



ADVANCING THE LEGACY

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WEBINAR Highlights – Easements and ROW for Water Conveyance Structures

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Easements:

- An easement is a right conferred by grant, prescription, or necessity authorizing one to do or maintain something on the land of another which, although a benefit to easement holder, may be a burden on the landowner.
- The easement is referred to as the dominate estate and the underlying land is called the servient estate.
- Rights and obligations apply equally to an incorporated ditch or non-incorporated shareholder consortium or individually owned ditch in regard to easements.

Types of Easements:

- Deeded easements are recorded and have express terms of rights and obligations and defined boundary
- Prescriptive easements are the most common, created via adverse possession, continuous (perpetual), not recorded
- Fee simple ownership is a full, unconditional right of ownership

HB 19-1052: Provides for easement holders - such as ditch companies and individual water right holders - to construct, operate, clean, maintain, repair and replace, line or pipe ditches. This applies to prescriptive and deeded easements.

Crossing and License Agreements:

- A revokable privilege (not an easement) but if the licensee invests money or labor within the easement, the license may become irrevocable
- Grants license to cross and/or make other modifications within the easement (ex. utilities, driveways)
- Explicitly describes responsibilities of parties for future repairs, replacement, maintenance and mishaps, and defines the construction window(s)
- Creates a long-term referenceable document and construction plans can be attached to it



Protecting Easements and Right of Way (ROW):

- Maintain a regular presence on the ditch through maintenance, and engage adjacent landowners
- Require crossing or licensing agreements for encroachments (utilities, driveways, bridges, etc.) to relieve the easement holder (ditch company) of the burden of maintenance or replacement costs
- Post signage and install fencing as appropriate to inform the public and restrict access
- Educate adjacent landowners and the public

Dealing with Unapproved Encroachments

1. Verbal conversation with the landowner
2. Letter from the ditch company
3. Letter from the ditch company's attorney
4. Legal action, recover legal fees

Q & A discussion

- State and federal agencies typically recognize ditch easements that pre-date the establishment of the state or federal interest. Otherwise the agencies will typically require a special use permit.
- Ditch companies may leave cleaned materials (spoils) within their easement unless it unreasonably interferes with the underlying landowner's use of the property.
- Ditch seepage that causes impact to adjacent houses, such as a seepage into basements, is not the responsibility of the ditch if the ditch existed before the house was built. The exception is that if the ditch operator is negligent in maintaining the ditch – such as allowing rodents or tree roots to significantly increase seepage - it may be the ditch company's responsibility.
- If a ditch is piped and trees within the easement die, the ditch company is likely responsible for removing the dead trees. If the trees are outside the easement, it is likely the responsibility of the adjacent landowner. It's best to proactively communicate with landowners who has responsibility.
- Ditches are now considered utilities and are responsible for responding to 811 utility locate requests.
- A 50' to 75' easement width is not uncommon. A prescriptive easement covers the width necessary to accomplish the tasks required to maintain the ditch.
- Lateral ditches are typically not the responsibility of the ditch company. Typically the ditch company's responsibility ends with the measuring device at the turnout to the lateral ditch. However, the owners of the lateral ditch have the same rights and obligations regarding easements.
- It may be allowable for landowners to put a gate across a ditch road to keep cattle in for example, but the landowner must provide the ditch owners with access through the gate.