpublished), Benis purchased a lot on which Shoreridge’s 500-gallon water tank had been located for 45 years. When Shoreridge replaced the tank with a larger tank, Benis sued to determine the extent of Shoreridge’s rights. The trial court held that Shoreridge had a prescriptive easement, the size of which was limited to the original tank’s physical encroachment on Benis’s lot. In affirming the trial court’s decision, the appellate court noted that “there is no Washington authority quite on point but that American law generally recognizes that prescriptive easements are capable of ‘future change and growth in the same way as an easement created by general language in an instrument would be.’” The scope of express easements created with general language can change gradually to keep pace with the normal changes in the activities covered by the easement.” Id. at *6 (citations omitted).

The foregoing cases are intended to demonstrate the types of cases courts in these three states might look to in evaluating the issue of improvements to irrigation ditches. 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 improving permitted uses, but easement holders should carefully analyze each situation before taking any action.

Tort Liability

Easement holders have certain duties toward third parties that enter lands covered by the easement. The scope of these duties depends on whether the third party has been invited for some business purpose of the easement holder (e.g., a party constructing a new diversion structure) or is merely allowed or not prohibited from crossing the land (e.g., when 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 F2d 338 (9th Cir 1962).

In Martin, Houser owned an easement across Martin’s farm and had constructed an irrigation ditch on it. Martin’s son was chasing a stray cow on a path along the bank of the ditch, when he tripped and fell into the diversion structure, injuring himself. Relying on Washington law, the court held that Martin and his...
A somewhat more complex problem arises when federal agencies attempt to regulate use of rights-of-way granted by the federal government. In such cases, easement holders may argue that they have vested or “grandfathered” rights to continue to operate their easements exactly as they did at the time the easements 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 F3d 1254, 1260 (9th Cir 1993) (“Forest Service still has the authority to reasonably regulate” a vested RS 2339 water easement); Grindstone Butte Project v. Kleppe, 638 F2d 100 (9th Cir 1981) (in exercising discretion to impose terms and conditions on pre-FLPMA rights-of-way, the Secretary of the Interior must comply with the National Environmental Policy Act).

In Elko County Bd. of Sup’rs v. Glickman, 909 F Supp 759 (D Nev 1995), the court added that regulations that prohibit the use of an easement, or are so stringent as to amount to prohibition, are not “reasonable.” Id. at 764 (citing United States v. Doremus, 888 F2d 630, 632 (9th Cir 1989)). In Elko, a group of landowners and ranchers in Elko County, Nevada sued the US Forest Service (Forest Service), seeking to enjoin its interference with the landowners’ use of RS 2339 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 US District Court for Nevada denied the irrigators' requested injunction and held that, even assuming the ranchers had valid RS 2339 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 Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to perform any ditch maintenance or improvement in the national forest. The court did note, however, that the Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to perform any ditch maintenance or improvement in the national forest. The court did note, however, that the Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to perform any ditch maintenance or improvement in the national forest. The court did note, however, that the Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to perform any ditch maintenance or improvement in the national forest. The court did note, however, that the Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to perform any ditch maintenance or improvement in the national forest.

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Transfer of Easement Rights

A transfer of 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 or constructive notice of the servitude. Recording is a crucial step in protecting easement rights and avoiding disputes. A purchaser of servient property or any other third party automatically has constructive notice of easements properly recorded in county deed records. IC 55-811; ORS 93.710; RCW 65.08.070. A purchaser will also be considered on notice of any existing servitudes apparent from a physical inspection of the property. See IC 42-1102; Silvernale v. Logan, 252 Or 200, 207, 448 P2d 530, 533 (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); and Peterson v. Weist, 48 Wash 339, 93 P 519 (1908). 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.

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

When a dominant estate is subdivided, each grantee is given a right to all appurtenances. Therefore an easement appurtenant to the entire property will continue to be appurtenant to each of the subdivided parcels. An increased 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. 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); Hoffman v. Skewis, 35 Wash App 673, 668 P2d 1311 (1983) (subdivided parcels entitled to use easement for ingress and egress); and Russell v. Irish, 20 Idaho 194, 118 P 501 (1911) (appurtenant water right passes to subdivided land in same proportion as land was divided).

Termination of Easements and Rights-of-Way

An easement can be extinguished by a conveyance in which the easement holder releases its interest in the servient estate. The release should be written and should comply with the formalities of the statute of frauds (requirements under contract law). If, however, an easement holder orally releases the servient estate and the owner of the servient estate, in reasonable reliance, substantially changes its position to its 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. See, e.g., Heg v. Alldredge, 157 Wash 2d 154, 137 P3d 9 (2006); and Pfandler v. Bruce, 195 Or App 561, 98 P3d 1146 (2004). An easement is also extinguished when its stated duration has expired or when the specific purpose for which it was granted can no longer be served by its continued existence. Also, certain easements may be canceled by the landowner if the easement holder has breached a material term of the easement document.

Forfeiture and Abandonment

An easement ceases to exist when it is abandoned. This does not mean, however, that an easement holder must make continuous use of an easement once the interest is created. Abandonment requires proof that the easement owner intended to permanently abandon the easement. A variation in the use made of the easement does not necessarily indicate that intent. Nonuse alone is also insufficient evidence of intent to abandon. See, e.g., Heg, 157 Wash 2d 154; Powers v. Coos Bay Lumber Co., 200 Or 329, 263 P2d 913 (1953); and Ada County Farmers’ Irr. Co. v. Farmers’ Canal Co., 5 Idaho 793, 51 P 990 (1898).

If the need to use an easement has not yet arisen, the easement will not be deemed abandoned by the mere passage of time. See, e.g., Quinn, 75 Idaho 243 (failure to construct irrigation ditch does not show intent to abandon easement). 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 & James W. Ely, Jr., The Law of Easements and Licenses in Land ¶ 905[2] at 9-32 (1988). Nonuse for a substantial duration may give rise to the inference of intent to abandon. A greater degree of evidence will probably be required to establish abandonment when such a finding would result in forfeiture of a valuable right.

Prescription

Rights to easement use are subject to hostile takeover. An easement may be lost by “prescription” if the use by the owner of the servient estate satisfies all the elements required for the creation of an easement by prescription (see above). The only difference between the prescription necessary for termination and that necessary for creation is that adversity may be more difficult to establish when proving termination of an easement. Because the owner of the servient estate is entitled to use the servient land as owner of the land, the prescriptive period will not begin unless the use by the owner of the servient estate is clearly inconsistent with the use of the easement. Damming ditches and locking headgates may constitute such inconsistent use. Irrigation easement holders subject to such behavior can avoid losing their easements either by formally permitting the behavior and thus rendering it not adverse, or by challenging it in court.
PROTECTION OF EASEMENTS AND RIGHTS-OF-WAY

The following section briefly reviews common forms of legal actions that water conveyors might use to resolve disputes and provides a basic understanding of the potential legal means of protecting their rights. Parties involved in litigation should always consult with counsel at the earliest possible stage.

Quiet Title

In Idaho, Oregon, and Washington, a suit to quiet title is a statutory civil action in which the court determines the ownership of and right to possess a parcel of real property. See IC 6-401; ORS 105.605; RCW 7.28.010. If the action concerns federal land, an easement owner may bring suit under the Quiet Title Act (28 USC § 2409a). 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 F3d 1254 (9th Cir 1993) (quiet title suit brought by holder of public highway easement crossing US 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 possesses a reasonable awareness that the government claims some interest adverse to the plaintiff. See Overland Ditch & Reservoir Co. v. United States, No. Civ. A. 96 N 797, 1996 WL 33484927 (D Colo Dec. 16, 1996) (citing Knapp v. United States, 636 F2d 279 (10th Cir 1980)).

Declaratory or Injunctive Relief

Due to the statutory requirements of a quiet title action, irrigation districts and other easement holders often seek to resolve disputes through suits for declaratory or injunctive relief. See, e.g., Nampa & Meridian Irr. Dist. v. Mussell, 139 Idaho 28, 72 P3d 868 (2003); Ericsson v. Braukman, 111 Or App 57, 824 P2d 1174 (1992); and Sunnyside Valley Irr. Dist., 149 Wash 2d 873. 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 an easement holder seeking, for example, a determination that a particular easement is valid, and an injunction prohibiting the landowner from interfering with the 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 when residential development is gradually encroaching on an irrigation canal or when a landowner has sent the easement holder a letter stating that the owner plans to lock its gates and not permit the easement holder access to maintain or repair its canal.

Trespass

Trespass is an action that affords the plaintiff damages and injunctive relief for a 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. See Coulson, 47 Idaho 619. A trespass action generally does not lie against the landowner; instead, quiet title, declaratory, or injunctive relief is appropriate. 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 ditch owners).

Private Nuisance

Nuisances are either “private” or “public.” 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. Any person whose property or personal enjoyment of his or her property is affected by a private nuisance may maintain a claim for damages. IC 52-111; ORS 105.505; RCW 7.48.020.

As is the case for trespass, nuisance actions are generally not the most direct or appropriate means of resolving disputes with landowners, but they can be effective when third-party actions interfere with an easement holder’s rights under an easement. For instance, a nuisance action may be appropriate when third parties not subject to the terms of the easement are polluting an irrigation ditch, interfering with access to the ditch, or endangering the lateral support for the ditch.

Challenge to Agency Action

As discussed above, government agencies will sometimes attempt to regulate an easement holder’s use of its easement rights in a way that substantially interferes with the water conveyance 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 easement holder’s claim is typically that the agency’s regulatory decision or action is unreasonable (i.e., “arbitrary and capricious”) or unauthorized by statute.

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