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Easements: Acquire, Maintain & Protect Water Access Including Wells, Ditches, & Pipelines

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Presentation Outline

- Basic Property Concepts
- Types of Easements
 - Express, implied, prescriptive, statutory, & “irrevocable licenses”
- Statutory Easements
- Utility Easements
- Interpretation





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Basic Property Concepts





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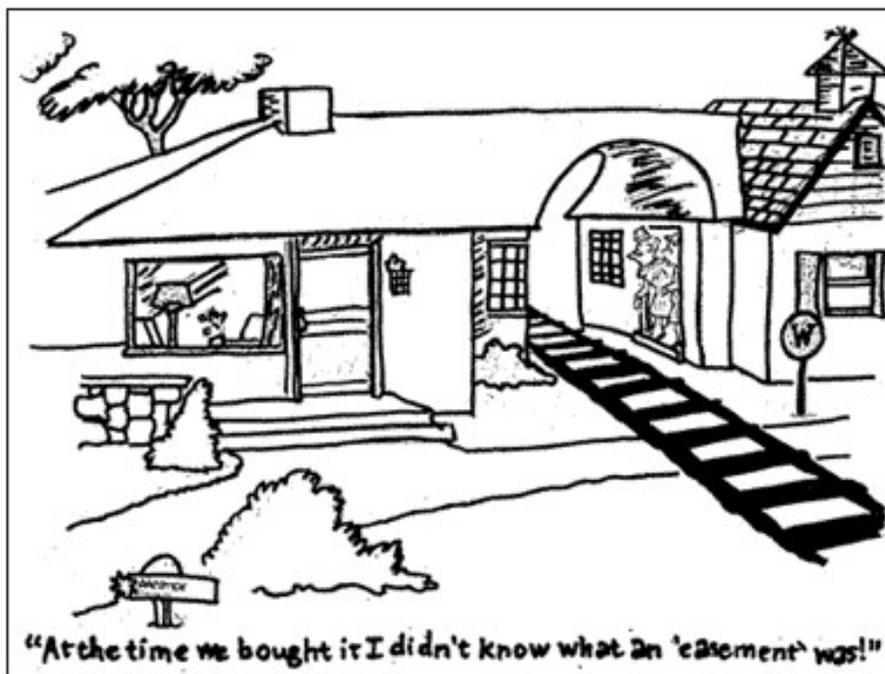
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What is an Easement?

A nonpossessory interest in the land of another, that entitles holders to a private right of way, embodying the right to pass across another's land





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Property as “Bundle of Sticks”

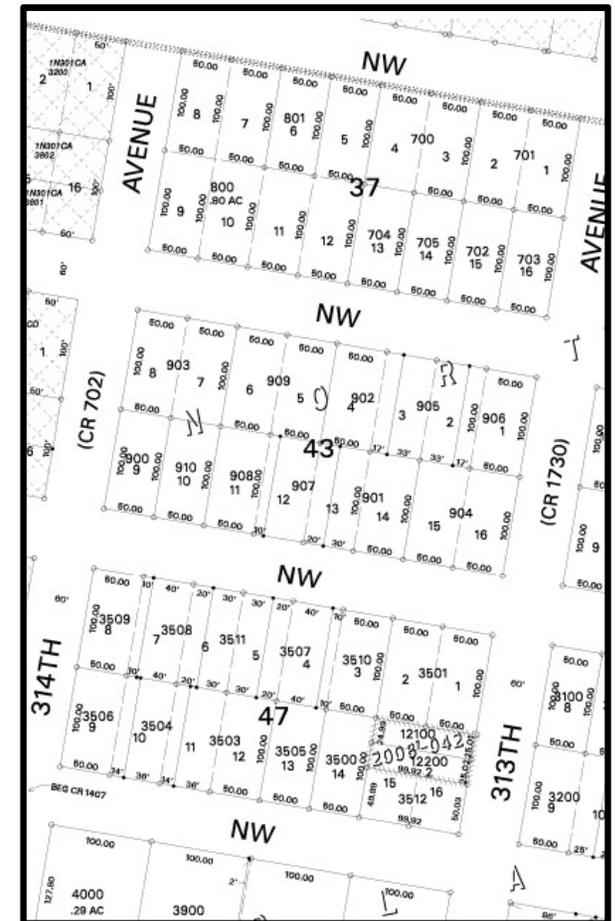
- Fee Ownership – full ownership
- Easements – right to use/control property owned by another
- Licenses – revocable permission to use land of another





Covenants

- Mix of easement & contract
- Often basis of homeowners associations, community water providers & well share agreements



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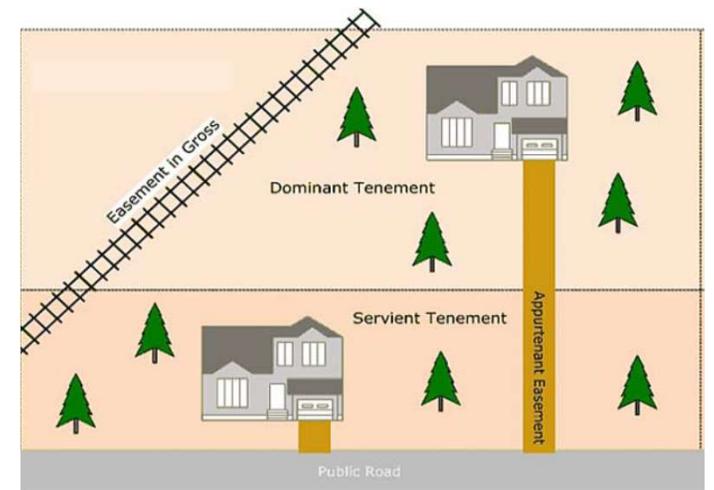
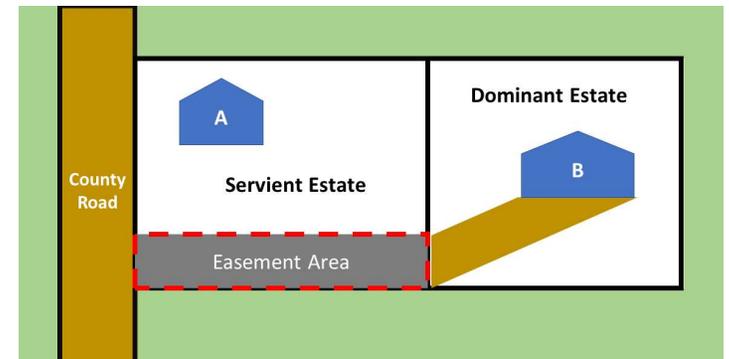
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Easements – General Info

- Dominant estate – benefited by easement
- Servient estate – burdened by easement
- In Gross – No dominant estate; personal to grantee





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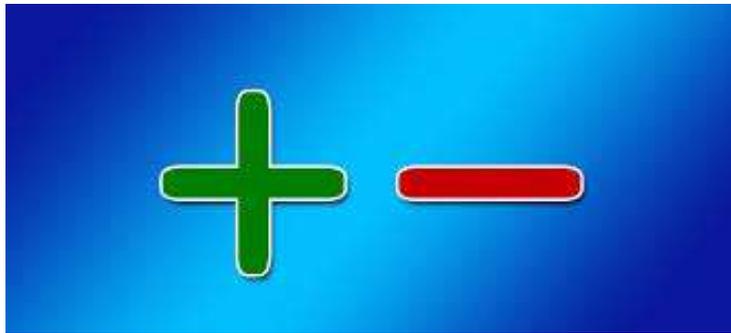
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Easements - Affirmative v. Negative



- *Affirmative easement* gives dominant holder rights to do something on servient estate
- *Negative easement* prevents servient estate from doing something on their own property



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Types of Easements





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Express Easements

- Express Grant
- Express Reservation
- Statute of Frauds
 - Agreements to sell land (or any interest) must be in writing to be enforceable
 - Exception: implied easements that are not written agreements (equity)
- Recording
 - Not always required for enforceability
 - Provides notice to bona fide purchasers
- Essential easement terms: location & purpose



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Water Agreements

- Easement components:
 - Permanent use to deliver water
 - Includes maintenance & access to the well/water source
- Covenant components:
 - Sharing of costs for electricity
 - Sharing of costs for repair & maintenance
 - Sharing of water supply if insufficient
- Examples:
 - Rotation agreements
 - Ditch/pipeline sharing agreements
 - Well sharing agreements





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Implied Easements

- **Prior Use**
 - Existing use prior to subdivision & sale that continues after sale
- **Necessity**
 - Access to landlocked parcel
 - Terminates as soon as necessity expires
- **Inclusion on Plat**
 - Implied easement for use of dedicated streets, parks & other open areas
- **Implied easements not favored by courts**
 - Equitable in nature
 - Claimant must have a reasonable expectation under the facts



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Prescriptive Easements

- Similar to adverse possession (no exclusive possession)
- Oregon Elements:
 - Adverse/hostile use to rights of owner
 - Permission is affirmative defense
 - Open & notorious use
 - Continuous for period of **10 years**
- Nevada Elements:
 - Same as other states, except:
 - **5-year** statutory period
 - “Peaceable use”





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Prescriptive Easements

- Idaho Elements:
 - Same as other states, except:
 - With actual or imputed knowledge of the owner
 - 20 years (5 years before 2006)
 - *Schoorl v. Lankford*, 161 Idaho 628 (2017)
- Washington Elements:
 - Same as other states, except:
 - 10 years





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“Irrevocable Licenses” or Easements by Estoppel

- Permission cannot be withdrawn
- Exception to revocable license rule
- Reasonable expectation license was intended to be permanent
- Reliance on expectation in expending funds





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OR Statutory Easements

- Example Statutes:
 - ORS 541.030: Right of way across state lands for water companies formed under 1891 Act
 - ORS 273.761: Right of way for ditches & pipes across submersible, swamp, & school lands
 - ORS 545.239: Irrigation district power of condemnation for water development
 - ORS 376.150: Ways of necessity may be established to provide utility service access from existing service location to a point that would otherwise have no service
 - ORS Ch. 772: Utility right of condemnation for right of way & acquisition of water



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NV Statutory Easements

- Example statutes:
 - NRS 11.370 – Easements for collection of solar energy
 - NRS 11.390 – Conservation easements
 - NRS 37.035 – Eminent domain to create easements for monorails
 - NRS 539.207 – Irrigation districts
 - NRS 539.223 – Rights-of-way over state lands for irrigation districts



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Idaho Statutory Easements

- Example statutes:
 - IC 43-304 – Irrigation districts
 - IC 42-5224(13) – Ground water districts
 - IC 42-4416(11) – Levee districts
 - IC 42-3115(11) – Flood control districts



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Washington Statutory Easements

- Example statutes:
 - RCW 87.03.140 – Irrigation districts
 - RCW 79.36.540 – Easements across state lands for irrigation districts
 - RCW 89.30.130 – Reclamation districts
 - RCW 85.05.070 – Diking and drainage districts
 - RCW 86.09.202 – Flood control districts



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Federal Easements – History

- 1866 Mining Act
 - Section 2339 grants right of way for access & construction of ditches & canals for water conveyance
- 1891 Right of Way Act
 - Granted ditch & canal companies a right of way for irrigation, domestic use, transportation & power
 - 50 feet on either side of ditch/canal
- 1894 Carey Act
 - Granted easements across federal land to holders of vested water rights



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Federal Easements Today

- Federal Land Policy & Management Act (1976)
 - Executive department *may* grant easements
 - Existing rights of way “grandfathered”
- Rights subject to abandonment (FLPMA- 5 years)
- May not be able to improve infrastructure





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Utility Easements





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Utility Easements

- Example of “in gross” easement
- Likely nonspecific/generic to utility type
- Likely dedicated to “public” or “utility” use in general
- Provides utilities with access to certain areas to provide services



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Utility Easements

- Often allow clearing of vegetation/trees to access/maintain infrastructure
 - Oregon's treble damages for harvesting timber/shrubs owned by another (ORS 105.810/ NRS 40.160)
- Located as separate easement or in plat map dedications
- Option to condemn private property for public purpose & pay just compensation
 - Statutory right for private utilities
 - Government/district right of condemnation



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Easement Scope & Interpretation





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Easement Purpose & Scope

- Purpose:
 - What is the easement for?
 - Access, travel, water conveyance, etc.
 - Limit: cannot 1) change purpose; or 2) increase burden on servient estate
- Scope:
 - Defined by purpose.
 - 10 feet vs. 100 feet corridor?
 - Easements presumed to include right to enter property for purposes of inspection, maintenance & repair.



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Duties & Interpretation

- Right & duty, to maintain & repair
 - Usually rests on party receiving benefit
 - ORS 105.175: Easement holders shall maintain & repair
 - ORS 105.180: \$ damages for failing to maintain & repair
 - *Cox v. Glenbrook Co.* (Nev. 1962): Easement holder may maintain, repair, improve to promote purpose of easement
- If language is silent: consider reasonable expectations of original drafters
- Technological & economic changes → a basis for enlarging permitted uses
 - E.g. - Ditch converted to pipeline.



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Amendments & Termination

- Written Agreement
- Temporary Rights
- Merger
- Abandonment
- Prescription
- End of necessity
- Eminent domain
- Release
- Bona fide purchaser w/o notice





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S.B. 98 Broadens Ability to Turn Wastewater into Renewable Natural Gas

Written October 2, 2019 by Rachel Harman

Categories: [Legislation](#), [Oregon](#), [Water law](#)

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Starting September 29, 2019, natural gas providers in Oregon will have a new, renewable way of powering their customers' homes. Governor Kate Brown executed a new law at the end of July, 2019 allowing capture, treatment, and conversion of methane found in wastewater into renewable...

Wifi Through the Sewers in Anacortes

Written September 26, 2019 by Brian Fairbanks

Categories: [International](#), [Washington](#)

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The city of Anacortes, WA, is making news by running part of its new fiber optic cable network through its water system. Brown and Caldwell's Water News for September 25, 2019, links to a report by KUOW News: "Wifi wires will run through water pipes..."



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