

Don't Get Locked Out: Securing Access with Easements

BY KIRK B. MAAG

Forestland parcels in the Pacific Northwest often are not accessible by public roads alone. This means forestland owners must frequently cross property owned by other parties, including private owners, tribes, and local, state, and federal governments. While informal agreements among landowners may provide quick and easy access, these agreements are generally terminable at will and are unlikely to be legally enforceable. Failure to obtain enforceable access rights can increase the cost of accessing forestlands, lead to litigation, or worse, make these lands inaccessible (except perhaps by air). This can be particularly problematic in the context of harvesting timber, which may require road improvements and lead to increased traffic. Easements provide a mechanism for securing clear, enforceable rights.

An easement is a nonpossessory interest in the land of another party that entitles the easement holder to use the property of another for a particular purpose without interference. For example, an easement could provide Company A (a timber buyer) with access to timber located on Company B's property across a private access road located on Company C's property. Alternatively, an easement could grant Company D (a forestland owner) the right to construct a road across Company E's property to access Company D's property. Because ease-



ments are generally irrevocable within their specified term—whether the term is perpetual or limited—they are an effective mechanism for securing enforceable access.

In contrast to the limited use allowed under an easement, fee simple ownership represents full ownership of the land. That is, once a grantor conveys fee simple ownership without reservation, the grantor no longer owns any interest in the land conveyed. This distinction is important because one of the attributes of fee simple ownership is the right to exclude. This means that a grantor who inadvertently conveys fee simple ownership to a road across the grantor's property could thereafter be excluded from using the road.

Drafting an easement agreement

Given that easements are often long-term agreements authorizing the use of a valuable asset, parties should take particular care when drafting easement agreements. An easement agreement should be in writing and should include precise language. The agreement should identify the party granting an easement (the grantor), the party receiving the easement (the grantee), and any other parties who are giving or receiving benefits under the agreement. The grantor must be the current owner (or owners) of the property to be burdened by the easement. An easement agreement that fails to correctly identify the grantor might be unenforceable. To correctly identify the current owner, it is often helpful to enlist the services of a title company and an attorney.

To avoid disputes about whether a

grantee obtained an easement or fee simple ownership, the easement agreement should use the term "grant" rather than "convey" (e.g., "Company A grants to Company B a permanent, non-exclusive easement to use the road described below."). Some easement agreements contain a section titled "Recitals" or "Purpose" in which the parties describe the reason for the easement. In the event of a dispute between the parties, this section can be helpful in interpreting the scope of the easement.

Finally, an easement agreement should clearly describe any terms and conditions desired by the parties, such as those described below. Anyone who is entering into an easement agreement should consult the laws of the jurisdiction in which the property at issue is located because the applicable laws vary somewhat across jurisdictions.

Type of Easement. Easements can benefit a specific parcel of land (appurtenant easements) or can be unrelated to any particular parcel of property (easements in gross). An appurtenant easement is inseparable from the benefited parcel of land. For example, in most (if not all) jurisdictions, an access easement that is appurtenant to forestlands remains appurtenant to those lands even if the forestlands are sold to another party, unless the easement agreement limits the transferability of the easement. On the other hand, an easement in gross cannot typically be assigned to another party. For example, if a timber company obtained an easement in gross to access certain timber it purchased, the timber company might be unable to sell the easement to another party.

Use of the Easement. When drafting an easement agreement, the parties should consider current and future access needs, and identify the limits on the rights of use, including use by the grantor, the grantee, and third parties. Unless the agreement states that the easement is exclusive, the grantor may continue to use the land underlying the easement in any manner that is consistent with and does not unreasonably interfere with the grantee's rights. The parties can also specify whether the grantee's



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access rights are limited to personal use or whether they extend to commercial use. An easement that does not extend to commercial use could limit the grantee's ability to sell timber or charge for recreation or hunting access.

Location. An easement agreement should contain a full legal description of the underlying property. The parties should identify the location of the easement on a map, plat, or scale drawing and attach the identifying document to the agreement. For an access easement, the parties should identify the center line of the easement and specify its width. If the easement requires the grantee to construct a road, the width of the easement should be sufficient to accommodate construction.

Payment. The easement agreement should state whether the grantor received any cash (or other valuable benefit) for granting the easement. If there is a dispute between the parties regarding the scope of the easement, a court may use this to help ascertain the parties' original understanding.

Duration. The parties should identify whether the easement is permanent or for a limited duration. Unless otherwise specified, the easement continues in perpetuity or until abandoned. Thus, the parties should define what constitutes abandonment. If the easement is for a limited duration and for the purpose of harvesting timber, the grantee should ensure that the easement extends long enough to accommodate delays in logging activity.

Maintenance, Repairs, and Damages. The easement agreement should identify who is responsible for maintenance, repairs, and damages. For example, if the agreement allows the grantee to use an existing road on the grantor's property, the agreement should specify which party is responsible for maintenance and repairs. Because it is possible that the grantee's use of an existing road or construction of a new road could damage the grantor's property, the easement should identify the party who bears the burden of such damages.

Improvements. The easement agreement should state whether the grantee is authorized to make improvements within the easement

area, such as improvements to an existing road. If the grantee is authorized to make improvements, the agreement should specify whether the parties will share in the costs of such improvements.

Taxes. Because easements are not taxed separately, the parties should determine whether the grantee will pay the grantor for a portion of the taxes. This is particularly important if the easement increases the value of the grantor's property.

Remedies. Unless otherwise stated, failure to abide by the terms of an easement agreement generally will not result in termination of the easement. Instead, courts will typically award damages or order a party to stop certain offending activity. The parties can, for example, require that disputes be resolved through arbitration or that the losing party pay the attorneys' fees of the prevailing party.

Recording an easement

As a best practice, parties should record all easement agreements with the county where the burdened property is located, making the easement part of the public record. Nevertheless, an easement need not be recorded to be enforced between the original grantor and grantee. The benefit of recording is to ensure the easement agreement is enforceable against subsequent owners of the burdened property. If an easement agreement is not recorded, the purchaser of property burdened by the easement may challenge the easement for lack of notice. But if an easement is recorded, courts will assume that the purchaser

knew of the easement's existence, making the easement enforceable against the purchaser.

The parties can record an easement agreement at the county recorder's office. To record an easement, certain conditions must be met, and these conditions will vary across jurisdictions. The signature of the grantor generally must be acknowledged by a notary public; the easement agreement must conform to certain formal requirements, such as formatting, and payment of required fees. A person should call the county recorder to determine the statutory format and fee requirements before attempting to record an easement.

Absence of a written easement

Absence of a written easement agreement does not necessarily mean that a forestland owner lacks access rights. A party may, in some cases, establish access rights under other theories such as prescription, implication, and necessity. The conditions that must be satisfied to establish such rights will vary across jurisdictions, but these conditions are often difficult to prove and may require legal action to establish. As such, forestland owners should not rely on their belief that they have acquired such an easement.

A properly drafted and recorded easement agreement will secure long-term, enforceable access to forestlands. ♦

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