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AN INTRODUCTION TO EASEMENTS

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Joint Agricultural Economics / Law Research Program Report

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FOREWORD

The Agricultural Economics/Law Research Program is a cooperative venture between the School of Law at the University of North Dakota and the Department of Agricultural Economics at North Dakota State University. The research efforts are funded by the North Dakota State University Agricultural Experiment Station Project No. ND3319.

The joint research program is designed to research aspects of North Dakota law, and to report the findings in published form readily available to all North Dakotans. This project has been productive in studying and reporting on such legal situations as farm tenancy laws, farm fence laws, condemnation of farmland, drainage laws, how farmers/ranchers acquire water rights, easements, severed mineral rights, using grasslands, and land use controls.

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AN INTRODUCTION TO EASEMENTS

by

Jerome E. Johnson and Joanne Liebmann¹

North Dakota farmers and ranchers face many land-oriented legal problems resulting from development of energy resources and programs aimed at more efficient use of agricultural land in producing food. These problems may include protection of one's surface or mineral rights or sale or use of land for mining or gasification plants. Many farmers may find themselves negotiating easements so that others, utility companies or even farmers, may use their land for pipelines or rights-of-way.

This report explains the basic legal aspects of easements. It will discuss what an easement is, the different types of easements, how an easement may be created, some permitted uses under easements, ways to transfer and terminate easements, and how eminent domain may be involved in the acquisition of an easement.

WHAT IS AN EASEMENT?

An easement is a property right in a person or group of people to use the land of another. The use must be for a special purpose and not inconsistent with the general property right of the owner of the land. Acquiring an easement does not give title to the land involved, but only a right to use the land. An easement is, therefore, a nonpossessory interest in land. Common examples of easements are the right to use a path or roadway over another's land and the right to place utility lines under or above another's land.

An easement is a nonpossessory interest in land, but acquiring an easement gives the easement holder protection from interference by third persons in his use or enjoyment of the land and revocation of the use at will by the landowner. The nonrevocability of an easement is what distinguishes it from a license. Licenses and easements may serve the same purpose, but licenses are terminable at will. Therefore, acquiring an easement gives assurance that the right of access will continue in the future.

A license is generally considered revocable, but under certain conditions the grantor of a license may be prevented by a court from revoking it. An easement is created by the court to avoid injustice. This happens most often when the grantor of a license (known as the licensor) has given permission to the person holding the license (called the licensee) to do something and the licensee performs some act or acts in the belief that an

easement has been granted or that the licensor's permission is nonrevocable. These acts generally involve the expenditure of money, but the mere expenditure of money is not sufficient in and of itself to convert a license into an easement. The licensee must have acted (expended the money) in reasonable reliance upon representations made by the owner of the property (licensor). If he has, the holder of the easement is privileged to continue the use permitted by the license to the extent necessary to realize his expenditures.

North Dakota easements include the right to enter and take something capable of ownership from the land of another. This may involve the removing of a portion of the land or its products including game, water, wood, minerals, and other things.

The North Dakota legislature in 1977 passed a separate statute for the creation of solar easements for the purpose of exposing a solar energy device to the direct rays of the sun. Solar easements must be in writing, must include the angles at which the easement extends over the property, and must contain the terms under which the easement is granted and will be terminated. The easement agreement also must contain provisions for compensation of the easement holder for interference with his easement. Since these requirements are quite technical, it is suggested that one consult an attorney before acquiring or granting a solar easement.

WHAT ARE THE DIFFERENT TYPES OF EASEMENTS?

Easements may be classified for use as either affirmative or negative. Easements permitting the holder to do affirmative acts on land in possession of another are called affirmative easements. Easements which restrict the way in which the landowner may use his own land so that the easement holder may benefit are called negative easements.

Easements also may be classified on the basis of whether or not the easement benefits other land owned by the holder of the easement. An easement is considered appurtenant when it is attached to a piece of land and benefits the owner of the land in his use or enjoyment of it. An appurtenant easement requires two pieces of land owned by two different parties. The two pieces of land are called the dominant tenement (the land whose owner is benefitted by the easement, and also the land to which the easement is attached) and the servient tenement (the land burdened with the easement). One has an appurtenant easement when he is the holder of an easement-of-way over another's land in order to reach an adjoining parcel of land that he

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owns. The land on which the easement is located is the servient tenement, while the easement holder's adjoining parcel is the dominant tenement.

An easement is considered to be in gross when it does not benefit other land owned by the holder of the easement. Only one piece of land is involved in an easement in gross, that being the servient tenement or land burdened by the easement. This type of easement benefits the holder personally, not any land that he owns. An example of an easement in gross is the right to install and maintain telephone or sewer lines across another's land.

HOW ARE EASEMENTS CREATED?

Three main ways to create an easement are by an express act of the parties, implication, and prescription.

A. Express Act

An express act to create an easement usually involves a written grant or deed, similar to that used to convey other interests in land, such as fee simple (or full) title to land. Conveyance of an easement may occur as the result of a purchase agreement or gift.

The deed or other written instrument must correctly describe the interest to be conveyed to create an easement. It is essential that the deed be clearly worded, since an ambiguity might convey something other than an easement, such as full title to the land. Generally, an easement is created by a grant of an identified space without clearly marked boundaries of a limited use for a limited purpose. A grant of a clearly described area for all uses for all purposes may cause full title to the property to be conveyed. Conveyances of an interest in land have certain legal and formal requirements to avoid later problems in interpreting the deed and insuring that the proper interest in land is conveyed. North Dakota law since 1977 requires that the instrument creating an easement properly describes and specifies in writing the area covered by an easement. If the land is not described, the courts may imply a description. Consult an attorney before any agreement affecting real property is created to assure that it meets statutory requirements and accurately states the terms of the agreement.

An easement also may be created by express reservation or exception. This occurs when a landowner conveys a parcel of land to another but reserves or excepts an easement so that he may cross the land. It is vitally important that the deed be properly worded, since there is often a question as to what interest has been retained—an easement or a possessory interest.

B. Implication

An easement created by implication is created by the courts, rather than by written deed or grant. An easement by implication can arise in either of two situations: 1) when the existence of an easement is necessary for the enjoyment of land that has been conveyed or retained; or 2) when a quasi-easement is already in

existence at the time of the conveyance.

Regardless of the prior use of land, an easement may arise by implication when it is necessary for the enjoyment of land either conveyed or retained. For example, if a person divides his land and sells a portion with no frontage on a public road, a court may imply an easement in favor of the purchaser over the seller's land, since such an access will be necessary for the purchaser's use and enjoyment of his land. Creation of an easement by implication is based upon the presumed intent of the parties involved. Such an easement will arise only when the two parcels of land involved were once owned by the same person and will exist only during the period of necessity. A person cannot buy a land-locked parcel and then demand an easement by necessity over adjacent land if the two parcels have never been owned by the same person. However, a way by necessity may lie dormant and pass through many transfers of the land and still be exercised at a later date.

An easement also may be implied from an existing quasi-easement. A quasi-easement exists when during ownership of a parcel of land by one person an apparent, permanent, and continuous use has been imposed on one portion of the land in favor of another portion. If the use is reasonably necessary for the enjoyment of one portion of the land and the land is later divided, a grant of the right to continue the use arises by implication even though this right is not reserved or specified in the deed. This type of easement may arise, for example, when a farmer sells a portion of his land which is accessible by a path running through an adjacent tract which the farmer himself has used to gain access to the sold parcel and alternative routes are inconvenient. Unlike an easement implied by necessity, an easement implied from a quasi-easement does not terminate when the necessity no longer exists. It may continue to exist indefinitely.

C. Prescription

A third way to acquire an easement is by prescription or adverse use of the land. An easement by prescription arises only if the use has been open and notorious, continuous and uninterrupted for the number of years required by the statute. The use also must be hostile to the true owner; it cannot be with his permission.

Negative easements cannot arise by prescription in the United States. These include easements for support, drainage, light, and air. Neither can easements by necessity be acquired by prescription, since use by necessity is by right and not adverse.

An easement by adverse use might arise when a mining firm continually moves its equipment over an unleased parcel of land near its strip mine. If the owner of the unleased land allows the company to continue using the land for the required statutory period, even though he has indicated his disapproval, the result may be the establishment of a prescriptive easement

over his land in favor of the company. An indication of disapproval is not sufficient to prevent the creation of a prescriptive easement. The owner must interrupt the company's use of his land to discontinue the adverse use and stop the statute of limitations from operating.

D. Creation of an Easement on Leased Property

Creation of an easement becomes more complicated when the land on which the easement is to be located is leased to a third party. Negotiation of the easement is usually conducted with both the landlord and tenant. Generally, neither the landlord nor the tenant has authority to grant the easement by himself. A lease granting possession of land for a period of years effectively prevents a landlord from altering or transferring the interest conveyed by the lease. Even though the landlord can sell or alter his own interests, his interests are subject to the tenant's interest. An immediate easement for an indefinite duration over property leased for a term of years can be obtained by both negotiating an easement with the tenant for the term of his lease and an indefinite easement for the same purpose with the landlord.

Many leases run from year to year and are renegotiated annually. In this situation a landlord is permitted to negotiate an easement to take effect at the end of the year and then add the easement provision to the terms of the new lease. Some leases contain clauses which give the landlord the power to grant easements to third parties at any time without the tenant's consent. Or the lease may contain a clause providing for notification of the extent and specifications of the easement and the payment of compensation to the tenant.

It may be possible for the tenant alone to grant an easement if the term of the easement is to end before the lease expires and the use does not injure the property. An easement that causes destruction to trees or other foliage may constitute waste, thereby making the tenant liable to the landlord for damages resulting from the easement.

Easements to be obtained under the power of eminent domain have both the tenant and the landlord as proper parties to the condemnation action. Damages sustained by the tenant, such as loss of crops or pastureland, would be contained in the total damage award along with the loss of land sustained by the landlord. Courts will sometimes award the tenant and landlord their respective damages. Or a court may award the total amount to the landlord, leaving the landlord and tenant to decide between themselves how the money will be divided. The tenant may be forced to bring an action against the landlord if the landlord and tenant cannot reach a satisfactory agreement. Here the tenant will have to prove his damages, which may include lost profits and the cost of crop production.

The National Environmental Policy Act (NEPA) may further complicate the granting of an easement when the landlord/owner is the federal government. This act requires an environmental impact statement

for all "major" federal actions "significantly" affecting the environment to be written and approved before an easement can be granted. The environmental impact statement details all the environmental effects of the easement and requires public comment to be solicited from all interested parties, including those who are leasing the land. The government then decides on the basis of the impact statement whether or not an easement should be granted.

Actions of the state government as landlord/owner are not subject to NEPA. Its actions, however, should involve considerations similar to those of the federal government and the same considerations as those of the private landowner.

WHAT IS THE SCOPE OF USE GRANTED BY AN EASEMENT?

The extent of use permitted under an easement generally depends upon how the easement was acquired—by express grant, implication, or prescription. Generally the scope of an easement is determined either by the terms of the grant or the nature of the use by which the easement was acquired.

The use permitted in easements created by express grant is determined by looking at and interpreting the words of the grant. However, the scope of an express easement may be enlarged by adverse use for the necessary prescriptive period. The scope of an easement by implication is determined by the extent of the necessity or the use of the quasi-easement. Easements arising by prescription generally have their scope determined by the nature of the use that established the easement.

Regardless of how an easement was acquired, the owner of an easement has the right to do things that are reasonably necessary for the proper enjoyment of the easement. This includes the right to come onto the servient estate and make repairs necessary for the continued use of the easement. Not only does the easement owner have a right to enter and make repairs, he has a duty to do so; and absent any special agreement, the servient owner has no duty to repair.

The owner of the servient estate may use his land for any purpose so long as the use does not unreasonably interfere with the use of the easement. He must endure a routine level of interference and inconvenience to his land as a result of an easement, but he may be entitled to compensation for substantial damage and interference with his land as a result of unreasonable repair activity on the part of the easement owner. Unless the easement agreement specifically states that all injury from activity involving repair will be paid for, damages generally will not be awarded without a showing of unreasonable interference. Some easements, by their very nature, practically require exclusive possession of the servient estate by the easement holder. An example of these are easements for railroad rights-of-way. Owners of land on which this type of easement is located will probably have more difficulty in using that area of the

servient tenement or collecting damage for injury to the land than owners of land burdened with other types of easements.

It is essential that easement holders be allowed a certain degree of flexibility in the use of an easement, since the times and technology are constantly changing. A court will usually assume that the parties to an easement agreement have considered the normal development of the use and have incorporated this development into their agreement. For example, an easement for high voltage power line towers and cable may later be interpreted as allowing for buried cable if the use of buried cable becomes technologically feasible.

Although the extent to which an easement may be used can vary, the nature of the use cannot. Thus, a farmer who has granted a right-of-way easement across a pasture for hauling coal from a mine will not be heard to complain if the traffic on the right-of-way increases. But if the company hauling the coal attempts to use the right-of-way for any purpose other than hauling coal, the additional use may be prohibited or the farmer may receive additional compensation.

An appurtenant easement only can benefit the original dominant land and cannot be expanded to include additional land acquired by the holder of the easement. Use of the easement for the benefit of another parcel of land is improper and may be enjoined unless it is merely incidental to the normal benefit to the dominant estate. The area of land subject to an easement in North Dakota may not be increased without negotiation between the holder of the easement and the owner of the servient tenement.

HOW ARE THE RIGHTS OF PARTIES TO AN EASEMENT PROTECTED?

Generally the rights of parties to an easement are protected by the initiation of legal action by the party who feels his rights have been infringed. Either easement holder or the servient tenant may commence legal action if he feels that the other party has exceeded rights granted under the easement agreement or has interfered with the use of his tenement. This action may be to collect money for damages or to obtain a temporary restraining order or injunction, depending upon the manner and results of the interference.

A temporary restraining order is an order forbidding the doing of an act until a hearing on the issue can be held. It is usually granted when the aggrieved party demonstrates that the other party's continued action would cause the aggrieved party injury, either to his person or his property. This injury may simply be trespassing on the aggrieved party's land. Once granted, a temporary restraining order may become a temporary injunction, in which case the aggrieved party will have prevented the other party from uses the aggrieved party contends are in excess of the easement grant. The injunction will remain in effect until a court determines the exact rights of the respective parties under the easement agreement. If the court establishes

that the other party has exceeded its rights under the agreement, the court will grant a permanent injunction against the excessive use; and damages may be awarded.

A party who feels that he has been wronged is advised not to use self-help to abate what he thinks is an interference with his use of property. Self-help may provide the setting for a breach of the peace and result in the aggrieved party being liable for injury or other damage to the party wronging him. It is generally recommended that when dealing with disputes over real property, the parties seek their remedies in court rather than taking the law into their own hands.

ARE EASEMENTS TRANSFERABLE?

Easements appurtenant are transferable with the dominant tenement. This transfer will occur even though the easement is not mentioned in the deed. The easement is thought of as being attached to the dominant land. Therefore, when the owner of a coal mine and a right-of-way easement over another's land sells the mine, the easement also is transferred to the new owner of the mine, unless the easement agreement specifically states that the easement will end when the mine is sold or the seller specifically reserves the easement.

Traditionally, easements in gross are personal rights and are not transferable. Many American courts, however, hold that commercial easements in gross are transferable but that noncommercial easements in gross are transferable only if the deed creating them states that they may be transferred. Therefore, a power company or telephone company will most likely be able to transfer their transmission rights-of-way without legal problems, while an easement for the right of taking game for sport may not be so easily transferred.

HOW DOES AN EASEMENT TERMINATE?

There are several ways by which an easement may terminate. The most common way is to have it expire by its own terms. An easement for a specified number of years will terminate when that number of years has passed. An easement created for the life of either the grantor or grantee will terminate at that person's death. An easement created for a specific purpose will end when that purpose has been completed.

The North Dakota legislature in 1977 passed a statute governing the regulation of easements that became effective after July 1, 1977. It states that the duration of an easement will be specifically stated in the agreement and cannot exceed 99 years. This statute indicates that all easements created after July 1, 1977, will have a maximum term of 99 years or less, except temporary easements acquired by the State or any of its agencies or subdivisions, which must contain a fixed date of termination no greater than five years from the creation of the easement.

An easement may terminate before its complete term of years has run. For example, an easement may terminate if the holder abandons it. Easements acquired by prescription may terminate by nonuse for the statutory period. However, an easement created by express grant requires that the nonuse be accompanied by the easement holder's intent to abandon, evidenced by some act demonstrating this intent, in order to extinguish the easement. But nonuse alone may cause an easement to terminate if the owner of the servient land reasonably believes that the easement has been abandoned and takes action, such as changing his use of land, in reliance on this belief. The holder of the easement may later be prevented from asserting his right to the easement if it would cause damage to the servient landowner.

An easement will also terminate: 1) when the holder of the easement acquires title to the servient land, since a person cannot have an easement over his own land; 2) when the servient tenement is destroyed; or 3) when any act is performed upon either tenement by the owner of the easement or with his permission that is incompatible with the nature or exercise of the easement.

CAN AN EASEMENT BE ACQUIRED BY CONDEMNATION?

Generally, easements are obtained by negotiation between parties, implication, or prescription. However, certain groups recognized by state law may use the power of eminent domain to acquire interests, including easements, in private property for public use.

Public uses for which the right of eminent domain may be exercised are defined by statute in North Dakota. They include public buildings; parks; highways; electric power plants and power transmission lines; canals, ditches, and pipes for public transportation; supplying mines; irrigating, draining, and reclaiming land; roads, tunnels, ditches, pipes, and dumping places for working mines; outlets for flow; deposit or conduct of tailings or refuse from mines or mills; and oil, gas, and coal pipelines. It is illegal to use eminent domain to take private property for private use. Therefore, if the private property owner can prove that his land is not being taken for a public use, the eminent domain proceeding may be defeated.

A taking by eminent domain is limited to that which is necessary to fulfill the purpose. If the taking of an easement is sufficient to fulfill the purpose, then only an easement will be allowed. A court will allow a fee simple or full title to be taken if full title to the land is required.

Once it has been established that the right of eminent domain is available for the acquisition of private property, the courts will allow those entitled to the right much latitude in the extent and exact location of the property to be taken. The party taking the land need only show reasonable or practical necessity in selecting a particular location or specified area. The

existence of alternative sites or routes for the easement will not affect a court's decision. So long as there is no evidence of fraud, bad faith, or an abuse of discretion, the courts usually will not interfere with the condemnor's choice of property.

The dispute in most cases involving takings by eminent domain is not over the validity or location of the taking, but over the amount of compensation or damages to be paid for the taking. Compensation may be determined by computing the damage to the land actually taken for the easement and damage to the land not taken but adjacent to the property taken. Total damages for the taking of an easement for a power line would include damage to the land under the line and damage resulting from the easement to adjacent land. Since the land located under a power line can still be used for farming, compensation paid for the taking of a power line easement will generally be less than that paid for a taking for highway purposes.

Damages to land adjacent to the easement are usually determined by subtracting the value of the land with the adjacent easement from the value of the land without the adjacent easement. Damages must be certain and, therefore, a court will not allow for speculation as to future use of the land or possible production and future prices in determining them. But consequential damages may be considered. Thus, a farmer may be compensated for damage done to crops, fences, and trees, or for the added expense in farming irregularly shaped fields or impairment to the adjacent land.

For a more detailed discussion of eminent domain as it affects the North Dakota farmer/rancher, the reader is encouraged to see *Condemnation of Farmland in North Dakota*, Ag. Econ. Miscellaneous Report No. 50, (1981).

MAY EASEMENTS BE GRANTED FOR THE PRESERVATION OF WILDLIFE HABITAT?

The North Dakota legislature in 1977 passed new laws concerning easements between the federal government and North Dakota landowners for wildlife habitat. The 1977 law requires the federal government (specifically the Department of the Interior) to negotiate with the landowner, prepare an environmental impact statement, and obtain approval of county officials and the governor before an easement for wildlife purposes can be acquired using money from the migratory bird conservation fund. That easement terminates upon the death of the landowner or sale of the land. The effect of this statute has been to prevent perpetual easements for such uses from coming into existence.

The Fish and Wildlife Service in 1979 challenged the North Dakota statute in federal court. The statute has been declared invalid on the ground that it frustrates federal laws and migratory bird treaties. However, the case is pending appeal. If the 1977 law is held to be invalid on appeal, the Department of the Interior may once again be able to acquire perpetual easements for wildlife habitat simply by negotiating with land-

owners. Such a situation may strike a major blow to the Garrison Diversion Project. Since 1977 until the present, the governor has vetoed such easements in an effort to force the Department of the Interior to agree to consider the easements as part of the area required for wildlife mitigation before the project can be completed. However, the federal court ruling striking down the law applies only to areas acquired with monies from the sale of duck stamps to hunters and not to the congressionally approved loan program, an additional program by which the government obtains land. It is unclear at this time what impact the decision, if upheld on appeal, will have on this program.

An easement entitles its owner to limited use of land belonging to another. The easement agreement benefits both parties, since the easement holder acquires use of land without having to purchase it outright, and the landowner will regain full use of his land when the special use ends. This results in less cost to both parties and a more efficient use of land.