The *Right* Right of Way

by Jerry Moran

WE IN THE RIGHT-OF-WAY profession deal with many issues that surround our specialty. We talk about appraisals, relocation, property management, leasing, and more. There is very little devoted to the issue of the lowly easement and the rights we acquire from private property owners and franchise rights from governmental agencies. I am going to address these topics from the utilities viewpoint. I suppose we could also call this a right of way agents primer.

What exactly is the *right* right of way?

1. It is the correct easement form, properly executed and notarized by all of the legal owners of interest in the property.
2. The description of the property on the easement form is exactly as that described in the deed.
3. The location of the easement on the property is adequately described and leaves no room for interpretation by others.
4. The grantors of the easement were fully informed of what would be placed within its boundaries.
5. The easement is not a blanket easement. A blanket easement allows the easement holder to place their facilities anyplace on the property they wish.
6. The easement is properly recorded in the recorder's/registrar's office in the county/parish in which the property is located.
7. Your plant is installed within the boundaries of the easement.

Let's address each one of the above items and see what they really mean.

Legal Owners

How do you know who has an interest in the property? Some might think that it is a simple matter of checking the deed or the tax assessor's records. This couldn't be farther from the truth. Here are some reasons why:

Deeds do not have to be recorded until the current owner(s) sell the property.

Other transactions could have occurred after the current deed was recorded.

There could be a contract for deed in motion and not recorded. Some jurisdictions, not all, require that the contract be recorded.

If the property is leased when you acquire your easement, the lessee can keep you from exercising your easement rights under some circumstances if the lessee doesn't sign a release.

If there is a life estate on the property, do you know who must sign the easement?

The tax records are always a good place to start looking for ownership; however, that is all that they can really be used for. In most jurisdictions the party paying the taxes is the name that appears in the records. It is not necessarily the owner(s) name that appears.

Is there one or more mortgages/trust deeds on the property? When do you take a subordination from the lender(s)? Do you realize that without a subordination, your easement could be made invalid if the lender takes the property back due to a default by the property owner(s)? The lender has as much to say about the property as the current owner(s). Sometimes this information comes as a shock to some right of way practitioners.

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Correct Property Description

The correct description of the piece of land that you want an easement on is

critical. A land description is unique to that particular parcel, to the exclusion of all other parcels of land in the world. An incorrect description may invalidate the easement taken.

The following are the only ways to describe real property.

- Metes and Bounds (measurements and boundaries)
- The rectangular method (section, township and range)
- Subdivision (lot and sometimes block)
- Using the State Plane Coordinate Grid System

Location Of The Easement

The easement may be described in many different ways. The most common is metes and bounds which requires a survey, (figure 1). Next is a single, two- or three-way call, which may sometimes be accomplished without a survey if the property boundaries are clearly evident, (figure 2). Sometimes an exhibit "A" is used, which is just a pictorial of the area incumbered, (figure 3).

Owner(s) Fully Informed

We have all experienced "buyers remorse" at one time or another. Imagine how a property owner feels after he or she has granted an easement to the local utility for a buried line and one small above ground device. On the day of construction the owner is confronted with the largest Caterpillar tractor made instead of a light duty Ditchwitch trencher, and a crane lowers a huge manhole into place instead of the small device. The easement document may allow for such equipment, but imagine how the property owner feels. This can happen, and if it does, someone's telephone is going to start ringing at the utility.

Blanket Easements

What's wrong with a blanket easement? Doesn't it allow the utility to place whatever it wants whenever it wants? Of course it does! But, if you owned the property, would you want some utility to have the ability to place their plant wherever they want? Probably not. It can be a problem later when the utility tries to enforce the rights granted under a blanket easement. If the property owner decides to fight, the blanket easement could be viewed as an "unreasonable burden" to the property. The court may restrain the utility from enforcing any easement rights. The blanket easement can also cause problems for subsequent purchasers who try to obtain financing on the land.

Proper Recording

Recording the easement provides "notice" to subsequent purchasers of the property. When a prospective purchaser is interested in the land, and a title search is conducted, he or she discovers that the utility has an easement on the property. It is because of this discovery that they are then "notified" of that fact. If they buy the property knowing that there is an easement, they take the property "subject to" the easement. In other words, the buyer agrees to honor the rights granted in the easement as disclosed in the search of the public records.

Within The Boundaries

The fact that you have an easement may prove worthless if the contractor places your facility outside of the boundaries of your easement. Sometimes it be may be just an inch or two, but if you have a really picky property owner it could cost a lot of money to correct the situation. I recall a manhole that encroached just 2.5" outside of the easement into the owner's property. That additional 2.5" strip cost the utility $10,000. The original easement cost only cost $750. That utility learned the hard way that it is critical to obtain an easement large enough for some margin of error during the placement and installation job.

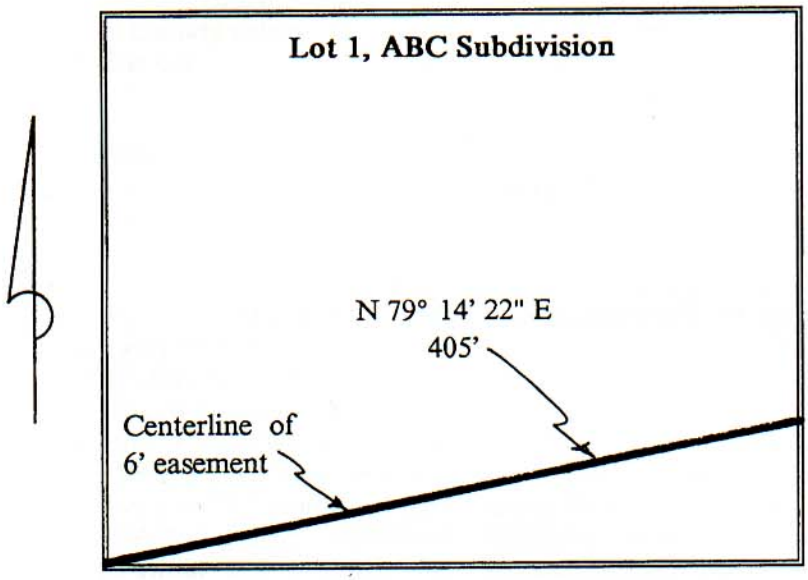

Figure 1

Fig. 1 Example of Metes and Bounds description
An easement six feet in width in Lot 1 of ABC Subdivision, the centerline of which is described as follows:
Beginning at the Southwest Corner of said property; thence North 79° 14'22" East four hundred-five (405) feet more or less to the point of termination at the Easterly line of said lot 1.

Public Right Of Way

So far I have only discussed private property easements. Let's discuss the public right of way. Public roads and streets are occupied by utilities all the time. The rights that a utility acquires from the town, city, county or state is called a franchise. A franchise is usually granted in exchange for a certain percentage of gross revenue. Along with the rights of a franchise there are certain obligations. The franchisee, the utility, must accept the fact that they are a secondary user in the public way. If the utility is a secondary user, who or what is a primary user? The traveling public is the primary user. Along with the traveling public, any other support function is also a primary user. For example, traffic signals, street lighting, and storm drains that clear the roadway during wet conditions are considered primary users. This means that if a utility has a facility (line, pipe, pole, cabinet, manhole, etc.) in the public right of way and the road is going to be widened, the utility must relocate the facility at its expense if its facilities interfere with the project. Do you then avoid the public right of way in order to protect yourself from the unknown future? Not necessarily.

From an engineering standpoint, a look into the future always is helpful. You might ask the following questions before committing to public or private right of way:

- How likely is it that the current roadway will be widened?
- How wide is the current public right of way in relation to the width of the current paved roadway?
- Is the current paved roadway in the center of the public right of way?
- Does the public agency that has jurisdiction over the public right of way have any short or long-range plans for changes or improvements to the right of way?

Let's take a hypothetical situation to help drive home a point:

A utility engineer needs to place a large piece of equipment in conjunction with a large engineering project. A nice location is chosen within the public right of way and a permit is taken. The equipment is placed and service is now working out of it. The local agency later decides to widen the road from a two lane to a four lane. They kindly inform the utility that the equipment is in the way and would you mind "sliding it over a few feet." We all know the chances of sliding it over. In most instances you will have to build a completely new facility, cut it over and then possibly scrap the old one. What if you had elected to acquire an easement in the first place, and placed your facility inside the property line. Presumably the local agency would have to buy or condemn a strip of land from the private property owners on each side of the roadway that is to be widened. If your facility was on the part to be taken, and you had a recorded easement, your telco would be entitled to all relocation costs.

How much money would it have cost for the easement? It depends on the negotiating skills of the person acquiring it. The costs can range from a few hundred dollars to several thousand. I know one right-of-way agent who acquired an easement from a an individual who wasn't particularly impressed with the $500 offer the agent had made for the easement. The owner, however, had taken a liking to the agent's sports coat! The agent, sensing victory, offered his coat in exchange for the easement. The owner accepted the offer and signed. The agent bought a new coat and submitted an expense of $149.95, plus tax, which his company readily paid.

Handling Trespass Complaints

Frequently an attorney is consulted—which can be very expensive (even in-house attorneys cross charge the expense to your department in most companies now)—on right-of-way matters when it could easily have been

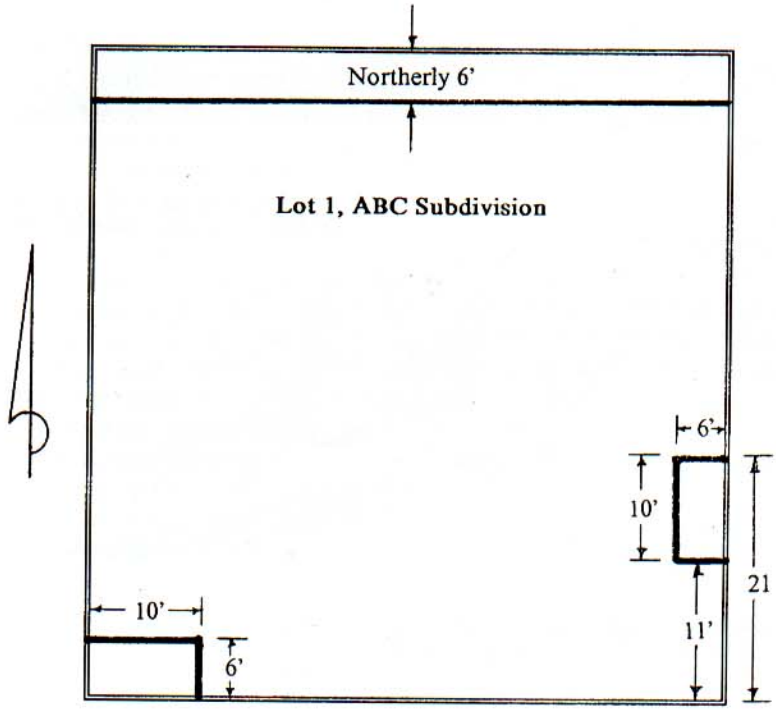

Figure 2

Fig.2

Single Call

An easement located on the Northerly six feet of Lot 1 of ABC Subdivision, as measured along the Easterly and Westerly boundaries of said lot.

Two-Way Call

An easement located on the Southerly six feet of the Westerly ten of Lot 1 of ABC Subdivision, as measured along the Southerly and Westerly boundaries of said lot.

Three-Way Call

An easement located on the Northerly ten feet of the Southerly twenty-one feet of the Easterly six feet of Lot 1 of ABC Subdivision, as measured along the Easterly and Southerly boundaries of said lot.

taken care of by someone properly trained in such matters. In fact, a frequent problem for many utilities is the following scenario:

A property owner calls to complain about a pole on their property that they never saw before. They are absentee owners and recently decided to build their retirement home on the property. They can't find anything in their title report or deed that indicates that your utility has any rights to be there. What are your options?

Try to find some sort of easement or permit in your files. None can be found. Then you must weigh the cost of moving the plant versus hiring an attorney to defend your presence on the property. Without some documentation, the attorney is likely to say that it is very difficult to defend in court what appears to be trespass.

Perhaps the pole was placed with verbal permission years ago. It probably was because you know that your company has never trespassed. You do some investigating and discover the pole was placed there 22 years ago, but the current owners bought the land six years ago. You wonder why they never noticed the pole before. However, when they bought the

Fig. 3 Example of Exhibit "A"

The easement document would have a statement indicating that the location of the easement "shall be located as shown on Exhibit "A," attached hereto and made a part hereof."

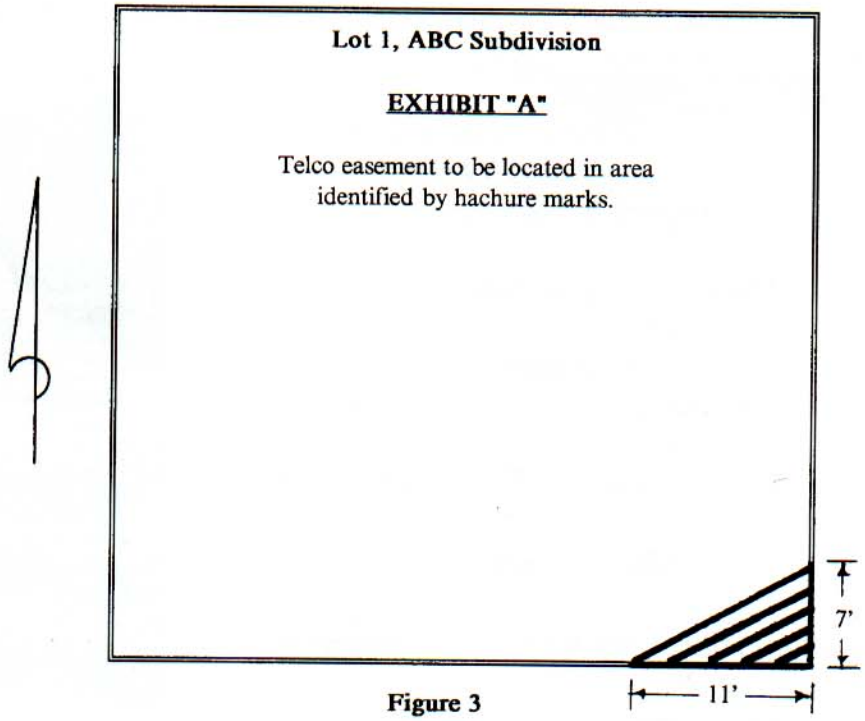

Figure 3

property they really hadn't thought of where they would ultimately build their home until now. The pole is in the middle of the proposed house, and they want you to remove it at your expense.

You might consider an optional approach. It doesn't always work but it's worth a try. There is something in the law called Laches. It means "failure to act within a reasonable period of time." This can be interpreted to mean that the owner, upon purchase of the property, did not inquire as to the rights of the utility and therefore has given "tacit" permission to leave the pole there. Will it stand up in court? Not likely, but it has worked on innumerable occasions. Remember, we are discussing an optional approach.

Another tactic to use is "Prescriptive Rights." Prescriptive rights can be invoked if your plant is clearly visible (open and notorious), in continuous use for the statutory time (five to 30 years depending on which state you are in), under a claim of right, and it must be adverse to the property owner. The use of prescription is much stronger than laches because it is a realistic possibility if it is taken to court and all of the conditions for obtaining a prescriptive easement have been met. The court can actually grant the easement. The exception to this is in New York state, where utilities are prohibited from exercising prescriptive rights.

Sometimes, the inclination is to just move your plant, at your company's expense, without any fight or negotiation. It is more cost effective in the long run to have a staff or engineering person, well versed in right-of-way matters, than it is to refer it to an attorney every time a question arises about easements or rights of way.

Remember: when asking property owners for an easement, put yourself in their place. Would you grant the easement if this were your property? ❑

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