1998 May (Rights-of-Way How Right is Your Right-of-Way?)
Chapter 8
OBTAINING RIGHTS OF WAY BY MEANS OTHER THAN AN EXPRESS GRANT

Sheryl L. Howe
Clanahan, Tanner, Downing & Knowlton, P.C.
1600 Broadway, Suite 2400, Denver, Colorado 80202, (303) 830-9111

» **TABLE OF CONTENTS**

» Easements may be obtained without a formal grant of an easement or right-of-way. The law will imply an easement under certain circumstances. This paper will address the real property rules regarding prescriptive easements, implied easements and dedications. It will cover the general rules of law on these points. The paper will look at the oil and gas owner's rights to reasonable surface use, which is an implied easement that has generated quite a few litigated cases. The paper will then address the procedures to obtain permits from counties and states.

» The oil and gas lessee needs access to drillsites and it needs pipelines to transport production. This paper covers the general law of implied and prescriptive easements, with an emphasis of these specific needs of the oil and gas lessee.

» Several other papers being given at this Special Institute cover topics that include rights of way obtained other than by express grant. The paper on R.S. 2477 will detail the rights under that statute, so R.S. 2477 is only briefly mentioned in this paper. Condemnation proceedings are covered in a separate paper. Also, since there are papers on obtaining rights of way across federal and Indian lands, this paper will not address easements on those types of lands. Thus, this paper will focus on easements across lands where the surface estate is owned privately.

» □Easements and rights of way□ are often covered together as one topic in title opinions. Black's Law Dictionary defines Easement as □a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.□[1] Black's Law Dictionary defines Right of Way as □the right of passage or of way is a servitude imposed by law or by convention, and by virtue of which one has a right to pass on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, through the estate of another.□[2]

[8-2]

» This paper will mainly use the term easement rather than right of way: easement is used because it is a broader term than right of way. Also, traditionally the areas covered by this paper use the easement terminology rather than right of way. Thus, implied easements and prescriptive easements are the terms used in the case law and the common law, rather than □implied right of way.□

II. PRESCRIPTIVE EASEMENTS

» Prescriptive easements are essentially easements obtained by adverse possession. They originally arose in England based on the common law theory of a □lost grant.□ Once the period of time required for prescription had passed, and the elements of a prescriptive easement had been satisfied, the law presumed a lost grant. The lost grant theory is a presumption or legal fiction that there had in fact been a conveyance but that it had been lost.[3]

» If a company is seeking to obtain access to a drillsite or to obtain a right-of-way for a pipeline, a prescriptive easement will usually only be a practical solution if the prescriptive easement already exists. This is because the prescriptive easement requires a period of time, ranging from five to twenty years, before the company has rights under the prescriptive easement. The prescriptive easement would be a risky route to take when planning operations, since the company could be evicted before the required time period runs, and thus the company may never acquire the right to a prescriptive easement. However, a prescriptive easement which already exists may offer a solution to problems of obtaining access and the right to lay a pipeline.

A. Elements for a Prescriptive Easement

» The elements necessary to establish a prescriptive easement are generally the same as those for adverse possession. The elements vary to some degree from state to state. Generally, in order to obtain a prescriptive easement, a person must show the following: adverse, open and notorious, continuous and uninterrupted use of another's lands for the period of prescription.[4] One difference between prescriptive easements and implied easements (which are discussed below) is that for a prescriptive easement there is no need to establish that the [8-3] dominant and servient estates were once under common ownership. Also, necessity is not required to prove a prescriptive easement.[5]

» The requirement that the claimant must show adverse or hostile use means that the use must be wrongful and without regard to the rights of

the owner.[6] In other words, the use cannot be with the landowner's permission. Thus, if the owner of the servient estate (i.e., the fee owner) gives permission, either verbally or in writing or by implication, for another to cross or use his land, a prescriptive easement will not arise.

» The requirement that the use is open and notorious means simply that the landowner either knew of the adverse use or had reasonable notice of the adverse use and thus had the opportunity to stop the adverse use. There is some case law holding that buried pipes and conduits are not sufficiently notorious to permit a prescriptive easement to arise.[7]

» The element of continuous and uninterrupted use means recurring and consistent use. Sporadic use would not satisfy the continuous and uninterrupted use requirement. However, since it is an easement which is at issue, the use need not be literally continuous. For example, use of a road to a field only during the growing season could ripen into a prescriptive easement, even though it was not a year-round use. The amount of continuousness and the number of interruptions allowed will depend on the type of prescriptive easement being acquired. A California court has held that a country club owned a prescriptive easement to use adjacent land as a rough, when several □misdirected□ golf balls landed on the servient estate each day.[8]

» The adverse use must be uninterrupted for the entire prescriptive period. If the landowner discovers the use and puts a stop to it, before the prescriptive period has run, the use would then be interrupted. However, a mere complaint or protest by the owner is not enough to interrupt the adverse use. Rather, the landowner must take actions to stop the use, such as erecting gates or otherwise physically preventing the adverse use from continuing. In some states, there are statutes which allow a landowner to give persons using the owner's land written notice of an intention to [8-4] dispute any claim arising from such use. This notice constitutes an interruption, preventing the acquisition of any prescriptive right.[9]

B. Period of Prescription

» The period of time required to obtain a prescriptive easement is called the □period of prescription.□ It is set by statute in most states. In many states, the period of prescription is the same as the adverse possession statute or statute of limitations for actions to recover possession of land. The prescriptive periods in several of the Rocky Mountain states are as follows:

» eighteen (18) years in Colorado[10]

» fifteen (15) years in Kansas[11]

» five (5) years in Montana[12]

» ten (10) years in Nebraska[13]

» ten (10) years in New Mexico[14]

» twenty (20) years in North Dakota[15]

» twenty (20) years in South Dakota[16]

» twenty (20) years in Utah[17]

[8-5]

» ten (10) years in Wyoming[18]

» Tacking is permitted. Tacking refers to subsequent adverse use by different people, in other words the adverse use need not be by the same person or company for the entire prescriptive period.[19]

C. No Prescriptive Easements Against the Government

» Like adverse possession, a prescriptive easement cannot be asserted against the government.

III. IMPLIED EASEMENTS

» There are a number of situations in which a court will find that an easement is implied. Many of the decisions focus on the inferred intent of the parties, or in other words that the parties □must have□ intended that an easement be given in connection with a transfer of another interest in land.

» There were two types of common law implied easements: easements implied from quasi-easements and easements of necessity.[20]

A. Easements Implied from Quasi-Easements

» Easements implied from quasi-easements are based on an historic use by the landowner of part of his property for the benefit of another part of his property. This use is not technically an easement because a person cannot have an easement across his own land.

» The historic use of part of one's property to benefit another part of the property is a quasi-easement. The quasi-easement may then become an implied easement if the owner later transfers only part of his property and the grantee would need use of the quasi-easement to access the transferred parcel. This type of easement is similar to a way of necessity or easement of necessity, but it differs because it is based on prior use. The level of necessity may be less than what is required for a way of necessity.[21]

[8-6]

B. Ways of Necessity

» A way of necessity can arise when an owner transfers part of his property to another, the transferred portion of the property is inaccessible, and the original owner has adjoining lands that could provide access to the transferred parcel. In most instances, ways of necessity relate to access. There have been a few cases seeking implied easements of necessity for parking.[22] No compensation needs to be paid for a common law way of necessity.

» The elements required to obtain a common law way of necessity are as follows:

» 1.Previous common ownership of the two parcels of land (the dominant and servient estates);

» 2.Transfer of one of the parcels;

» 3.Necessity at severance for an easement;

» 4.Continuing necessity for an easement.

» Some states require strict necessity to be shown. Montana has adopted the strict necessity test,[23] while other courts such as those in Utah have ruled that reasonable necessity suffices.[24]

» The classic way of necessity arises if a person owns one large tract of land and thereafter transfers a □landlocked□ tract of land which is entirely surrounded by the lands retained by the grantor. If there is no right of access provided in the deed, the grantee should be able to establish a way of necessity in order to obtain access to his parcel.

» The first element of a way of necessity, requiring prior common ownership of the dominant and servient estates, requires common private ownership. The mere fact that the United States or a state formerly owned

both parcels will not suffice.[25]

[8-7]

C. Statutory Ways of Necessity

» The common law way of necessity has been replaced or supplemental in a number of states by statutory procedures. States in the Rocky Mountain region that have statutes granting ways of necessity include Colorado, Kansas, Montana, South Dakota and Wyoming.[26] Each of these statutes requires a showing of present necessity and also requires compensation to the owner of the burdened or servient estate. Prior common ownership is not required.

» A statutory way of necessity is not strictly an implied easement. However, it is discussed here since it is similar in some ways to the common law way of necessity, which is an implied easement created by operation of law. The statutory ways of necessity are often categorized as eminent domain or condemnation proceedings. Please refer to the separate paper at this Special Institute concerning eminent domain and condemnation.

» In most states, a statutory way of necessity provision does not eliminate the opportunity to claim a common law way of necessity. However, in Wyoming, the court has determined that the statutory way of necessity eliminated common law easements of necessity in Wyoming.[27]

D. Description of a Granted Parcel as Bounded by a Road

» Several cases have held that an easement may be implied if a deed transfers a parcel described as bounded by a street or driveway which is owned in fee by the grantor at the time of the conveyance.[28] This type of implied easement does not come into being if the deed specifically indicates that no easement is intended.[29]

[8-8]

E. Easements Implied from Reference to a Plat

» Easements created by dedication are discussed in a section below. □Dedication□ refers to rights created in the general public. Often the recording of a subdivision plat causes a dedication to the public use of easements referred to in the plat. However, in some instances the plat may not satisfy all the requirements for a dedication to public use. In that instance, parties who purchase lots in a subdivision under a deed which references a plat, receive an implied easement over streets and other common areas shown on the plat.[30]

» A private easement implied from reference to a plat arises even if a dedication did not occur because the city or county never accepted the rights of way laid out in the map, or the plat was never recorded.[31]

» Courts in various jurisdictions have followed different rules regarding the extent of the easement implied from a plat reference. Some courts find that the grantee receives an easement in all streets, alleys and other common areas designated on the plat. This is referred to as the □unity□ approach. Courts in other jurisdictions limit the grantee's implied easement to those streets and common areas that contribute to the beneficial use and enjoyment of the grantee's lot. Finally, courts in some states find that the lot owner receives an implied easement only in roads which abut his property and non-abutting roads which are necessary to reach a public way.[32]

IV. EASEMENTS CREATED BY DEDICATION

» Dedication refers to an owner giving an easement for the benefit of the public. The dedication of public easements may be express or implied. Express dedications may be made under the common law or pursuant to statute.

A. Common Law Express Dedication

» If an owner of property intends to dedicate an easement and the public or a governmental unit accepts the offered easement, a common law dedication occurs.[33] Common law express dedication usually occurs by a deed or other written conveyance. It must be for the benefit of the public at large, not for a specific group of [8-9] people.[34] The public or governmental officials must accept the offer on behalf of the public. Acceptance is often accomplished by a resolution or ordinance by the governmental entity. The acceptance may also be implied based upon municipal improvement or repair of the dedicated street or other easement, or actual use by the public may constitute implied acceptance.

B. Statutory Express Dedication

» Statutory dedication of easements for public roads occurs during the subdivision process. The subdivision process is governed by statute. A developer files a plat which designates streets and other public areas; this is an offer to dedicate. Approval of the plat is acceptance of the offer to dedicate in some jurisdictions, and in other jurisdictions further, more formal action by the municipality is required.[35] In Wyoming, a statutory dedication transfers the surface estate to the public authority, while a common law dedication creates only an easement for the public to use a street for public purposes.[36]

C. Common Law Implied Dedication

» An implied dedication, like express dedication, requires both intent of the landowner to dedicate property to public use and acceptance by the public. The implied factor in these easements is that the landowner's intent to dedicate is implied rather than express. A number of cases finding implied easements by dedication were based on facts such as: allowing extended public use, selling lots referencing a plat that designates a street, failure to object to the government's establishment of a roadway across one's land, or permitting the government to repair and maintain a street crossing the owner's land.[37]

» The California courts have taken this doctrine a step further and have found an implied dedication based solely on adverse public use. This rule from the California court has been criticized in many articles and commentaries.[38] The criticism is focused on the California's court putting too much weight on use by the general public, and not requiring an additional finding that the landowner impliedly intended to dedicate an easement for the public use.

[8-10]

V. IMPLIED EASEMENT TO USE THE SURFACE FOR THE BENEFIT OF THE MINERAL ESTATE

» There is an implied easement to use the surface of lands to gain access to the mineral estate. This implied easement can be modified by express provisions. Thus, a deed in the chain of title or the terms of the oil and gas lease may govern surface access. However, in the absence of any lease or deed or other express provisions, an implied easement exists.

» The implied easement to use the surface to access the mineral estate is similar to a way of necessity. In other words, access is necessary to develop the mineral estate and the law of implied easements provides the right to gain access to develop the mineral estate. The severed mineral estate would be like a □landlocked□ parcel if access were not implied.

» There have been many recent articles and cases regarding the right of the mineral owner to use the surface for development. A recent article by John S. Lowe covers this topic, including the traditional rule, the long-standing limits to the traditional rule, and the changes which are occurring in this area of the law. Much of the change arises from the fact that more wells are being drilled per section of land, and there is also increased use or value of development on the surface estate. Thus, the courts' interpretation of the implied easement of the mineral owner to use the surface has evolved and changed over time.

A. The Traditional Rule

» For many years, the courts have held that when the mineral estate is severed from the surface estate, the mineral owner or lessee has an implied easement to use the surface to the extent reasonably necessary to explore for, produce and market the minerals from the property.[39] The traditional rule allows the mineral owner to use the surface, without obtaining the surface owner's permission or paying the surface owner any compensation, limited only by the rule that the mineral owner may not destroy the surface.[40] The mineral owner's rights include use of the surface to drill and operate wells, and also the right to construct roads and pipelines.[41]

[8-11]

B. The Reasonable Use Limit on the Traditional Rule

» The traditional rule gives the mineral owner the right to use the surface to the extent reasonably necessary. Many cases have been brought to determine whether an oil and gas lessee exceeded its right to reasonable use of the surface. It may be difficult to predict what a court will find is reasonable use. This is one reason that oil and gas companies try to obtain surface use agreements from landowners, rather than run the risk that a court will ultimately declare that their use was unreasonable. The cost of litigation and the uncertainty of litigation have gone a long way toward encouraging oil and gas operators to settle surface use issues with the landowner, rather than rely on the implied easement to gain access.

» Professor Lowe's article predicts that current cases involving the implied easement are likely to focus on environmental damage and to include demands for punitive damages.[42] He cites the case Marshall v. El Paso Natural Gas Co.,[43] which is a federal case involving Oklahoma law. In that case, Meridian plugged a well, and the Oklahoma Corporation Commission inspector approved the plugging as done properly. However, Meridian allegedly failed to comply with various pit and pond regulations when it plugged the well. The plaintiff sued Meridian, and the jury awarded the plaintiff $350,050 for diminution of value of the property, $50,000 for nuisance damages, and $5 million in punitive damages. The Tenth Circuit Court of Appeals affirmed the jury's award. Later, the Oklahoma Corporation Commission ordered Meridian to remedy the problems it had created, so Meridian paid the Marshalls over $5 million in damages for a parcel of land worth much less and Meridian also had to restore the premises. This case demonstrates that juries who are called on to decide whether an oil and gas operator's surface use was reasonable may be too unpredictable and raise too great a risk for companies to take.

» The recent Colorado case of Gerrity Oil & Gas Corp. v. Magness[44] reiterates the rule that the owner of a severed mineral estate or lessee may use that portion of the surface as is reasonably necessary to develop the mineral interest. The court recognized that the right of access is in the nature of an implied easement.[45] The surface owner may use the surface of the land so long as its use does not preclude exercise of the oil and gas [8-12] lessee's rights. This case was sent back down to the trial court for further proceedings to apply the law to the facts of the case.

» The □accommodation doctrine□ was first adopted with that name in a Texas case.[46] The court held that Getty was required to use a more expensive pump on its well, in order to allow the landowner's existing center-pivot sprinkler system to operate. The court found that the mineral owner was required to accommodate the surface owner's uses where there was an existing use of the surface, the mineral owner's proposed use would substantially impair the surface owner's existing use, and the mineral owner had reasonable alternatives available.[47]

» The accommodation doctrine has also been recognized in Utah, North Dakota and Colorado.[48] The accommodation doctrine appears to be a subset or more specific name for the traditional rule that the mineral owner is only entitled to reasonably necessary use of the surface estate.

C. Requirement that the Surface Use be for Benefit of the Minerals Under that Tract

» The implied easement is implied based on the mineral owner's need to use the surface estate to develop the minerals. All implied easements are limited by the purpose for which they are implied.[49] In the mineral context the surface of a particular tract may be used for the benefit of the mineral estate under that tract. □Tract□ refers here to the lands covered by the deed that severed the surface and mineral estates or the lands covered by the applicable oil and gas lease. The mineral owner does not have any right to use the surface to benefit mineral development on other lands. Thus, the implied easement may not be used to gain access to other lands, to transport minerals from other lands across the surface, or to dispose of salt water or other wastes from other lands.[50] Even if an oil and gas lessee holds leases from all the mineral owners in an area, that alone does not give him the right [8-13] to use the surface of one tract for the benefit of a neighboring tract.[51]

» There have been a few cases regarding whether unitization modifies the rule that the surface of one tract may be used only to extract minerals from that same tract. An Oklahoma case held that □the unit operator has the right to use any surface within the unit for the purpose of efficiently

carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome to any particular surface area.□[52] This case involved lands that had been unitized into a secondary recovery unit under the Oklahoma Unitization Act. It also only involved pipelines laid across one lease in the unit area. An Alabama court has held that the unit operator has the right to reasonable use of the surface of any unitized tract.[53]

» The Oklahoma and Alabama cases involving unit operations are 20-35 years old. The question of whether one tract may be used to gain access to or remove product from another tract, if the two tracts are unitized, may be the subject of continuing litigation, just like the continuing question of what is reasonable use.

D. Surface Damages Acts and OGCC Rules

» A number of states have passed surface damages acts, which modify the common law implied easement of the mineral owner to reasonable use of the surface to develop the minerals. States in the Rocky Mountain area which have passed surface damages acts include North Dakota, Montana, Oklahoma and South Dakota.[54] These acts override the common law implied easement allowing reasonable surface use without an obligation to pay damages. The acts require notice to the surface owner and payment of surface damages. They establish a procedure for a determination of the proper amount of damages if the parties cannot reach an agreement.

» In addition to surface damage acts, the rules and regulations of the Oil and Gas Conservation Commission of many states require notice to the surface owner and an attempt to negotiate a surface [8-14] damage agreement. These regulations further restrict the rights of a mineral owner under the implied easement to use the surface to develop the minerals.

VI. RIGHTS ACROSS LANDS PATENTED UNDER THE STOCK RAISING HOMESTEAD ACT

» Many lands in the West were patented pursuant to the Stock Raising Homestead Act.[55] These patents granted lands to parties who had established the homestead, with a reservation to the United States of □all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same.□ Thus, the surface and mineral estates were severed in the patent. The United States could then grant a federal oil and gas lease covering the lands.

» The Stock Raising Homestead Act provides a mining claimant, which would include a federal oil and gas lease, □shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent

improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting.[56] The Stock Raising Homestead Act provides that the lessee may enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals. The lessee must first either obtain written consent or an agreement as to the amount of damages (and thus presumably an express grant or agreement from the surface owner so these concepts are not covered in this paper), or may execute a bond to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined in a later court action.[57]

» The courts have in the past found that the mineral lessee has the right to entry beyond doubt, once the mineral lessee has given notice of entry and posted the requisite bond to protect the surface owner for payment of damages for crops, tangible improvements, use of more of the surface than needed, and negligence.[58] If the lessee uses more of the surface than is [8-15] reasonably required to remove oil and gas, the lessee may be liable for trespass against the surface owner.[59]

» The Stock Raising Homestead Act was amended on April 16, 1993, by adding Sections (b) (p) of 43 U.S.C. Section 299. This amendment added provisions which pose higher burdens on the oil and gas lessee with regard to surface use.[60] These amendments require the oil and gas lessee to file a notice of intention to enter the lands with the Secretary of the Interior and to provide notice to the surface owner at least thirty days prior to entry.[61] The bond is required to insure completion of reclamation, to ensure payment to the surface owner for permanent damages to crops and tangible improvements resulting from the mineral activities, and to ensure payment to the surface owner of compensation for any permanent loss of income to the surface owner.[62] This last requirement, regarding permanent loss of income to the surface owner, was new in the 1993 amendments. The oil and gas lessee must prepare a surface use plan of operations and file it, giving the surface owner at least forty-five days to comment on the plan. The plan must cover minimizing damages to crops, improvements and other surface uses, and the payment of a fee for loss of income to the surface owner. The secretary has sixty days to approve the plan. The oil and gas lessee must pay a fee to the surface owner which shall not exceed the fair market value for the surface of the land.[63]

» The 1993 amendments to the Stock Raising Homestead Act complicate access to surface of lands patented under this Act. They impose additional requirements on the oil and gas lessee. Yet, the right to access is stated in

the Act and the Act has a procedure for determining the damages. Thus, the Stock Raising Homestead Act would still be a valuable tool if a surface owner attempted to prohibit entry or was requesting extremely high damages to sign a surface use agreement.

VII. OBTAINING PERMITS FROM STATES, COUNTIES AND MUNICIPALITIES

» Permits are often obtained to lay oil and gas pipelines along or across public roads. While these permits are written and could [8-16] be called an express grant of rights, they are covered in this paper. We will first look at what rights a county, state or municipality might have in these roads.

A. Section Line Roads

» R.S. (Revised Statute) 2477, covered in another paper for this seminar, was a federal statute passed in 1866 which allowed public highways to be established on the public domain.[64] □Public domain□ refers to lands which had not yet been patented by the United States of America nor had the right to a patent yet been earned or even located. Thus, to the extent land was owned privately because it had already been patented, R.S. 2477 would not be applicable. The grant became effective when a highway was constructed or established.[65]

» In Colorado the legislature passed a statute that provided the commissioners of any county could by resolution declare rights-of-way for roads across lands which were still part of the public domain. A number of counties did pass such resolutions. For example, the Weld County Commissioners passed such a resolution on October 12, 1989.[66] The Weld County resolution states that all section and township lines on the public domain of the United States, within Weld County, are declared to be roads sixty feet wide, being thirty feet on each side of said section and township lines.

» In North Dakota and South Dakota, the legislatures passed statutes declaring that all section lines are public highways.[67] A North Dakota court held that □there can be no question but that no proceedings are necessary to establish a highway on a section line.□[68] In Kansas, a legislative declaration was held to have reserved the declared right of way width, centered on the survey [8-17] section lines in a particular county, as of the date of the legislative declaration.[69]

B. Procedures to Obtain Permits

» The procedure to obtain a permit to lay pipeline in the ditch or □barrow pit□ running along a road varies from county to county and state to state. A landman should first contact the county personnel to determine whether

the county is the proper entity from which to obtain the permit. In Colorado, the State Department of Transportation should be contacted for any state highways, while the county is the party to deal with on county roads. The landman can determine whether the road is a state or county road in Colorado based on the road number. The initial contact to the county official should cover whether a particular road is a state or county road. The party that maintains the road may not necessarily be the party that owns the road and has the right to grant permits to lay pipeline in the ditch.

» In Weld County, the Right of Way Use Permit is the form used for installation and construction of lines of telegraph, telephone, electric light, wire or power or pipelines along, across, upon and under Weld County road rights of way. A copy of this permit is attached as Exhibit A. The current Colorado Department of Transportation form, CDOT Form #333, is attached as Exhibit B (this form is currently being revised).

» While the landman must work with each particular county to obtain a permit, in some states there are statutes granting the right to use the ditches along highways for pipelines. For example, in Colorado, □ 38-5-101, C.R.S., provides as follows:

» Any...pipeline company authorized to do business under the laws of this state...shall have the right to construct, maintain, and operate lines of telegraph, telephone, electric light, wire or power or pipeline along, across, upon and under any public highway in the state, subject to the provisions of this article. Such lines...shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.

[8-18]

» Case law also includes statements that pipelines may be laid in streets with the consent of the government entity but without consent of the underlying fee owner.[70]

C. Limitations in Permits

» The Weld County permit, and permits issued by many counties, have provisions stating that if the roadway is changed, the permittee will remove or relocate its pipeline at its own expense. Many permits also provide that they may not be transferred. For example, the State of Colorado utility permit (Exhibit B) provides that the permit is subject to cancellation due to transfer of ownership. Thus, if a company is attempting to acquire a permit from another party, the acquiring company should contact the various counties and states which have granted the permits to determine whether they will approve transfer of the permit or whether a new permit needs to be obtained.

VIII. CONCLUSION

» The common law creates several types of rights of way which can be acquired without an express grant. These include prescriptive easements, implied easements and dedications. If an oil and gas company finds that it cannot gain access to a drillsite or the right to lay pipeline, these types of easements may provide a solution. The mineral owner also has an implied easement to use the surface to the extent reasonably necessary to develop the minerals. The purpose of this implied easement is to insure that the mineral owner has the right to develop the mineral rights he owns.

» Oil and gas lessees also have the right to use public roads and in some instances may have the right to lay pipeline along public roads and highways. The right to use public roads and highways is relatively straightforward. Unfortunately, the other types of easements discussed in this paper (and in particular prescriptive and implied easements) often require a court action to confirm the rights claimed by the lessee. Nevertheless, in a pinch, these types of easements may provide a solution if a lessee is unable to gain access to a leasehold.

[8-19]

» Exhibits

» Omitted From Electronic Version

[9-1]