

# Pipeline and Informed Planning Alliance Conference

## Title and Surveying Issues

Arlington, Virginia  
January 15, 2008

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### I. Title Issues – Easements

#### A. Definitions

- The “Bundle of Sticks” concept of real estate ownership.
- Easement - A limited, non-possessory interest in the land of another
  - Must be in writing due to statute of frauds
  - Recordation! Or it may only represent an agreement between the two parties
  - Real estate is subject to a written easement regardless of whether the conveying deed mentions it or not.
- License
  - A personal privilege, unassignable and terminable at will, to do something on another’s land, which contains no interest in that land, and which is not required to be created by a conveyance
  - An agreement for an easement that is not in writing can only be a license
- The Term “Right of Way” - used in two contexts: the “easement” and the “corridor.”

#### B. Types of Easements

1. Appurtenant Easements
  - a. Creates Dominant and Servient Estates
    - i. Explain estates and attachments thereto
2. Easement in Gross – Most pipelines because they do not typically “serve” a property
  - a. Creates only a servient estate
3. Positive v. Negative Easements. Pipeline easements are positive easements.

#### C. Creation of Easements

Written by Express Grant

- Dedication
- Grant
- Reservation in a deed
- In a Mortgage

#### Unwritten

- Prescriptive Easement – statutory period of time and exact requirements vary state to state
- By Necessity – typically not a pipeline, but explains the need to know state’s requirements (In Maine not landlocked if bounded by navigable water; but not in Vermont or most other states)
- By Implication – typically not for a pipeline
- Although these operate by law, to get marketable title, you need to go to court.

#### U.S. Revised Statute 2477

- “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” (1866)
- Repealed in 1976, but with a grandfather clause – “If it could be shown that a ‘highway’ was ‘constructed’ prior to 1976 over U.S.–owned land before it was set aside for other uses, an RS 2477 claim can be granted.”

### **D. Termination of Easements**

- Written - By a document having that purpose:
  - Release
  - Partial release
  - Vacation
  - Abandonment (two step process with Railroads) – Railroads!
- By Merger of Title
- Unwritten
  - Adverse Possession
  - Abandonment
    - Non-Use all by itself is not sufficient
    - Must be accompanied by an express intent to abandon which could be by action of inaction on the part of the easement owner

### **E. “Scope”**

- Scope needs to be carefully outlined in the document

- If it is not, it is ripe for litigation
  - A large percentage of real property law suits relate to Easements
    - i. Don't be drawn in by the "It's just an easement"
1. Scope - Physical Extent (legal description)
    - a. Blanket easements
  2. Scope – Nature of Use (for what purpose)
    - Estates created (dominant and servient)
  3. Overburdening on Easement
    - (1) By physical extent
    - (2) By nature of use
      - i. e.g. Easement to install and maintain "a pipeline" vs. "pipeline or pipelines"
    - Generally:
      - i. Easement owner cannot disrupt the underlying owner's rights beyond that necessary for the exercise of his/her rights
      - ii. Fee owner can use his/her property to its full extent as long as it does not disrupt the easement owner's rights
      - iii. The extent of use that the underlying fee owner can exercise depends on the state.
        - a. Safety
        - b. In some states, the underlying owner can use any part of the easement area that is not currently being used.
        - c. In some states, the underlying owner can use any part of the easement area that the easement owner does not actually need!
  4. What about Exclusivity?
    - i. Exclusive in terms of who can use the easement for its granted use?
    - ii. Exclusive in terms of the underlying fee owner's remaining rights?

## F. Railroads

An excellent resource [www.right-of-way-law.com](http://www.right-of-way-law.com)

- Was the railroad's interest an easement or was it fee?
- In recent litigation in Indiana, courts have been determining about 85% of the time, that the railroad held an Easement;

and about 15% of the time, that the railroad actually held fee title.

- **\*\*What are the easement owner's rights, if any, after RR abandonment?\***

## II. Title Issues

1. Discovery
  - a. Requirements and practices
    - i. marketable title statutes misunderstood as defining search criteria
  - b. Some states regulate title insurance rates (NM, TX, FL)
  - c. Practices are basically Market and liability driven
    - i. Poor searches/missed easements result in claims
    - ii. Substantial competition in the title industry
2. Sources of Information
  - i. Public records, including court records; GIS
  - ii. Private records
3. Title Company role – Conduct a title search, prepare an abstract of title and provide title insurance.
  - a. Title search - An examination of the historical records concerning title to a property. Records searched include deeds, mortgages, court proceedings, property indexes, taxes and other documents. Its purpose is typically to confirm the property owner's right to sell or finance the property, and to identify any claims or defects to the property.
  - b. Abstract of title - A historical summary of those documents. An abstract typically:
    1. Documents the current ownership and vesting of the real estate
    2. Gives the legal description of the real estate
    3. Identifies record encumbrances affecting the property including:
      - i. open liens and judgments against the property, including the amount, date, and priority status
      - ii. mortgage lenders and amounts owed against the property
      - iii. Identifies other servitudes, including easements
    4. Provides assessed value, annual tax amount, unpaid taxes, and checks prior years' records for any delinquencies
  - c. Types of Title Company products

- i. Full title search (length of deed chain varies)
- ii. Current owner search (no chain of title)
- iii. Judgment and Lien search
- iv. Easement search
- v. Title Encumbrance Report
- vi. For pipelines, often only a deed search is performed; but when there is a condemnation, the search will be more complete because of notification requirements

There is some confusion over the extent of any given Title search. Some people think that a state's marketable title act dictates the length of the search. This may be true in the context of the deed chain, but not in terms of a search for easements and encumbrances.

### III. Survey Issues

#### A. Types of Surveys

The issue is "what Easement information will be shown on a survey?"

- Regulation of this issue depends on 4 things:
  - Statutes
  - Administrative Rules, including Ordinances
  - Recognized standards
  - Normal Standard of Care of the state/locale

Bottom line – be careful about assuming what easement information is shown on any given survey

1. ALTA/ACSM Land Title Survey
  - Nationally-recognized standard for surveys of commercial/developed real estate – 2005 standard
  - Easement info to be provided by client (title company)
    - EXCEPT that in some Colonial and New England states, the surveyor must prepare an abstract
    - This is NOT the case in USPLS States
  - Surveyor to show any easements for which information was provided
  - Surveyor to show any observed evidence of easements regardless of whether info was provided

- Possible prescriptive easement
    - Did title company miss an easement in the search?
  - One-Call issues abound; this is a very controversial topic in surveying. Many times, there will be no response to a call for marking of utilities on a design survey
2. Generic "Boundary Survey"
    - Be careful of relying on
    - What is shown vis-à-vis easements depends on laws and normal standard of care
  3. "Mortgage Survey"
    - For residential property – not used or allowed in some states
    - What is shown vis-à-vis easements depends on laws and normal standard of care

## **B. Existing Pipeline Easements & Development**

- The surveyor and engineer must be aware of pipeline easements when working with a client to develop real estate.
- MUST have a survey with title work/abstract in order to assure there is not an encumbrance that would present and impediment or hazard to development.
- But, clients do not always reveal their plans
- In my opinion, surveyors should not plat or participate in the platting or development of real estate without having an abstract of title, title commitment or title policy to review. If one of those is not provided, the client should be notified in no uncertain terms of the potential liabilities.
- If there is an existing pipeline, the development will have to work around that
- If the real estate is subject to a blanket easement, the surveyor will need to work with the pipeline company to get a release or partial release. The resulting width of easement will be based on industry standards, documented future plans on the part of the pipeline company, and the original easement document.

## IV. Training Issues

- A. Title company employees, Real estate agents and Surveyors are subject to mandatory continuing education in many states

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