


Access Issues

MLTA Fall Education Seminar
November 6, 2020

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No right of access to and from the Land


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TODAY'S PROGRAM

Access Issues

- **Policy Coverage and Increased Risk**
 - What's the difference and why do we care?
 - Insuring easement parcels on Schedule A
- **Basic Searching Procedures**
 - What are we missing?
 - Claims, Claims, Claims.....
- **Unusual Access issues**
 - Things we should always consider.

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

- ALTA 2006 Loan Policy *Covered Risk No. 4*
- ALTA 2006 Owners Policy *Covered Risk No. 4*

“No right of access to and from the Land”

- ALTA Homeowner's Policy of Title Insurance *Covered Risk No. 11*

You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

**The estate or interest to be insured-
 Schedule A**


Paragraph 2 of the ALTA 2006 Owner's Policy reads:

- 2. The estate or interest in the Land that is insured by this policy is: (we insert the interest to be insured such as fee, leasehold, easement)

Paragraph 2 ALTA 2006 Loan Policy

- 2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

**Affirmatively insuring an Easement on
 Schedule A**

- Preferred practice is to set both interests up as separate parcels on Schedule A:
-a "fee simple interest" in Parcel 1 and an "easement interest" as created by that document recorded as Instrument No....." in Parcel 2
 - Parcel 1 being the fee simple parcel of land being sold or encumbered and
 - Parcel 2 being the easement parcel that is appurtenant to the fee parcel
- Alternative practice:
 - "Together with" language in the Legal Description.

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

- Be careful about insuring a buyer or lender as having a fee simple estate in a portion of Land, when the only interest they were granted, was an easement interest
- At a minimum: Paragraph 2 of Schedule A
 –Fee Simple and Easement interest
- Important - Distinguish the different types of interest to be insured

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

- Whether identifying as a separate parcel or simply including "together with" language in the legal description, you are affirmatively insuring that specific access right at that specific location.
- This is different than issuing a policy without a Schedule B "lack of access" exception, which insures a "right of access" that could be secured in a variety of ways.
- Consider these things before automatically including "together with" on Schedule A, just because it's on the conveyance deed.

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

<p>ALTA 17-06 Endorsement</p> <ul style="list-style-type: none"> • Land abuts specific street • Street provides actual vehicular and pedestrian access • Street is physically open and publically maintained • Insured has the right to use curb cuts or entries along that portion(s) of street abutting the land 	<p>ALTA 17.1-06 Endorsement</p> <ul style="list-style-type: none"> • Easement identified as Parcel __ provides the Land identified as Parcel __ actual vehicular and pedestrian access to and from a specific street • Street is physically open and publically maintained • Insured has the right to use curb cuts or entries along that portion(s) of street abutting the easement
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Claim ALTA 17-06

- McDonalds needed 2 points of entry...
- City may not allow new curb cuts for safety reasons.
- Survey or other satisfactory evidence
- Property inspection
- Affidavit

- Publicly maintained but not physically open.
- No curb cut and no right of entry from Simon Street.

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Claim ALTA 17-06

The "Land" – as described in Schedule A

consider multiple parcels and/or multiple roads.

"Land" is all land described in Schedule A, unless specified differently on the endorsement.

We issued 17-06 stating the Land abutted 1st Avenue and Main Street.

Main Street is a "dead end"

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Policy Coverage and Increased Risk

What's the difference and why do we care?

- What is the difference and why do we care?
- Not affirmatively insuring specific access
 - No Schedule B exception for "Lack of a right of access to and from the Land".
- Affirmatively insuring specific access
 - Schedule A parcel
 - ALTA 17-06 or ALTA 17.1-06 Endorsement
 - ALTA Homeowners Policy of Title Insurance

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Policy Coverage and Increased Risk
 What's the difference and why do we care?

- Whether you are:
- Insuring a right of access by not taking "lack of access" exception in Schedule B;
- Issuing an ALTA Homeowner's Policy;
- Insuring affirmative access on Schedule A;
- Insuring affirmative access on Schedule A and issuing access endorsement:

MUST FOLLOW THE SAME "BASIC" SEARCHING PROCEDURES

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Basic Searching Procedures
 What are we missing? Why so many claims?

- Identify legal right of access.
 - "Where" is the access located –VISUALIZE
 - Locate it on the ground.
 - Montana Cadastral
 - Google Earth
 - County maps
 - Identify the closest public county road.
- How is access obtained?
 - City Street, County Road, COS, Private Easement or does it abut the Highway (limited-controlled access MCA 60-5-105).

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Basic Searching Procedures
 What are we missing? Why so many claims?

- What type of land does it cross?
 - State, BLM, Forest Service, Railroad ROW, Rails to Trails, River, Native American Land.
- How is access established?
 - Public County Road
 - Dedication on subdivision plat, shown on the official county map, shown on official state highway system map-things to think about – ARE YOU SURE IT'S A PUBLIC ROAD?

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Basic Searching Procedures

What are we missing? Why so many claims?

Private Access Easement

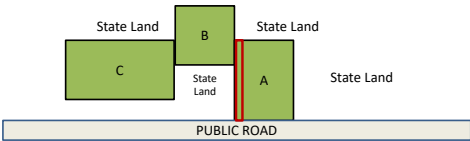
Must examine the easement parcel – separate chain of title.

- Authority to grant access.
- Consent or subordination of existing lien holders.
- Documents Recorded Subsequent to easement on easement parcel.
 - Extinguished by agreement
 - Foreclosure
 - Merger of title


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Termination by Merger



An easement is a right of lands in another and you cannot have an easement on your own property


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Termination by Merger

Doctrine of Merger/Unity of Title

- An easement is a right of lands in another and you cannot have an easement on your own property
- **70-17-105 MCA** - A servitude cannot be held by the owner of the servient tenement
- **70-17-111(1) MCA** - A servitude is extinguished by the vesting of the right to the servitude and the right to the servient tenement in the same person.
 - (2) A conservation easement is an exception to (1) above and may not be extinguished by taking fee title to the land to which the conservation easement is attached
- **TUNGSTEN HOLDINGS, INC. v. OLSON** Mont. 1087 Cite as 50 P.3d 1086 (Mont. 2002)


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Termination by Merger

Doctrine of Merger/Unity of Title

- If one of the merged parcels is later sold, the old recorded easement does not automatically re-instate, a new easement would be necessary
- Consider if one contiguous parcel is conveyed from (common ownership) H/W to a family LLC (a separate legal entity)
- Use caution when making a determination of merger in the context of removing a recorded easement agreement as a Schedule B exception – Call your underwriter
- MULARONI v. BING Mont. 497 Cite as 34 P.3d 497 (Mont. 2001)
 - The Supreme Court, [Patricia O. Cotter, J.](#), held that: (1) dominant estate owners' acquisition of the servient estate while they owned only part of dominant estate did not extinguish the easement under the doctrine of merger;
- BE AWARE


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Basic Searching Procedures

What are we missing? Why so many claims?

- **Oops I forgot to verify access!**
 - Base file used-access was never verified.
 - Base file used, access was verified then but the easement was subsequently terminated.
 - Wish we knew then what we know now.
 - Access work-up sheet/checklist.

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Claims- Things we should always consider

COS/ Easement by Reference Doctrine

Easement-By-Reference Doctrine: an easement can be created by transferring property with a deed which refers in its legal description to a "COS" or a subdivision plat depicting the easement.

However, the plat **MUST:**

- Identify and show both the dominant and the servient estate on the plat.
- Must give clarity of what parcel is benefited by the easement.
- Easement must clearly be labeled as an easement and must be explicit and also state if it is public or private.
- Must be adequately described.

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Unusual Claims- Things we should always consider
 Land abuts a Highway – Controlled Access Highway

60-5-105, MCA Design of controlled-access facility — entrance and exit restricted

- (1) Each highway authority may so design any controlled-access facility and so regulate, restrict, or prohibit access as to best serve the traffic for which the facility is intended.....
- (2) No person shall have any right to enter upon, exit from, or cross any controlled-access facility except at designated points at which access may be permitted. Terms and conditions governing such access may be specified from time to time.

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Unusual Claims- Things we should always consider
 Land abuts a Highway – Controlled Access Highway

60-5-109 Marking of controlled-access highway or facility with signs.

- Any controlled-access highway or facility and portions thereof shall be physically marked by signs indicating to drivers of vehicles the points at which they enter and leave a controlled-access area.

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Unusual Claims- Things we should always consider
 Access across State and Federal Land

- We insured access to a subdivision on a road that crosses over Montana State trust land without obtaining an easement.
- Road also crossed over Forest Service Land.
- State wanted access to other state land on the other side of subdivision.
- Access across State land requires specific Access Rights.
- State of Montana may grant easements on state lands for public or private roads but it requires the formation of a Road User's Association (RUA) in order to hold an easement from the State of Montana where multiple parties would use a road in common on state trust land. (77-2-101(ii)).

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Unusual Claims- Things we should always consider
Access across State and Federal Land

- Any disposition of an interest in state trust land, such as an easement, requires compensation at full market value, which consists of land and road value including improvements (77-2-106).
Example of current State formula:
- Fair market value of land \$9,000 per acre.
- Access requires an easement 1.6 miles long x 60' wide (=506,880 sq. feet).
- This equates to 11.64 acres.
- Payment to State under this option would be \$104,760.

Seems to be a new trend with the State of MT

- Multiple subdivisions.
- Multiple other claims.

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Unusual Claims - Things we should always consider
Overburdening/After Acquired Title

After acquired land by boundary relocation survey overburdened the easement.

- Easement to Tract A was established by COS in 2003.

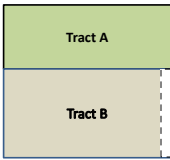
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Unusual Claims - Things we should always consider
Overburdening/After Acquired Title

Easement went to the south line of Tract A and was for the benefit of Tract A.



COS 516643

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Unusual Claims- Things we should always consider
Overburdening/After Acquired Title

In 2006 parcel enlarged by boundary relocation survey adding 20 acres to PIQ on the north, Portion A of COS 570932.

COS 570932

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Unusual Claims- Things we should always consider
Overburdening/After Acquired Title

- Nothing on COS 516643 indicates that the road easement was intended to benefit the land to the north of Tract A, which at the time of the easement was owned by a stranger to the deed.
- Later in 2006 we issued a Loan Policy insuring Tract A, COS 516643 and Portion A, COS 570932 without showing a lack of access exception.

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Unusual Claims- Things we should always consider
Overburdening/After Acquired Title

Lender foreclosed and claimed that as a result of no legal access to the north 20 acres (Portion A), a potential sale fell through.

COS 570932

Parties involved in conveyance by boundary relocation survey assumed the additional 20 acres would enjoy benefit of the easement serving the original Tract A

How could an easement serve the southern portion of the parcel, but not the northern portion?

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Unusual Claims- Things we should always consider
Overburdening/After Acquired Title

- Treatises, national case law and Montana case law predominantly prohibit use of a record easement to also serve a contiguous parcel later acquired by the dominant estate owner, on an assumption that serving another dominant estate automatically results in overburden of the easement on the servient estate.
- 70-17-111 1(c) MCA (servitude is extinguished by the performance of any act upon either tenement that is incompatible with its nature or exercise).
- *Leffingwell Ranch, Inc. v. Cieri, 916 P. 2nd 751, 758, (1996)*
 - A record easement cannot be used to access later-acquired property even though that property is contiguous because the extension to nondominant land constitutes an unreasonable increase in burden on the servient estate.

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Access Through Native American Lands

- A valid easement or right of way is required to cross NAL.
- County roads and state highways may not have current access easements.
- Many of these access easements and rights of way are for a term of years. Check for expiration of these grants and show appropriate Schedule B Exception.
 - Example:
The terms, conditions and provisions contained in that certain grant of easement dated ___ by and between _____ and _____, recorded _____ as instrument number ___ records of ___ County and the lack of a right of access to and from the Land resulting from any termination or revocation of said grant of easement.
- Talk to your Underwriter about their preferred language for Schedule B Exceptions

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Access Through Native American Lands

- Land owned in unrestricted fee by a Native American tribe or Tribal Entity,
 - special analysis is necessary as to the application of the Nonintercourse Act, 25 U.S.C. § 177.
- Land owned in restricted fee or held by the U.S in trust, the easement or right of way must be granted by the Department of the Interior
 - pursuant to 25 U.S.C. § 323-328 and 25 C.F.R. § 169, et seq.
 - the individual Native American, Native American Tribe, or Tribal Entity must consent to the grant.
- Are there other options in Montana?
 - Act of March 4, 1915 (38 Stat. 1188)

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Access Through Native American Lands

Act of March 4, 1915 (38 Stat. 1188) ("The ACT") Specific to Montana

- The legal authorities charged with the duty of laying Public roads under the laws of the State of Montana, having jurisdiction over any territory embraced within any Indian reservation in Montana,
- Lay out and open public roads within any of the said Indian reservations in conformity to and in accordance with the laws of the State of Montana and that any public road when so laid out and opened shall be deemed a legal road:
- **Provided**, That such road authorities shall accomplish the following 6 processes:
 1. Notify the landowners as provided in the State laws
 2. Serve notice upon the superintendent in charge of the restricted Indian lands




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Access Through Native American Lands

Act of March 4, 1915 (38 Stat. 1188) ("The ACT") Specific to Montana

- **Continued:**
 3. Furnish superintendent with a map showing the definite location and width of such proposed road, and
 4. No such road shall be laid out until after it has been approved by the Secretary
 5. Must comply with the steps required by state law for opening public roads
 6. Demonstrate it has jurisdiction over the territory to be impacted by the creation of public roads on the reservation



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Access Through Native American Lands


- Not automatic, must have complied and **MUST BE DOCUMENTED**
- Don't rely on verbal agreement or county maintenance of road.
- [Confederated Salish & Kootenai Tribes v. Lake County Board of Commissioners 2020 U.S. Dist. LEXIS 68250](#)
- Should obtain documentation or written agreement or show exception for lack of access or other modified exception – **call underwriting**
- New rights-of-way must be granted under 25 U.S.C. 323 and in accordance with 25 C.F.R. 169 (Old 169 included regulation for the Act, new revised 169 eliminated that regulation bringing all ROW under USC 323 and will no longer use specific limited statutes)



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Helpful Tools

- Google Earth (other aerial programs)
Get a visual
<http://www.earthpoint.us/TownshipsSearchByDescription.aspx>
- Access Workup Sheet

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Conclusion

- Identify-Visualize
- Verify Authority and Sufficiency
- Priority

Ask yourself:

- 1) Where does this go
- 2) Who gets to use it
- 3) For what purpose

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Thank you!

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