



**Getting From Here to There: Easements, County Roads and Other Access Issues**

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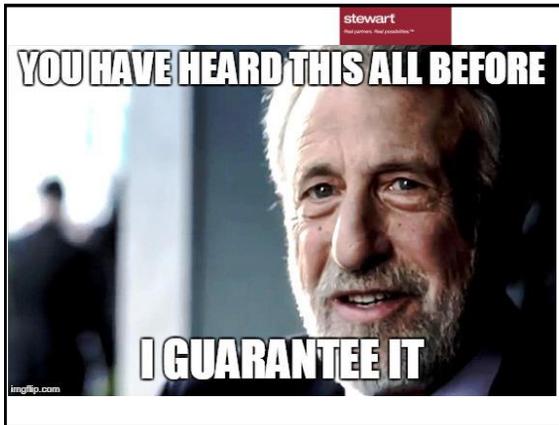
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**YOU HAVE HEARD THIS ALL BEFORE**

**I GUARANTEE IT**

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**Easement Basics**

- *Easement*: "A right of use over the property of another" – *Black's Law Dictionary* (6<sup>th</sup> ed. 1990)
- An interest in land in the possession of another which:
  - Provides the owner with a limited use or enjoyment of the land
  - Protects the use or enjoyment from interference by third parties
  - Is not subject to the will of the possessor of the land

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**Easement Basics, Cont'd**

- Dominant Estate (or Tenement): The land benefitted by the easement
- Servient Estate (or Tenement): The land burdened by the easement



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**Types of Easements**

- Easements Appurtenant
  - Created for the benefit of a particular property
  - "Runs with the land"
  - Does not need to be mentioned in subsequent conveyances
  - Cannot exist separate and apart from the property that it benefits

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**Types of Easements, Cont'd**

- Easements in Gross
  - Not appurtenant to any estate in land
  - Mere personal right to use another's land
  - Generally not assignable or inheritable unless the parties agree
  - Insurable in limited circumstances

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**Classification of Easements**

- Duration
  - Perpetual unless stated otherwise
  - Easements in Gross terminate upon death of holder
- Affirmative or Negative
  - Ingress and egress, parking
  - Conservation, historical preservation
- Identifiable (or not) dominant and servient estate
  - Default assumption is appurtenant easement

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**Licenses**

- Permission or privilege to perform an act or series of acts on land which belongs to another
- Does not create an estate or possessory interest in licensee
- Not assignable and may be revoked at any time
- Insurable in limited circumstances

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**Profits a Prendre**

- "Right of taking"
- Right to take something (e.g. soil, timber, gravel, minerals) from land owned by someone else
- Interests that were historically considered profits are now denominated as deeds or leases (e.g. timber deed, gravel lease)
- Insurable in limited circumstances (except minerals)

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**Basic Methods for Creating an Easement**

- Easements can be created by grant, prescription or implication
- Written instruments creating an easement may include:
  - Express Grant
  - Deed of Conveyance
  - Deed Reservation
  - Plat Dedication
  - Certificate of Survey

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**Basic Methods for Creating an Easement, Cont'd**

- *Wild River Adventures, Inc. v. School District No. 8*
  - Complicated land swap involving Forest Service, School District and multiple private parties
  - COS and various grants state "Subject to a 40 foot private road easement"
  - Subsequent conveyance of the "easement" to Wild River
  - Holding: The phrase "subject to" does not create an easement. In addition, no easement could have been created because there was no dominant estate served by the easement.

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**Easements as Title Exceptions**

- Any easement which affects the property in question must be shown as a title exception unless:
  - The easement is properly released of record; and/or
  - The easement is judicially terminated or extinguished
- Basic form of easement exception should include:
  - Nature or purpose
  - Recording data
  - If too comprehensive or complex, the phrase "terms and provisions of"

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**Easements as Title Exceptions, Cont'd**

- Methods for waiving an easement exception include:
  - Recording of a proper release or abrogation agreement
  - Final, non-appealable Court Order based on:
    - Merger
    - Abandonment or Non-use
    - Expiration of Term
    - Completion of Purpose
    - Over-burdening or violation of conditions
    - Foreclosure of a senior lien

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**Insuring Access**

- The generally used ALTA policy forms provide coverage for loss or damage sustained by reason of a lack of a right of access to and from the land
- Court have generally interpreted this coverage to mean "Legal Access"
- Legal Access means that the owner may cross to and from the land to a legally established public way

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**Insuring Access, Cont'd**

- Legal Access does not guaranty any particular form of access (i.e. vehicular) or that the public way is of a particular type, location or width
- Legal Access also does not assure that the public way is passable or that it connects to any other public way
- Any known limitations on access should be listed as a Schedule B exception

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**Insuring Access, Cont'd**

- Conditions for insuring access via appurtenant easement:
  - Easement must have been created by a properly executed and recorded written instrument
  - Easement must have been created for a specific purpose (e.g. "for ingress and egress" or for "access and utilities")
  - All owners and lienholders of the servient estate must join in the creation of the easement

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**Insuring Access, Cont'd**

- Other considerations for insuring appurtenant easements
  - Search chain of title on the servient estate to determine existence of liens or encumbrances
  - Any liens not joining in the creation of the easement must be subordinated or excepted to in Schedule B
  - Ownership of the dominant and servient estate must be by different parties at the time of the creation of the easement or ownership must be severed at the time of creation

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**Insuring Access, Cont'd**

- Affirmatively Insuring Access via Endorsements
  - ALTA 17-06 (Access and Entry): Insures actual vehicular and pedestrian access to a specified public street or road
  - ALTA 17.1-06 (Indirect Access and Entry): Insures that an easement affirmatively insured in Schedule A provides actual vehicular and pedestrian access to a specific public street or road

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**Insuring Access, Cont'd**

- Affirmatively Insuring Access via Endorsements, Cont'd
  - ALTA 17.2-06 (Utility Access)
  - CLTA 103.4: Insures that an easement affirmatively insured in Schedule A provides ingress and egress to and from a specific public street
  - CLTA 103.7: Insures that the land abuts a specific physically open street

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**Doctrine of Easement by Reference**

- Pursuant to M.C.A. § 76-3-304 and various cases, a recorded plat or certificate of survey may establish an easement by reference
- However, the Easement-By-Reference doctrine has been restricted and arguably made more confusing by subsequent Montana Supreme Court holdings

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**Doctrine of Easement by Reference, Cont'd**

- Bache v. Owens (1994)
  - Baches owned 34 acre tract and sold a 2.4 acre parcel to Owens
  - Certificate of Survey is created to establish the division of the land into two tracts
  - COS depicts a dotted line which is labeled "private roadway easement" and "public utility easement"

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**Doctrines of Easement by Reference, Cont'd**

- *Bache v. Owens* (1994), Cont'd
  - Holding: The easements depicted on the COS were incorporated in the deed and created valid easements
  - Seems to satisfy requirement from previous cases that the easement be clearly shown and adequately described so that the owner of the servient estate is given notice of its use and necessity

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**Doctrines of Easement by Reference, Cont'd**

- *Blazer v. Wall* (2008)
  - 1979 COS divides the land into seven separate tracts and depicts an easement running along the northern and western boundaries of Tract 1
  - 1987 Deed describes Tract 4 and states that it is "Subject to a 30 foot road easement as shown on" the 1979 COS

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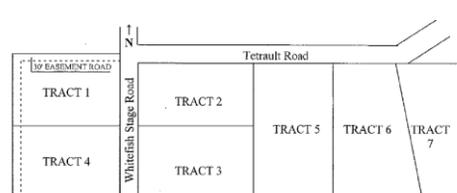
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**Doctrines of Easement by Reference, Cont'd**



The diagram illustrates a land parcel divided into seven tracts. Tract 1 is at the top left, with a 100-foot easement road along its northern and western boundaries. Tract 4 is directly below Tract 1. Tracts 2, 3, 5, 6, and 7 are arranged in a grid-like fashion to the right of Tract 1 and 4. Tetrault Road runs along the northern boundary of the entire area, and Whitefish Stage Road runs along the western boundary.

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**Doctrines of Easement by Reference, Cont'd**

- *Blazer v. Wall* (2008), Cont'd
  - Blazer argued that the 1979 COS created an easement over Tract 1 for the benefit of Tract 4 and other land that he owned to the South and West of Tract 4
  - Holding: No easement was created because the COS failed to adequately identify the dominant and servient estates with reasonable certainty

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**Doctrines of Easement by Reference, Cont'd**

- Elements for Easement by Reference
  - Correctly recorded plat or certificate of survey which adequately describes the easement
  - Reference to the recorded plat or COS in an instrument of conveyance
  - Description of the easement must (1) provide the owner of the servient estate with notice of the easement's use and necessity, but must also (2) clearly identify the dominant and servient estates without reference to extrinsic evidence

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**County Roads**

- Statutory Methods for Creating County Roads
  - Petition by freeholders, approval by resolution and opened by the board of county commissioners
  - Dedication for public use and approval by resolution of the board of county commissioners
  - Eminent Domain and acceptance by a resolution of the board of county commissioners

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**County Roads, Cont'd**

- Disputes Involving County Roads
  - Landowners often attempt to cut off use of county roads running through their property
  - Owners argue that statutory procedures were not followed or not properly followed in order to establish a county road
  - Courts have adopted an analysis of the "record as a whole" as the standard for whether a county road was properly established

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**County Roads, Cont'd**

- Disputes Involving County Roads, Cont'd
  - *Pederson v. Dawson County* (2000)
  - Owner gave County a right-of-way easement and requested that County construct roads. Owner reimbursed part of the construction cost and would occasionally request county provide maintenance
  - Holding: Roads were not county roads because the board of commissioners never took any steps to recognize them as county roads

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**County Roads, Cont'd**

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**County Roads, Cont'd**

- Use of Eminent Domain to Create County Roads
  - M.C.A. § 70-30-101, *et. seq.* establishes procedures for use of eminent domain to establish county roads or open private roads
  - Providing access to a residence or farm qualifies as a public use upon a showing of necessity
  - Interest condemned will be limited to minimal estate or rights necessary to serve the public purpose

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**County Roads, Cont'd**

- County Roads Obtained Via Prescription
  - The public may adversely possess a prescriptive easement for road purposes
  - Requires a showing of open, notorious, exclusive, adverse, continuous and uninterrupted use for the statutory five year period (M.C.A. § 77-19-404)
  - Evidence of regular county maintenance is a major factor in determining adversity

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**County Roads, Cont'd**

- County Roads Obtained Via Prescription, Cont'd
  - The extent of the prescriptive road depends on the history of actual use
  - Width of prescriptive road may also include area necessary or incidental to maintenance or support
  - Owner can use reverse adverse possession to extinguish an existing prescriptive road

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**Recognition of Historic Right of Ways**

- M.C.A. § 77-1-130 provides for recognition of historic right-of-way across state land in order to reach private property
- Owner must provide evidence of continuous use starting prior to 1997 and pay the Department of Natural Resources fair market value for the interest to be obtained
- Following satisfaction of all requirements, the Department of Natural Resources will convey an easement that becomes appurtenant to the property

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