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Unbounded Interests: The Limits of Blanket Easements

By Megan M. Cunningham and Thomas J. Dougherty*

Blanket easements affect the use of burdened land and the rights of both landowners and easement holders. This article examines the various trends that have begun to emerge as states decide whether to invalidate, uphold, or limit the scope of blanket easements. It then discusses the implications of each trend, with an eye to the interests of utilities and infrastructure developers.

Historically, it was not uncommon for utilities and other infrastructure developers to obtain from landowners blanket easements that allowed improvements to be located anywhere on the subject property. However, as time passes and property changes hands, conflicts may arise between a landowner's plans for their property and the broad rights created by a blanket easement. For example, the landowner may seek to change the use of their property, or the infrastructure owner may try to exercise its blanket easement rights to change the installed facilities or their location. For utilities and other infrastructure easement owners, attempts to limit the broad scope of a blanket easement may stilt their long-enjoyed—and often necessary—use of the land.

States have slowly begun addressing the question of how to balance these interests. Some states disfavor blanket easements and have passed statutes limiting their applicability. Most states refuse to entirely invalidate them, while still recognizing that justice may require limits on easement rights. Such states attempt to fix the easement's location based on one of three inquiries: the original intent of the parties, the area reasonably necessary for use, or the prior use of the parcel. This article examines the application and implications of these trends.

EASEMENTS GENERALLY

First, recall that an easement is an interest in another person's land which permits the easement holder to use or control the land for a specific purpose. Easements may grant a right to place or keep something on the burdened land. While easements may arise in a variety of ways, they are commonly created by

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a servient property owner's express written grant permitting particular use of a designated area of his land. At a minimum, the grant must identify the servient estate and indicate the owner's intent to create an easement. Where an express grant does not specifically state the boundaries or location of an easement, the easement is often known as a "blanket" or "floating easement."[1]

VALIDITY OF BLANKET EASEMENTS

Only a few states either expressly prohibit or explicitly validate blanket easements, and then only in limited circumstances. This section examines each of these approaches.

Expressly Prohibited

Some states, like Missouri, Wyoming, and Minnesota, prohibit blanket easements in limited contexts (*e.g.*, those created after a certain date or through condemnation by public utilities). Others, like North Dakota, have passed statutes intended to inhibit blanket easements, but their courts have upheld easements where the parties clearly intended to grant blanket rights.

Under Missouri's condemnation statute, public utility companies can acquire an easement to provide public utility services by condemning private land.[2] The statute, however, disallows blanket easements as against public policy. It defines a blanket easement as one created after December 31, 2006, that purports to allow a public utility to locate its facilities at some undefined location on condemned property so that it can access the entire parcel.[3] As to easements created before December 31, 2006, the intent of the contracting parties and the language of an express grant control their validity.[4] Where a grant clearly identifies a servient parcel and gives a utility company "the right to fully use and enjoy" the land for its public services, the grant creates a valid blanket easement.

Wyoming's statute more thoroughly prohibits recently-created blanket easements. It nullifies easements created after March 24, 2006 that do not specifically describe the easement's location.[5] If a grant expressly permits an easement's location to be fixed later, the easement is invalid if its location is not recorded within one year of its creation. Like Missouri, however, the statute does not govern easements created before March 24, 2006. Instead, courts determine the

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[1] Law Easements, § 7.4 (2018).

[2] Mo. Rev. Stat. § 523.010 (2018).

[3] Mo. Rev. Stat. § 523.282 (2018).

[4] *See Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 839, 842 (8th Cir. 1975).

[5] Wyo. Stat. Ann. § 34-1-141 (2018).

scope of older floating easements by examining the original parties' intent, reasonable necessity, and prior use.[6]

Although Minnesota seriously limits modern blanket easements for utilities, it is highly deferential to older express easements that unambiguously give utilities blanket access rights. Minnesota Statute § 300.045, enacted in 1973, requires that public service corporations 1) "definitely and specifically describe" property acquired by an easement, 2) limit the property acquired to "the minimum necessary for the safe conduct of their business," and 3) provide a definite and specific description of an ambiguous easement upon the request of a servient owner.[7] The statute, however, does not govern easements created before its enactment.[8] The extent of older easements depends entirely on the terms of the grant if the granting language is unambiguous. In *Scherger v. Northern Natural Gas Co.*, a gas utility company was allowed to construct a new pipeline anywhere on a servient owner's property because a blanket easement granted in 1931 clearly gave the utility the right to "construct, inspect, maintain, repair, and replace its pipelines" on the original owner's land.[9]

Even in North Dakota, where grants must specifically set out the portion of a servient parcel burdened by an easement,[10] courts will not invalidate blanket easements that parties intended to create. In *Krenz v. XTO Energy, Inc.*, landowners granted a utility company an easement to construct a pipeline in a surveyed area that comprised several parcels, with the utility expressly given the right to choose where to build.[11] The court acknowledged the utility's right to build anywhere within the described area, even though the grant did not designate the pipeline's exact location, because the parties clearly meant to leave the location undetermined at the time of the grant.

Explicitly Valid

West Virginia statutorily permits blanket easements only for oil and gas and mineral utilities. Under W.Va. Code Ann. § 36-3-5a, most deeds granting or reserving easements must describe the easement with some particularity.[12] The statute makes an exception, however, for easements granted under oil and gas or mineral leases. Such grants need only accurately describe the land where the

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[6] *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 587 (Wyo. 1999).

[7] Minn. Stat. Ann. § 301B.03 (2018).

[8] *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578, 581 (Minn. 1998).

[9] *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578, 580–81 (Minn. 1998).

[10] N.D. Cent. Code § 47-05-02.1 (2017).

[11] *Krenz v. XTO Energy, Inc.*, 890 N.W.2d 222, 232–33 (N.D. 2017).

[12] W.Va. Code. Ann. § 36-3-5a (2018).

easement is located, not the easement itself. Further, a utility easement will not fail even if the description of either the easement or the servient parcel does not meet the statute's requirements.

The Middle Ground

The treatment of blanket easements by most states falls somewhere between total invalidation and express approval. The next section discusses the primary approaches to blanket easements taken by states in this middle ground.

SCOPE OF BLANKET EASEMENTS

Though most states recognize an easement holder's property interest in an express grant that fails to specify the easement's location, courts rarely leave such an easement unbounded. Instead, they try to fix the easement's location based on 1) the original intent of the parties; 2) the area reasonably necessary for use; or 3) prior use of the burdened area. Even in those states that have not addressed blanket easements specifically, adjudicating ambiguous easements generally follows these trends. This section discusses each of these methods in more detail.

Original Intent of the Parties

Because easements are governed by traditional contract principles, the scope of an easement depends on the parties' intent. Where granting language is unambiguous, intent is determined from the four corners of a contract. In some states, inexact descriptions of the location of an easement or the extent of its use do not make a grant ambiguous, and the words of the grant will control.

For example, in the Kentucky case *Texas Eastern Transmission Corp. v. Carman*, landowners granted an oil company a very broad right-of-way to lay, maintain, and replace pipelines across their property; to "select, change, or alter the route" of said pipes; and to install one or more pipelines in the future.[13] When the landowners refused to allow the oil company to construct another pipeline, Kentucky's highest court upheld the oil company's right to install an additional pipeline based on the easement's express language.

A Michigan appellate court similarly addressed the issue in *Consumers Energy Co. v. Acey*, wherein an easement granted a gas utility the right to build "not more than two lines of gas mains . . . in an Easterly and Westerly direction, in, under, through and across said above described land."[14] There, the easement language clearly and unambiguously permitted the utility to build up to two

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[13] *Tex. E. Transmission Corp. v. Carman*, 314 S.W.2d 684, 685–87 (Ky. 1958).

[14] *Consumers Energy Co. v. Acey*, No. 277039, 2008 Mich. App. LEXIS 1472, at *6–7 (Ct. App. July 17, 2008) (unpublished opinion) (partially reversed on other grounds).

mains. Thus, extrinsic evidence of what the parties intended was unnecessary. Missouri,[15] North Carolina,[16] and Rhode Island[17] also look to original intent when determining an easement's scope.

Other states find that failing to locate an easement creates an ambiguity in the grant. As such, they examine extrinsic evidence to determine the parties' intent.[18] In the North Dakota case *Krenz v. XTO Energy, Inc.*, an easement gave an oil company the right to construct and determine the route of "pipelines" through various parcels, but other language in the grant limited the right to "one pipeline within the surveyed right of way."[19] The landowners sued for trespass after the oil company built a pipeline through one parcel, then constructed a connecting pipeline that passed through a different parcel. The Supreme Court of North Dakota found it was ambiguous whether the easement permitted only one pipeline within the entire area or one pipeline within each parcel, so summary judgment by the trial court was improper. It remanded the case for consideration of extrinsic evidence of whether the parties intended to allow the oil company to construct multiple adjoining pipelines within the designated area as a whole. Colorado,[20] Delaware,[21] Idaho,[22] Tennessee,[23]

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[15] *Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837 (8th Cir. 1975). The intent inquiry applies to personal express easements, as well as to utility easements created by condemnation before 2006. As noted earlier, utility easements created by condemnation after 2006 are void and unenforceable in Missouri.

[16] *Higdon v. Davis*, 337 S.E.2d 543, 547 (N.C. 1985).

[17] *Vallone v. City of Cranston, Dep't of Pub. Works*, 197 A.2d 310, 317 (R.I. 1964): "[If] a grant . . . creates an unrestricted or undefined easement . . . the rule is that construction should not be used for the purpose of burdening the servient estate beyond the intention disclosed in the terms of the grant or, in the instant case, beyond the intention of the statement of taking.").

[18] *See, e.g.*, *Krenz v. XTO Energy, Inc.*, 890 N.W.2d 222, 231 (N.D. 2017) ("If a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent."); 61 Am. Jur. 2d Pipelines § 31 (2016) ("Even if a grant does not describe the route over which the line is to be laid, the grant is not nullified.").

[19] *Krenz v. XTO Energy, Inc.*, 890 N.W.2d 222, 232–34 (N.D. 2017).

[20] *Wulf v. Tibaldo*, 680 P.2d 1348, 1350 (Colo. App. 1984) ("Factors to be considered in ascertaining the intent of the parties are the circumstances surrounding the grant and the past behavior of the parties in regard to the right-of-way.").

[21] *Jestice v. Buchanan*, No. 1987-S (Del. Ch. June 14, 1999) (unpublished opinion) ("In construing an ambiguous deed, it is the grantor's intent at the time of execution which controls . . . This court may consider the circumstances surrounding creation of the easement to resolve any ambiguities.").

[22] *Bedke v. Pickett Ranch & Sheep Co.*, 137 P.3d 423, 426 (Idaho 2006) ("The location of the easement depends upon the intention of the parties and the circumstances in existence at the time the easement was given and carried out.").

Virginia,[24] and Wyoming[25] also permit extrinsic evidence to determine the scope of ambiguous easements.

Reasonably Necessary for Use

Where neither granting language nor extrinsic evidence indicates the dimensions or location of a blanket or floating easement, the Restatement (Third) of Property states that the dimensions are those "reasonably necessary for enjoyment" of the easement.[26] The majority of states adopt some version of this "reasonable necessity" test.

Most commonly, states prioritize the easement owner's reasonable use and enjoyment. In *Brown v. ConocoPhillips*, the Kansas Court of Appeals determined that the scope of a blanket easement depends on whether a servient owner materially encroaches on the easement's reasonable use or enjoyment.[27] There, a large oak tree planted near a gas pipeline made excavation of the pipeline difficult and obstructed the gas company's ability to aerially inspect the pipeline. Had the easement been specific, its dimensions would have determined whether the oak tree encroached on it and thus violated the gas company's property interest. Because the easement was a blanket grant, however, the question instead was whether the gas company could still reasonably use the easement as necessary. Alabama,[28] Alaska,[29] Maryland,[30]

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[23] *Mitchell v. Chance*, 149 S.W.3d 40 (Tenn. Ct. App. 2004) ("If the description of the easement in the deed or other instrument is inadequate or nonexistent, the courts may consider extrinsic evidence to ascertain the parties' intent regarding the location and dimensions of the easement.").

[24] *Adamson v. Columbia Gas Transmission, LLC*, 987 F. Supp. 2d 700, 704 (E.D. Va. 2013), aff'd, 579 F. App'x 175 (4th Cir. 2014) ("[When] the deed language does not state the object or purpose of the easement, the determination of the easement's scope 'is made by reference to the intention of the parties to the grant,' ascertained from the circumstances pertaining to the parties and the land at the time of the grant."). Note that this method applies only when the purpose of the grant is unstated. If the purpose is explicit, Virginia determines an easement's dimensions based on what is "reasonably sufficient for the accomplishment of that object."

[25] *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581 (Wyo. 1999) ("If the location or the dimensions of an easement are not adequately described in the instrument, the court generally examines the surrounding circumstances to determine the intent of the parties . . ."). Note that this method applies only to easements granted before 2007.

[26] Restatement (Third) of Property: Servitudes § 4.8 (2017).

[27] *Brown v. ConocoPhillips Pipeline Co.*, 271 P.3d 1269, 1274–76 (Kan. Ct. App. 2011).

[28] *Alonzo v. Sanford*, 465 So. 2d 1131 (Ala. Civ. App. 1984).

[29] *Simon v. State*, 996 P.2d 1211 (Alaska 2000).

[30] *USA Cartage Leasing, LLC v. Baer*, 55 A.3d 510 (Md. 2012).

Nebraska,[31] New York,[32] Oklahoma,[33] South Carolina,[34] and Vermont[35] similarly privilege the dominant owner's reasonable use when assessing an ambiguous easement's dimensions.

An alternative test balances the reasonable convenience of both parties. In the Wisconsin case *Enbridge Energy Limited Partnership v. Engelking*, landowners' predecessors-in-interest granted a gas utility an easement to lay, maintain, operate, repair, and remove a gas pipeline across their property.[36] They also gave the utility the right to "at any time lay additional lines of pipe," subject to the same conditions of the original pipeline. The utility constructed three pipelines over the span of twenty years before the property changed hands. The new landowners sued after further construction exceeded the 50-foot width originally estimated for the pipelines. According to the appellate court, when a grant does not define an easement's location, "the reasonable convenience of both parties is of prime importance and the court . . . must proceed with due regard for the rights of both parties."[37] As such, a 50-foot wide easement was reasonably convenient for both the landowners and the utility. "Reasonable convenience to both parties" guided similar decisions in Arkansas,[38] Florida,[39] New Hampshire,[40] and Ohio.[41]

Prior Use

The last common trend fixes ambiguous or blanket easements based on prior use. By this method, the area previously used by an easement holder sets an easement's boundaries. Courts assume that such use indicates tacit approval by the servient owner of the burdened area's dimensions, and also constitutes the area reasonably necessary for the dominant owner to accomplish the easement's purposes.

In *Jackson Elec. Membership Corp. v. Echols*, a Georgia appellate court denied a power utility the unilateral right to erect an additional power line on

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[31] *Thomas v. Weller*, 281 N.W.2d 790 (Neb. 1979).

[32] *Niagara Mohawk Power Corp. v. Pub. Serv. Com.*, 412 N.Y.S.2d 485 (App. Div. 1979).

[33] *Lindhorst v. Wright*, 616 P.2d 450 (Okla. Ct. App. 1980).

[34] *Moore v. Reynolds*, 330 S.E.2d 542 (S.C. Ct. App. 1985).

[35] Vt. Stat. Ann. tit. 27A, § 2-116 (2018).

[36] *Enbridge Energy, Ltd. P'ship v. Engelking*, 2017 WI App 47, *1.

[37] *Id.* at *17 (*citing* 17A Am. Jur., Easements, § 101 (1962)).

[38] *Howard v. Cramlet*, 939 S.W.2d 858 (Ark. Ct. App. 1997).

[39] *Florida Power Corp. v. Hicks*, 156 So. 2d 408, 410 (Fla. Dist. Ct. App. 1963).

[40] *Barton's Motel, Inc. v. Saymore Trophy Co.*, 306 A.2d 774 (N.H. 1973).

[41] *Geiger v. Ayersville Water & Sewer Dist.*, 2012-Ohio-2689, ¶ 33 (Ct. App.).

landowners' property several years after a blanket easement authorized the utility to build a first line.[42] There, although the court acknowledged the blanket easement did not delineate the location or extent of the lines to be built, it found that the utility fixed the easement's location by completing an initial line and then ceasing any activity for a number of years. Thus, the utility could not build a second, adjacent line outside the boundaries of the original power line without the landowners' permission.

Many states follow some variation of the "fixed by use" trend. For example, Arizona fixes the location based on first use, rather than historical use or use over time.[43] In Utah, the test is more aptly described as "by agreement of the parties," where a servient owner's acquiescence evinces tacit agreement to the easement's location.[44] Louisiana gives the servient owner the initial right to fix the location, but prior use controls if he fails to fix the location explicitly.[45] California,[46] Connecticut,[47] Mississippi,[48] New Mexico,[49] Oregon,[50] Pennsylvania,[51] and Washington[52] also look to prior use in locating blanket or floating easements.

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[42] *Jackson Elec. Membership Corp. v. Echols*, 66 S.E.2d 770, 772 (Ga. Ct. App. 1951).

[43] *Mountain States Tel. & Tel. Co. v. Kennedy*, 711 P.2d 653, 655 (Ariz. Ct. App. 1985).

[44] *Evans v. Board of County Comm'rs*, 97 P.3d 697 (Utah Ct. App. 2004) ("[Where] a deed containing an easement grant does not fix the location of the easement . . . the location may be fixed by agreement of the parties, by acquiescent use of a particular way for a considerable period of time . . .").

[45] *Miller v. Long Oil & Gas Expl., Ltd.*, 542 So. 2d 75 (La. Ct. App. 1989) ("If the title does not specify the location of the servitude, the owner of the servient estate shall designate the location; however, "a fixed status or condition of things, reaching over a number of years, the consent to which is evidenced not only by the silence and acquiescence of defendant, but by affirmative acts on his part, cannot be ignored . . .").

[46] *Colvin v. S. Cal. Edison Co.*, 240 Cal. Rptr. 142 (Ct. App. 1987) (disapproved on other grounds).

[47] *Coughlin v. Anderson*, 853 A.2d 460 (Conn. 2004).

[48] *Alabama & V. Ry. Co. v. Mashburn*, 109 So. 2d 533 (Miss. 1959).

[49] *Village of Wagon Mound v. Mora Trust*, 62 P.3d 1255 (N.M. Ct. App. 2002).

[50] *Tipperman v. Tsiatsos*, 915 P.2d 446, 451 (Or. Ct. App. 1996).

[51] *Zettlemoyer v. Transcon. Gas Pipeline Corp.*, 617 A.2d 51 (1992), rev'd, 657 A.2d 920 (1995).

[52] *Sunnyside Valley Irr. Dist. v. Dickie*, 73 P.3d 369, 372 (Wash. 2003).

IMPLICATIONS

Original Intent of the Parties

"Original intent of the parties" is the most fact-intensive, and thus perhaps the most unbiased, of any of the three methods discussed herein. When original intent controls, neither the landowner nor the easement holder presumptively benefits more. Instead, the granting language and the circumstances surrounding the grant define the scope of the easement and whether it can be modified in the future.

Whenever possible, utilities and energy companies that currently hold blanket easements should marshal evidence to show that the original parties intended to permit broad use of the land, including additional construction or future changes to the infrastructure. Ideally, the easement's granting language would evince this intent. In states where the failure to locate the easement inherently creates an ambiguity, utilities and infrastructure owners should collect extrinsic evidence to support broad ongoing rights for an easement holder. This is especially true in states like North Dakota, which disfavors blanket easements but nonetheless will respect them if the parties unambiguously intended to contract for expansive access rights.

Reasonably Necessary for Use

Fixing the location based on the area "reasonably necessary for use" generally is much more favorable to easement holders. In these states, an easement's scope will vary depending on its purpose. Utilities likely will fare better in states that apply this method, especially if the easement's purpose is to provide services to a wide or developing area. For example, in Ohio, changes in the use of an easement are permitted where they "result from the normal growth and development of the dominant land," making the expansion a reasonable use of the easement.[53] Likewise, a New York appellate court found that utilities were entitled to "all reasonable and necessary rights-of-way and easements required for the extension of their facilities."[54] These decisions suggest that courts are willing to give utilities broad leeway to enter landowners' property if they believe utilities require access for public service.

Prior Use

Energy companies face an uphill battle in states that fix an easement's location based on prior use, especially in conflicts over access for utilities. The prior use trend prioritizes landowners' property rights over a utility's convenience.

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[53] *Geiger v. Ayersville Water & Sewer Dist.*, 2012-Ohio-2689, ¶ 33 (Ct. App.).

[54] *Niagara Mohawk, Power Corp. v. Pub. Serv. Com.*, 412 N.Y.S.2d 485, 487 (App. Div. 1979).

"Fixed by prior use" sets the most definite boundaries on an easement's dimensions of any of the methods discussed herein, giving landowners' certainty as to the limits of an easement holder's access to their property.

Generally speaking, utilities seeking to expand or add infrastructure should be prepared to work only within the bounds of the area previously used. Even when a utility may retain the ability to build additional pipelines under a blanket grant, potential future lines may be circumscribed to the same general geographic area as existing lines.[55] Any change in the location or scope of the easement typically will require the servient owner's consent. However, exceptions may apply.[56] If a state has not explicitly addressed blanket easements or the propriety of modifying blanket grants, persuasive authority exists for utilities to argue that prior use is not wholly determinative of their access rights.

CONCLUSION

The trends discussed herein regarding unlocated and blanket easements often overlap with each other, but clear patterns are beginning to emerge as more states address the issue. Knowing which of these trends your state likely will apply can help you determine your litigation strategy on behalf of energy clients—or to decide if negotiation may be a better option.

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[55] *See Coughlin v. Anderson*, 853 A.2d 460, 474 (Conn. 2004).

[56] For example, in Georgia, changes in the manner, frequency, or intensity of use within a bounded area do not require consent by the servient owner so long as a change does not unreasonably damage or limit the servient owner's enjoyment of the servient property. *Wilann Properties I, LLC v. Georgia Power Co.*, 740 S.E. 2d 386, 392 (Ga. Ct. App. 2013). In Washington, even prior use does not definitively preclude expanding an easement if the easement's express terms "manifest a clear intention by the original parties to modify the initial scope based on future demands." *Sunnyside Valley Irr. Dist. v. Dickie*, 73 P.3d 369, 372 (Wash. 2003).