



Overburdening Easements

A Definition

Overburdening an easement occurs when use exceeds the use expressed in the terms of the granting document¹ or reasonably anticipated by the parties at the time the easement was granted.^{2/3/4} In view of ever rising land values and a population that is often willing to scrutinize and challenge public agency activities, the issue of overburdening easements might well be one increasingly confronted by public and private agencies.

The Project

As the right-of-way agent on a 4-mile 72-inch water transmission pipeline project team, the author was responsible for acquiring property and access. The pipeline route extended through a somewhat rural area. Initially, access did not appear to be a problem because existing well-traveled roads served the entire area. The roads on the east side were low standard paved roads used by residents as well as commercial avocado and flower growers. The roads on the west side of the project were 24-foot wide paved roads serving a development of up-scale homes with prices starting at \$200,000.

The Problem

A search of the county and nearby city road inventories revealed that the roads on both ends of the project were private roads serving a multitude of owners. The private roads were not controlled by a formal road management association. A few homeowner groups pooled resources under a non-statutory "road association" to periodically make repairs, but there was no obligation for any of the owners to contribute, nor was there authority to execute agreements with outside users.



As the concern for access mounted, alternative routes were evaluated. It was determined that topography and environmental concerns limited access to the existing roads (Photo lower left). Fortunately, it was thought, the agency owned fee property at both ends of the project. The title carried a right of ingress and egress to the parcels.

What does ingress and egress mean? What is the extent of permitted use of the private roads on the construction project and the propriety of use for construction equipment to use the existing private roads on a temporary basis? We turned to our legal counsel to provide an opinion so that we could go forward with assurance that our access issues were resolved.

Legal Issues

Counsel advised that once an access easement has been created and used, both parties have the right to demand that the use remain substantially as it was when the right accrued.⁵ Once the extent and use of access easements had been established, the agency could not subsequently enlarge its character so as to materially increase the burden on the properties over which the access rights existed.⁶

The extent to which the easement could be altered to allow access for construction equipment on a temporary basis turned on the factual question of whether such use was excessive.⁷ Whether or not the increased use was excessive depended on either the terms of the documents establishing the access easement or on the circumstances of its creation and the intent of the parties.

agency's facilities would be consistent with the use contemplated at the time the access easement rights were created. However, it was questionable whether or not the natural contemplation of the future needs of the agency for ingress and egress at the time the easement was created included access rights for the construction of a 72-inch diameter regional water pipeline (Photos below).

Possession could be obtained. This could take several days at best. It would not enhance the agency's reputation with the court or the community, and contractual delays could exceed \$10,000 per day. More important, it was not the right thing to do.

Because the use of the access easement could be determined to be excessive and thus could subject the



The use of an easement can be enlarged if it can be shown that an increased use was contemplated by the parties in the ordinary development of the property enjoining the easement rights (dominant tenement).⁸

The natural contemplation of the future use and needs for ingress and egress to the agency's property is also relevant to determine whether such contemplated use of the easement would be a "surcharge."

It was established that private access to parcels historically had been for construction of and access to private single family homes. The roads had also been used by commercial avocado and flower growers whose parcels were used for agricultural purposes. In purchasing its fee parcels with appurtenant easements, counsel advised that permanent maintenance and patrol of an

The terms of the document establishing the access rights did not address such use.

It was ultimately determined that the use of the private roads for construction access to its project could be determined to be a material or substantial increase in the burden on the properties (servient tenements). Since an unreasonable increase of the burden may ripen into a prescriptive right, it could also be determined to be a nuisance that could possibly be enjoined by the property owners.⁹ If successful, such enjoining could result in exposure of the agency to contractual delay claims.

The Solution

If the agency used the road and waited to receive a challenge it could be enjoined from road use until such time as an emergency Order of Immediate

user to injunctive relief, the decision was made to acquire additional temporary access rights from all property owners having rights to use the private roads. An action plan was developed to perfect the agency access rights. The action plan was to inventory the owners, define the rights needed, appraise the rights and make offers.

Using a map guide, an inventory was conducted of the entire roads tributary to the project roads. A day in the field gave the beginning and ending addresses on each road. A week in the office by a member of the clerical staff using a computer based parcel information service yielded a list of owners and addresses. The list was separated into parcels actually crossed by the roads, and parcels that only used the road for access.

The Appraisal

The next task was to appraise the rights required for acquisition. An independent appraiser was hired to appraise the rights being acquired. In defining the appraisal problem the appraiser considered several issues.

The rights of ingress and egress to the agency fee parcel would be equal to a typical home owner/builder. A light

amount of construction traffic under typical subdivision use would be anticipated if one were to build a home. The impacts of additional noise have historically been judged non-compensable. Even traffic delays caused by the additional traffic have typically been deemed non-compensable. Furthermore, only temporary construction access rights were required. Following construction,

the existing ingress and egress rights would be adequate for patrol and maintenance activities.

The appraiser determined the value of the additional construction access rights to be nominal for both the road owners and road users. It was thought, however, that the owners whose property was actually crossed by the road were probably impacted more than those that only used the road were.

The agency decided to offer \$100 to road owners and \$50 to road users. Letters of offer were mailed which contained a temporary construction access easement, notice of public hearing to adopt a Resolution of Necessity, and the amount offered. The appropriate lead time was given before the public hearing to allow for negotiations.

Engineering and Negotiations

Community meetings were arranged to explain the action of the agency as well as the project itself. They were well attended. At the meetings it was learned that the owners at the west end of the project were very active politically. They had successfully defeated proposals for annexation and had defeated a proposed adjoining subdivision from using their roads. Among their members were individuals who threatened to gate the roads if legal rights were not obtained. It became very apparent that had we chosen a wait and see approach, we would have been faced with the very injunction that we feared could be sought.

Keeping open communication to the community helped surface issues and brings resolution through negotiation. At the east end, the owners were concerned with one segment of road, which was narrow and had a bus stop at the bottom. The agency was able to delete this segment from heavy construction equipment and use a different traffic pattern, bringing construction traffic in from the opposite direction of an internal loop.

Although many owners were angry at the impact the project would provide, most understood the necessity. Rapport

THE NLS GROUP

Increasing Productivity Through Innovation and Technology

- Pipeline
- Highway
- Oil & Gas
- Co-Generation
- Fiber Optic
- Electric Transmission
- Cellular
- Dugout
- SMR
- Microwave
- PCS/PCN
- Two-Way

Pro **FPO**
P/U page
Spring page 32

- Street/Jail
- House Dev
- Right of Way
- Mineral
- Site Acquisition
- Survey
- Project Mgmt.
- Mapping

Opportunities available for qualified candidates to support projects nationwide. For consideration, please send or fax your resume to:

Northeastern Land Services, Ltd.
(Since 1986)

Corporate Office
 One Orange Parkway
 East Providence, RI 02917
 Phone (401) 435-4050
 Fax (401) 435-1055
 http://www.nlsgrp.com

was established with the various road maintenance groups. Because of the heavy loads and inadequate road base underlying some roads, they requested re-pavement following construction. The agency concurred with re-paving the specified roads and included the requirement in its construction contract.

Of the approximately 350 road users and 142 road owners, about 10 percent signed prior to adoption of the resolution of necessity. At the board meeting held to adopt a Resolution of Necessity, about a dozen residents showed up to challenge the decision to use the roads. A sound analysis of the inadequacy of other access alternatives persuaded the board to adopt the resolution. The same work paid off a week later when convincing a judge to issue an Order of Immediate Possession.

Acquisition efforts did not cease when possession was granted. The agency continued to pursue acquisition of the temporary construction access easements. Within a year all but a dozen owners had signed easements. By the end of the project there were only a couple of outstanding offers.

Summary

In bringing resolution to this access problem, skill in the disciplines of law, appraisal, engineering and negotiations were all required. This project demonstrates how the various disciplines of the right-of-way profession can work together to solve a complicated access problem. It also demonstrates the importance of thoroughly researching access issues and pursuing an ethical approach to resolution. ■

William Busch received his bachelor's degree from Humboldt State University in 1970. He has worked in the right-of-way profession at both the state and federal level for public agencies. Mr. Busch is currently a Right of Way Agent with the San Diego County Water Authority. Before his current employment, he completed a 16-year tenure with the U. S. Forest Service as Assistant Lands Staff on the Fremont National Forest.

Cases Cited

- ¹ 4 Witkin, Summary of California Law (9th Edition 1987) Real Property Section 434
- ² California Civil Code 801, definition of easement appurtenant
- ³ Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1034, 82 Cal. Rptr. 272, 274
- ⁴ Winslow v. Vallejo (1906) 148 Cal. 723, 725, 84 P. 191
- ⁵ 4 Witkin, supra, Real Property Section 444; and see Wall v. Rudolph (1961) 198 Cal. App. 2d 684, 692, 694, 697, 18 Cal. Rptr. 123.
- ⁶ 4 Witkin, supra, Real Property Section 450
- ⁷ Fletcher v. Stapleton (1932) 123 Cal. App. 133, 10P. 2d 1019
- ⁸ Youngstown Steel Products Company v Los Angeles (1952) 38 Cal. 2d 407, 410, 240 P. 2d 977
- ⁹ Crimmins v. Gould (1957) 149 Cal. App. 2d 383, 308 P. 2d 786.

Come and greet the
Flamingos at the
International
Education Seminar
Minneapolis, MN
June 28 - July 2, 1998

COORDINATED LAND & RIGHT OF WAY SERVICES

SINCE 1958



- Feasibility Studies
- Site Location
- Title Search
- Appraisals
- Preliminary Survey
- Right of Way Negotiation
- Relocation Assistance to Displacees
- Utility Relocation
- Construction Management
- Construction Survey
- Settlement of Construction Damages
- Computerized Project Records to
 - Gas & Electric Utility Companies
 - Pipeline Companies
 - Communications Companies
 - Federal, State, County and Municipal Governments



FIELD SERVICES, INC.
 800 447 8104

Compor
 1981-82
 2000
 Cor
 Jan
 02/1981

P/U with NEW COPY
 Film Supplied
 Nov/Dec page

1666
 100V
 28
 1
 3
 1-1200