Deschutes County Board of Commissioners
1300 NW Wall St., Suite 200, Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of March 25, 2015

DATE: March 19, 2015

FROM: Matthew Martin CDD 541-330-4620

TITLE OF AGENDA ITEM:
Deliberation on File No. 247-14-000373-HS, an application for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal in the Suburban Residential 2 ½ zone as a Goal 5 historic resource.

PUBLIC HEARING ON THIS DATE? No

BACKGROUND AND POLICY IMPLICATIONS:
On December 9, 2015, staff issued an administrative decision rejecting the filing of an application by the Pilot Butte Canal Preservation Alliance for a comprehensive plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal as a Goal 5 historic resource in the SR 2 ½ zone. The denial was based on a threshold issue regarding an interpretation of DCC 2.28.060(A)(2) and the timing of the application filing as it relates to another pending application (TA-13-4) affecting the subject properties. In addition, the decision addresses a second procedural issue relating to an interpretation of the term "owner," finding Central Oregon Irrigation District is an owner of record of the canal along with the underlying real property owners.

By Order 2014-038, dated December 15, 2015, the Board of County Commissioenrs initiated review of this application under DCC 22.28.050 through a de novo hearing. On January 28, 2015, the Board conducted a de novo public hearing. The record closed March 6, 2015.

A decision by the Board will provide interpretation of the timing criteria and likely obtain deference from the Land Use Board of Appeals (LUBA) in the event the decision is appealed. The ownership issue is also important to decide at this point because it may be dispositive of whether or not the County can adopt the proposed plan amendment.

FISCAL IMPLICATIONS:
None.

RECOMMENDATION & ACTION REQUESTED:
Conduct deliberation and give direction to Staff

ATTENDANCE: Matthew Martin and Legal Counsel

DISTRIBUTION OF DOCUMENTS:
Matt Martin, CDD

Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
http://www.co.deschutes.or.us/cdd/

MEMORANDUM

DATE: March 19, 2015

TO: Board of County Commissioners

FROM: Matthew Martin, Associate Planner

RE: Deliberations on an administrative decision rejecting the filing of an application (247-14-0000373) for a comprehensive plan amendment to designate a segment of the Pilot Butte Canal as a Goal 5 historic resource.

BACKGROUND

On December 9, 2014, staff issued an administrative decision rejecting the filing of an application by the Pilot Butte Canal Preservation Alliance for a comprehensive plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal as a Goal 5 historic resource in the SR 2 ½ zone. The rejection was based on a threshold issue regarding an interpretation of Deschutes County Code (DCC) 2.28.060(A)(2) and the timing of the application filing as it relates to another pending application (TA-13-4) affecting the subject properties. In addition, the decision addresses a second procedural issue relating to an interpretation of the term "owner" finding Central Oregon Irrigation District is an owner of record of the canal along with the underlying real property owners.

By Order 2014-038, dated December 15, 2014, the Board of County Commissioners (Board) initiated review of this application under DCC 22.28.050 through a de novo hearing. A decision by the Board will provide interpretation of the timing criteria and likely obtain deference from the Land Use Board of Appeals (LUBA) in the event the decision is appealed. The ownership issue is also important to decide at this point because it may be dispositive of whether or not the County can adopt the proposed plan amendment.

On January 28, 2015, the Board conducted a de novo public hearing. The hearing was closed with a deadline for submittal of written comments set for February 6, 2015. During this time period six written comments were received (attached). The subsequent deadline for the applicant final argument was, with extensions approved by the Board Orders 2015-013 and 2015-14, March 6, 2015. No final arguments were submitted.

KEY ISSUES

Issue #1: Timing of Application Submittal

Are There Other Pending Applications that Might be Affected by Historic Resource Designation?

The subject application was submitted on November 3, 2014. DCC 2.28.060(A)(2) requires any request for historical designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by

such historical designation. Text amendment file TA-13-4 was submitted on December 23, 2013, and proposes to allow the operation, maintenance, and piping of existing irrigation systems as an outright use within the Suburban Residential (SR) 2½ zone.

Staff interpreted "any other application" to include TA-13-4 since the burden of proof indicates Central Oregon Irrigation District (COID) is proposing to pipe the same segment of the Pilot Butte Canal which is being proposed as a Goal 5 historic resource. Therefore, application 247-14-0000373 cannot be filed until a decision is rendered for TA 13-4.

The applicant's argument is that designating the canal as a historic resource does not affect TA-13-4, a legislative matter, because the Board could still adopt the proposed text amendments. The applicant also argues that a legislative matter is not what "any other application" was intended to include given that the prior version of the code specifically referenced conditional use permits and other places in the current DCC Chapter 2.28 indicate that legislative applications are not intended to be included in that code provision. Therefore, the fact that TA-13-4 is pending should not prevent the filing and review of the historic designation application.

Board Options

- "Move to adopt Staff's finding because TA-13-4 is affected by a proposed historic resource designation therefore application 247-14-0000373 cannot be filed while TA-13-4 is pending."

- "Move that TA-14-3 is not affected by the proposed historic designation therefore application 247-14-0000373can be filed."

Issue #2: Property Ownership

Is COID an Owner Eligible to Refuse Historic Resource Designation of this Segment of Canal?

The canal is located within an easement held by COID. In land use decision, A-10-2 (NUV-09-1), a Deschutes County Hearings Officer addressed a similar easement and landowner relationship and found the holder of an easement across private property is an "owner of record" of an interest in the property, and therefore is a "property owner" as defined in DCC 22.08.010(A). Based on this analysis, Staff found that COID, as the easement holder for the Pilot Butte Canal, is an owner of record along with the underlying real property owners, and can refuse historic resource designation pursuant to OAR 660-023-0200(5).[1]

The applicant argues COID is only the holder of an easement across real property owned by others and the easement does not constitute ownership. Therefore, COID's consent is not needed for this segment of the canal to be designated as a historic resource.

Board Options

- "Move to adopt Staff's finding that COID is an owner and can refuse a historic resource designation on an approximately one-mile segment of the Pilot Butte Canal."

- "Move that COID is not an owner of an approximately one-mile segment of the Pilot Butte Canal."

Attachments: Six correspondences received since January 28, 2015.

[1] http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_023.html

Matt Martin

From: Gail Snyder <aussiegail@gmail.com>
Sent: Friday, February 06, 2015 4:54 PM
To: Matt Martin
Subject: Pilot Butte Canal: Comprehensive Plan Amendment File No, 247-14-000373-HS
Attachments: Pilot Butte Canal nomination Feb 6 2015.docx

Follow Up Flag: Follow up
Flag Status: Completed

Hi Matt,
I have attached and pasted below my personal testimony re the historic designation nomination for the Pilot Butte Canal. Please enter it into the record for:

Administrative Decision regarding the application timing and ownership issues related to File No, 247-14-000373-HS, an application for a Comprehensive Plan amendment to designate an approximately one-mile segment of the Pilot Butte Canal in the Suburban Residential 2 Yz zone as a Goal 5 historic resource.

Thank you,

Gail

Gail Snyder
503-961-4528

February 6, 2015

Oregon State Advisory Committee on Historic Preservation

Oregon State Historic Preservation Office

725 Summer Street NE, Suite C

Salem, OR 97301-1266

Dear Committee members:

I am writing to you in support of the Historic District designation application for the Pilot Butte Canal, in Bend, OR.

While many code and technical questions have arisen about the Pilot Butte Canal historic nomination, I would like to speak simply as a Deschutes County resident who cares about what the future holds for all of us.

I grew up in the wide-open and arid spaces of Australia, another country that has a young European history. The cultural history there is not that castles and cathedrals. It is tin shacks and dirt tracks, symbols of a tough landscape that required determination and resilience in order to make a life there.

Central Oregon is strikingly similar in that regard. It was noted by one of the COID attorneys before the recent County LandMarks Commission that the Pilot Butte Canal is historic because of agriculture. He's right. However, he then surmised that only parts of the canal that are now in agricultural land have historical significance. He's wrong.

According to him, the stretch of Pilot Butte Canal in question never had much agricultural land served by it. But that doesn't invalidate the significance of that reach of canal. On the contrary, it screams to the importance of that reach. Without it, *none of the rest of canal, laterals, and ditches would exist.*

I had the opportunity to walk the canal recently when it was not bank full. (There were still areas where the water was impounded by the impermeable basalt rock.) I had seen the canal with water flowing through it; that gave me an appreciation for the canals function for water conveyance, and also for the wildlife and aesthetic values.

But seeing the canal empty was an entirely different experience. I was captivated by the incredible effort that must have been required to create the canal. This is living history. It is no less significant than any other part of the canal system; I would argue exactly the opposite.

The interpretive value for this stretch of canal, for appreciating and learning about the history of Central Oregon, is enormous. The basalt-bottom canal is a powerful image of what it took to bring agriculture to Central Oregon and to settle this area. And it is incredibly accessible. Tourism is a significant and growing part of our economy. The Pilot Butte Canal has a role to play in that aspect of our economy (especially when considered as part of a trail from Bend to Redmond and Smith Rock).

I respectfully submit that this nomination for historic designation of the Pilot Butte Canal is a history and public friendly nomination. When the legal issues are resolved, I hope that we can move forward and embrace, celebrate, and share our history. It's too important to lose.

Sincerely

Gail Snyder

1668 SW Knoll Avenue,

Bend OR 97702

February 6, 2015

Oregon State Advisory Committee on Historic Preservation
Oregon State Historic Preservation Office
725 Summer Street NE, Suite C
Salem, OR 97301-1266

Dear Committee members:

I am writing to you in support of the Historic District designation application for the Pilot Butte Canal, in Bend, OR.

While many code and technical questions have arisen about the Pilot Butte Canal historic nomination, I would like to speak simply as a Deschutes County resident who cares about what the future holds for all of us.

I grew up in the wide-open and arid spaces of Australia, another country that has a young European history. The cultural history there is not that castles and cathedrals. It is tin shacks and dirt tracks, symbols of a tough landscape that required determination and resilience in order to make a life there.

Central Oregon is strikingly similar in that regard. It was noted by one of the COID attorneys before the recent County LandMarks Commission that the Pilot Butte Canal is historic because of agriculture. He's right. However, he then surmised that only parts of the canal that are now in agricultural land have historical significance. He's wrong.

According to him, the stretch of Pilot Butte Canal in question never had much agricultural land served by it. But that doesn't invalidate the significance of that reach of canal. On the contrary, it screams to the importance of that reach. Without it, *none of the rest of canal, laterals, and ditches would exist.*

I had the opportunity to walk the canal recently when it was not bank full. (There were still areas where the water was impounded by the impermeable basalt rock.) I had seen the canal with water flowing through it; that gave me an appreciation for the canals function for water conveyance, and also for the wildlife and aesthetic values.

But seeing the canal empty was an entirely different experience. I was captivated by the incredible effort that must have been required to create the canal. This is living history. It is no less significant than any other part of the canal system; I would argue exactly the opposite.

The interpretive value for this stretch of canal, for appreciating and learning about the history of Central Oregon, is enormous. The basalt-bottom canal is a powerful image of what it took to bring agriculture to Central Oregon and to settle this area. And it is incredibly accessible. Tourism is a significant and growing part of our economy. The Pilot Butte Canal has a role to

play in that aspect of our economy (especially when considered as part of a trail from Bend to Redmond and Smith Rock).

I respectfully submit that this nomination for historic designation of the Pilot Butte Canal is a history and public friendly nomination. When the legal issues are resolved, I hope that we can move forward and embrace, celebrate, and share our history. It's too important to lose.

Sincerely
Gail Snyder
1668 SW Knoll Avenue,
Bend OR 97702

Matt Martin

From: Anthony Raguine
Sent: Monday, February 09, 2015 7:50 AM
To: Matt Martin
Subject: FW: Pilot Butte Canal comments

FYI

From: Tony DeBone
Sent: Friday, February 06, 2015 5:03 PM
To: 'A Warren'; Tammy Baney; Alan Unger
Cc: Anthony Raguine
Subject: RE: Pilot Butte Canal comments

Aleta Warren,

Thank you for the input on this subject.

Anthony (Tony) DeBone
Deschutes County Commissioner
541 388-6568

From: A Warren [mailto:a.warren.bend@gmail.com]
Sent: Friday, February 06, 2015 4:05 PM
To: Tony DeBone; Tammy Baney; Alan Unger
Subject: Pilot Butte Canal comments

As I am not quite sure of the correct procedure to reach you, I am taking this means to send you follow up comments to the public hearing last week on the Pilot Butte Canal Historical District.

We are simply trying to save one small section of the Pilot Butte Canal for the community and history. It was built over 110 years ago by hand and horse power. If you are unsure of the historical importance of the canals to Central Oregon, I recommend that you read the Historic Nomination at:
http://www.oregon.gov/oprd/HCD/NATREG/docs/sachp_docs/DeschutesCounty_PilotButteCanalHistoricDistrict_SACHP.pdf

COID is saying that they may eventually recommend historical designation for some presently unidentified location. Historical designation is not an either/or situation. Each nomination should be reviewed individually when it is received. It should be possible for you to review this application without political prejudice, and later also do the same for COID. You may approve both. COID has said that they will be designating agricultural land, so having two historical sites would really add to the overall knowledge of the impact of the canals in Central Oregon.

Please let this nomination proceed legally the way it should—not being stonewalled by COID, their paid counsel, and certain county staff (who noticeably all sat together at the public hearing). Allow the Deschutes County Historical Landmarks Committee to review this nomination. The final decision on the Goal 5 application will be with you, the Board of County Commissioners, after you receive additional input from the County Historical Landmark Committee. You County Commissioners need to receive all possible input before making your final decision and that is impossible when you are not even allowed to hear all sides of a question because information is intentionally blocked. This is about history, not politics.

Thank you,

Aleta Warren

Matt Martin

From: Nick Lelack
Sent: Friday, February 06, 2015 5:35 PM
To: Matt Martin
Cc: Peter Gutowsky
Subject: FW: Pilot Butte Canal comments

I assume for both records, but your call – one for the Goal 5 nomination and the other for the National Nomination? Your call.

Thanks.

Nick Lelack, AICP, Director
Deschutes County Community Development Department
PO Box 6005
117 NW Lafayette
Bend, OR 97708-6005
Office: 541.385.1708 / Cell: 541.639.5585 / Fax: 541.385.1764
www.deschutes.org/cdd

From: Tom Anderson
Sent: Friday, February 06, 2015 5:32 PM
To: Nick Lelack
Subject: FW: Pilot Butte Canal comments

From: Alan Unger
Sent: Friday, February 06, 2015 4:40 PM
To: Tom Anderson
Subject: FW: Pilot Butte Canal comments

FYI, interesting comments.

Alan Unger, Commissioner
Deschutes County
1300 NW Wall St. Suite 200
Bend, OR. 97701
alanu@co.deschutes.or.us
Office: 541-388-6569 Cell: 541-419-0556
From: A Warren [mailto:a.warren.bend@gmail.com]
Sent: Friday, February 06, 2015 4:05 PM
To: Tony DeBone; Tammy Baney; Alan Unger
Subject: Pilot Butte Canal comments

As I am not quite sure of the correct procedure to reach you, I am taking this means to send you follow up comments to the public hearing last week on the Pilot Butte Canal Historical District.

We are simply trying to save one small section of the Pilot Butte Canal for the community and history. It was built over 110 years ago by hand and horse power. If you are unsure of the historical importance of the canals to Central Oregon, I recommend that you read the Historic Nomination at:
http://www.oregon.gov/oprd/HCD/NATREG/docs/sachp_docs/DeschutesCounty_PilotButteCanalHistoricDistrict_SACHP.pdf

COID is saying that they may eventually recommend historical designation for some presently unidentified location. Historical designation is not an either/or situation. Each nomination should be reviewed individually when it is received. It should be possible for you to review this application without political prejudice, and later also do the same for COID. You may approve both. COID has said that they will be designating agricultural land, so having two historical sites would really add to the overall knowledge of the impact of the canals in Central Oregon.

Please let this nomination proceed legally the way it should—not being stonewalled by COID, their paid counsel, and certain county staff (who noticeably all sat together at the public hearing). Allow the Deschutes County Historical Landmarks Committee to review this nomination. The final decision on the Goal 5 application will be with you, the Board of County Commissioners, after you receive additional input from the County Historical Landmark Committee. You County Commissioners need to receive all possible input before making your final decision and that is impossible when you are not even allowed to hear all sides of a question because information is intentionally blocked. This is about history, not politics.

Thank you,

Aleta Warren

HURLEY | RE
ATTORNEYS AT LAW | P.C.
747 SW Mill View Way, Bend, OR 97702
541-317-5505 • Fax: 541-317-5507 • www.hurley-re.com

February 06, 2015

RECEIVED
BY: KW
FEB 06 2015
DELIVERED BY:

Deschutes County Board of County Commissioners
c/o Matt Martin
Deschutes County Community Development Dept.
117 NW Lafayette Ave.
Bend, OR 97701

RE: COID Record Submittal to Administrative Appeal to BOCC of Administrative Order No. 2014-03/Pilot Butte Canal Goal 5 Historic Resource, File No. 247-14-000373-HS

Dear Commissioners,

Our office serves as General Counsel for Central Oregon Irrigation District ("COID" or "District"). On COID's behalf, we submit this letter to support COID's concerns with the potential Goal 5 Historic Nomination of a particular stretch of the Pilot Butte Canal.

We support Deschutes County Planning Staff's denial of the Goal 5 Application ("the Application") on these grounds:

1. Deschutes County Code precludes processing of the Application while COID's pending land use application, TA 13-4, filed first, is pending;

2. COID has a vested interest in, and is considered an "owner" of the subject property because the District was granted right-of-way to operate irrigation system facilities on the real property, and may thereby preclude the Goal 5 request; and

3. Answers to questions raised in the January 28, 2015 public hearing attendant submittals.

Out of respect for the Board of County Commissioners ("BOCC") and County Staff, we will keep our comments focused only on the issue before the BOCC; whether the Application may properly be processed on procedural grounds. We will not address the merits – or lack thereof – of Goal 5 designation for this particular stretch of the Pilot Butte Canal.

I. **Deschutes County Code prohibits the processing of this application while another land use application is pending which might be affected by historic designation.**

A. **Deschutes County Code and legislative history support the procedural bar to the hostile application.**

Under DCC 2.26.060(A)(2) and (C)(10), no application for historic designation can be submitted after any land use application which "might" be affected by historic designation. The BOCC January 28, 2015, Public Hearing ("Hearing") included the Applicant's (Pilot Butte Canal Preservation Alliance or "PBCPA") Attorney White's comments, where he argued that under rules of statutory construction, Deschutes

County Code ("DCC" or "Code") interpretation, and selective passages of legislative history, that the efforts of other parties to consider historic designation eligibility in earlier decades constitutes "coming first," and so defeats the procedural bar to the instant application.

DCC Chapter 2.28 states:

> Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit which might be affected by such historical designation. (Emphasis added.)

This Code provision does not start the clock when someone thinks about designation. It specifically references that a request "must be filed with the County planning division before the date of application. …" Attorney White's argument does not address the Code requirement and is properly disregarded.

Attorney White argues that the phrase "any other application"[1] is not self-defining, and should therefore be viewed in context. He argues that because the current Code and previous versions include "building permit" and "conditional use," that "any other application" can only refer to quasi-judicial applications and not legislative applications such as COID's TA 13-4. Attorney White further argues that the canon of statutory construction, *ejusdem generis*, supports that argument because it limits the scope of the Code to "building permits." Attorney White's review of the Code and the legislative history misconstrues the plain language of the Code.

The operative language in the Deschutes County Code was adopted in 1980 by Ordinance PL 21. It is submitted as **Exhibit A**, for reference, and is incorporated herein, as are all other Exhibits. Included in the original language was not just "conditional use," but also the language at question here: "any other application." Therefore, plain meaning dictates that it would be inappropriate to define "any other application" by limiting its meaning, despite Attorney White's suggestion.

COID submits that "any other application" means just that, any application. The Code refers to building permits and any other applications or permits. This would be consistent with Oregon's definition of "land use decision" under ORS 197.015. COID's TA 13-4 qualifies as a land use decision because it concerns an amendment to the Deschutes County Code. Further, as will be discussed later, the record for TA 13-4 specifically identifies and affects the segment of the canal sought to be protected by the historic designation.

This interpretation is supported by the Code's broad modifier, the use of "might." The drafters of the Code recognized that historic designation significantly affects the land and its uses. Any change, rehabilitation, or upgrade is subject to administrative review and public comment. The Code does not say "will" or "shall" or any other term that is more definite. The Code uses "might," which is defined by Black's Law Dictionary, Fifth Edition as "the past tense of the word 'may.' Equivalent to 'had power' or

[1] Interestingly, Attorney White refers to the term "any other application" as a "catch-all phrase." However, Attorney White only allows it to catch those meanings he believes should be correct. Statutory interpretation is meant to be used when interpreting ambiguities in a statute, not to create them or invent new interpretations. Under *State v. Gaines*, "a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it." *State v. Gaines*, 346 Or. 160, 172.

'was possible' or 'have the physical or moral opportunity to be contingently possible.'" (Emphasis added.)

By using the word "might," the Code disallows a historic nomination if it is possible (remotely, contingently, even slightly) that a historic nomination would affect a land use application. The only lesser standard would be if the Code said "even if it doesn't." If the BOCC meant it to be more definite, more limited, more certain, then the legislative body could have used stronger language or confined its application to more defined and tangible applications such as building permits. The drafters chose not to do so, and their choice became law. This decision should give that law proper effect.

Additionally, Attorney White argues that the term "permit" in the section refers only to specific development or construction activity. Research proves otherwise. A "permit" can refer to any number of land use related authorizations, and the Code sections Attorney White cites support that argument. For example, DCC 2.28.090(D) says "any building *or* land use permit." (Emphasis added.) Deschutes County Code does not contain a definition of "permit." However, pursuant to ORS Chapter 215, which governs County Planning and Zoning, "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 *or county legislation or regulation adopted pursuant thereto*. . . ." ORS 215.402. (Emphasis added.) Therefore, because COID's TA 13-4 meets the definition of "permit" under State law (it is County legislation amending the zoning code), the hostile historic designation application is barred from being processed under DCC Chapter 2.28.

Commissioner Baney inquired as to when COID commenced its efforts to protect COID's historic resources. COID has prepared a sworn affidavit that outlines the timeline of COID's historic preservation efforts and has attached it as **Exhibit B**. We appreciate the Commissioners' continued interest in fairness and giving the "benefit of the doubt" to parties in such contentious matters. However, the facts of this matter prove that COID started the historic process earlier and filed the TA 13-4 application before the Goal 5 nomination. Under the Code as it stands today, the Application is properly denied.

B. TA 13-4 impacts the same land as the hostile historic designation application.

At the Public Hearing, it was suggested that TA 13-4 is distinguishable from the hostile historic designation application because TA 13-4 affects the entire Suburban Residential 2 ½ Zone ("SR 2 ½ Zone") whereas the Application only affects a set number of properties. That distinction is without merit in the subject controversy.

First, it is clear from the record of TA 13-4 (which we incorporate by reference herein)[2], that the goal of the text amendment is to pipe the same exact stretch of canal that the hostile historic application is seeking to designate as a Goal 5 resource.

Second, even though TA 13-4 affects the entire SR 2 ½ zone, this section of canal is the only section within the zone that can be piped. Therefore, it's clear and logical that the text amendment affects this same stretch of canal.

[2] Due to the size of that record, we are not attaching it to this document. It can be viewed at the Community Development Department office, if desired.

Lastly, even if some merit were to be given to this distinction, as already discussed, the use of the word "might" in the code would preclude the Application. If there is the slightest chance that the Application could possibly, potentially, maybe affect TA 13-4, per Deschutes County Code, the hostile Application cannot be properly processed.

II. Under Federal, State, and local law, COID is recognized as an "Owner" because it possesses right-of-way granted by the Federal government for the subject properties.

Attorney White and several members of the commenting public expressed doubt of COID's ownership claim in lands affected by the Application, and thus COID's ability to object to the Goal 5 Designation under State and local law. While we understand a lay person's confusion, property law has been interpreted in local, State, and Federal jurisdictions to find right-of-way is a form of ownership because of the control it exerts over the land.

Under ORS Chapter 197, each local government is charged with administering its own comprehensive plan which includes its Goal 5 inventory of historic places. Therefore, the maintenance and administration of Goal 5, including historic designation, is a matter of local law and local interpretation, so long as State law doesn't preempt a particular interpretation.

COID holds right-of-way, commonly referenced as an easement, for the purposes of irrigation water conveyance across the private lands that make up the geographical boundary in the Application. COID's easement was granted pursuant to the Right-Of-Way Act of 1891, now codified at 43 USC § 946. Federal and State patents which first deeded the subject lands to private owners, did so with express reservation for irrigation facilities.

A. COID's right-of-way is an ownership interest that is protected by Federal law.

COID has already submitted to the record the *Swalley v. Alvis* case, a Federal Circuit Court case that discusses the same Carey Act rights-of-way that COID holds over lands for the conveyance of irrigation water and the development of power generation. In 2009, the Ninth Circuit Court of Appeals affirmed that decision. *Swalley Irrigation District v. Alvis*, D.C. No. 6:04-CV-01721-AA, submitted as **Exhibit C**.

Property law holds that "easements create nonpossessory rights to enter and use land in the possession of another and obligates the possessor *not to interfere with the uses authorized* by the easement." (Emphasis added.) Restatement (Third) of Property: Servitudes § 1.2(1). This is the foundation of the ownership interest concept in relation to easement holders.

Further, "[i]t is well-settled that an easement is an interest in real property." *Leisnoi, Inc., V. U.S.*, 170 F.3d 1188, 1191 (9th Cir. 1999), *citing Cortese v. United States*, 782 F.2d 845, 850 (9th Circuit. 1986). Therefore, because COID holds an easement across the lands subject to the Application, it also holds an interest in the real property, and by logical extension, is an owner of that interest and so the property itself. COID agrees that it is not the fee simple absolute owner of the lands subject to the hostile Application. However, under Federal law, it *is* an owner because it holds an *interest* in the real property, and a dominant one.

COID has a federally recognized and protected ownership interest, pursuant to ORS 197.772, so Deschutes County cannot list COID's Pilot Butte Canal as a Goal 5 Historic Resource without COID's

consent. COID expressly does not give consent. Without COID's consent, the application for Goal 5 designation is procedurally barred.

Planning Commission Member Jim Powell submitted material to the record suggesting that the *Swalley* case supports the idea that rights-of-way are not ownership. Respectfully, Mr. Powell does not consider settled law – not questioned by *Swalley* – that a right-of-way is a type of easement and an easement is an interest in property. *Swalley* notes, and COID agrees, that COID does not have a fee ownership in the property over which its right-of-way exists. *Swalley* does confirm however, that COID has a federally granted and protected right-of-way that is legally dedicated for irrigation water conveyance. *Swalley* also confirms that COID is entitled to pipe its system so long as COID does not excavate below the bed of the canal, and that diminishment of aesthetic benefits and property values to adjacent landowners is not considered an additional burden and is thus irrelevant. *Swalley v. Alvaris*, Ninth Circuit Court of Appeals, No. 6:04-CV-01721-AA at 3.

B. Oregon State law recognizes COID's right-of-way as an ownership interest.

COID's right-of-way was granted under the Carey Act of 1894. 28 Stat. 422. ORS 555.010 expressly adopts and accepts the conditions of the Carey Act. ORS 555.010 states: "The State of Oregon hereby accepts the conditions of section 4 of the Act of Congress approved August 18, 1894 (28. Stat. 422), and amendments thereto, known as the Carey Act, together with all grants of land to the state under the provisions of that Act." Therefore, Oregon has specifically adopted and protected COID's right-of-way under the Carey Act.

Generally, Oregon law parallels Federal law in that it has long recognized an easement holder's interest in real property. In fact, Oregon goes further to say that "[a]n easement owner has the right to be free from interference with his actual and *prospective use* of the easement." (Emphasis added.) *Tausher v. Andruss*, 240 Or. 304, 308 (1965). There is no dispute that Goal 5 historic designation constrains the use of property. Otherwise, what would be the point? Designated properties must seek review for all upgrades and significant maintenance. Such review would adversely affect COID's actual and prospective use of its easement. Therefore, not only do Oregon statutes recognize COID's ownership interest, but Oregon case law protects that interest from interference – supporting the idea that the Goal 5 historic designation cannot be considered on its merits without first obtaining consent from COID as an owner of the subject property.

The Oregon Land Use Board of Appeals ("LUBA") has also recognized an easement holder as being an owner of property. *Baker v. Washington County*, 46 Or. LUBA 591. Attorney White attempted to distinguish this case, arguing that it does not apply because it dealt with a Washington County Code and not state law. We disagree. LUBA relied not only on the Washington County Code, but upon precedent by the Oregon Tax Court. *Baker*, at 597. In *Rockwood Development Corp. v. Department of Revenue*, the Oregon Tax Court found that easements have effect on appraisal values. *Rockwood Development Corp. v. Department of Revenue*, 10 OTR 95, 100 (1985). In *Baker*, LUBA recognized that precedent and used it to help establish that easement holders are considered owners of the servient estates over which the easement is held. *Baker* at 597.

Importantly, on February 4, 2015, the Oregon State Court of Appeals decided *Lake Oswego Preservation Society v. City of Lake Oswego*. 268 Or. App 811 (2015). In that case, the Court of Appeals interpreted the meaning of ORS 197.772, the ownership and consent provision of the historic preservation statute. The Court of Appeals said that "[f]rom that legislative history, we conclude that the legislature intended

to allow *any property owner* that had local historic designation forced on their property to remove that designation." (Emphasis added.) 268 Or. App at 820-821. Therefore, under *Lake Oswego Preservation Society*, because COID has a valid property interest, COID can object to this historic listing and it cannot be so designated.

Curiously, at the Hearing, Attorney White argued COID cannot be considered as an owner because it is not listed on the deeds or the tax rolls of specific properties. *Baker v. Washington County* dealt squarely with that issue, and rejected that argument, finding that property tax rolls are not conclusive as to ownership, and further, that appraisals are impacted by easements. *Baker* at 597. Therefore, this argument should properly be disregarded, as it has already been answered by the courts.

C. Deschutes County recognizes easement holders as having ownership interests and requires consent to changes proposed by the servient estate.

We have already submitted a Deschutes County Hearings Officer decision which found that easement holders are owners of record for purposes of Deschutes County Code interpretation. Attorney White did not dispute that interpretation, but rather argued that it should not be controlling because, in his opinion, the definition of "owner" is a matter of State law. We have already discussed why COID is recognized as an "owner" under State law, and more particularly, why "owner" in this context is a term that Deschutes County is empowered to interpret because the statutory requirements relate to the County's jurisdiction over its Comprehensive Plan and Code.

The operative provision of the Code which precludes the hostile application by the PBCPA is DCC 22.08.010. DCC 22.08.010 requires that property owners consent before any development application can be made for their property. In *Port Dock Four, Inc. v. City of Newport*, LUBA examine a provision of the City of Newport's code that is almost identical. "A property owner, their authorized agents, or an interested person with the written approval of the property owner, may make application for a land use action." *Dock Four, Inc. v. City of Newport*, 33 Or. LUBA 613 at 622. In that case, the City of Newport determined that an easement holder was not a property owner. LUBA found that "[w]e do not need to decide whether the city council's interpretation of NZO 2-6-1.025 is reasonable or correct. It is within the council's interpretive discretion, and we defer to it." By logical extension then, where Deschutes County has interpreted an almost identical code section to find that easement owners are owners for the purposes of land use application, LUBA would similarly determine that Deschutes County's interpretation of the Code to include easement holders as owners would be within its discretion and LUBA would defer to it.

Interestingly, Attorney White argued that the requirement that historic designations applications be submitted before other applications should only apply to quasi-judicial actions and actual building permits. However, even if the BOCC decided to agree with Attorney White as opposed to County staff on that issue, the historic designation application would still be barred by the DCC 22.08.010, which operates only based on the PBCPA quasi-judicial application.

III. Conclusion

County Staff issued a well-reasoned decision based on the applicable criteria to deny the processing of the historic nomination by the PBCPA. Staff found that the application was barred because an existing application could be affected by it, and because and underlying owner had not consented to it. Either reason is independently adequate and effective to conclude the application should be denied.

COID is in the middle of a process with State and Federal agencies to protect appropriate COID's best historic resources. That process has been ongoing for more than two years. COID has studied its entire system – which includes over 400 miles of canals. The hostile nomination application before you considers only a small stretch, 4200 feet, and did not consider or explore any other segments of canals as possible or better candidates for protection. We agree that segments of COID's canals are truly historic and should have protection. However, we believe that the appropriate way to identify and protect such resources is to study the entire system to designate best resources, and not to designate a 4200 foot stretch of canal that can only be accessed and appreciated by a few private property owners.

COID asks this Board to affirm and uphold the decision by County Staff, and deny the hostile Goal 5 Historic Nomination Application by the PBCPA.

Sincerely,

Elizabeth A. Dickson
General Counsel for COID
EAD/hoh
Encs.

J. Kenneth Katzaroff

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF THE STATE OF OREGON

FOR DESCHUTES COUNTY

In the Matter of an Historical Preservation Ordinance	COUNTY ORDINANCE NO. PL-21

WHEREAS, districts, buildings and sites in the county and its cities having special historic and prehistoric association or significance should be preserved as a part of the heritage of the citizens of the county, and for the education, enjoyment and pride of the citizens, as well as the beautification of the county and enhancement of the value of such property,

NOW, THEREFORE, the Deschutes County Board of Commissioners ordains as follows:

SECTION 1. Deschutes County Historical Landmarks Commission.

(A) There hereby is created a Deschutes County Historical Landmarks Commission (Landmarks Commission), which shall consist of nine official members, each entitled to vote as follows: One member from the Deschutes County Historical Society; one member from the Deschutes Pioneer Association; one member from the Deschutes County Museum Commission; one representative of the unincorporated areas of Deschutes County; and two citizens at large. All members of the commission shall serve without compensation and shall be appointed by the Deschutes County Board of Commissioners. The mayors of each city shall recommend their representatives to the Board of County Commissioners. All members shall serve for a term of four years except the first appointments, which shall be for the following terms: three members shall be appointed initially for four years, three members for three years, and three members for two years. Any vacancy occurring in a position for any reason other than expiration of the term shall be filled by appointment of the Board of County Commissioners for the remainder of the term.

(B) In addition to the nine official members, there shall be an undetermined number of liaison persons, appointed by the Board of County Commissioners, to act as ex-officio members to be called in as appropriate to act in an advisory capacity to the Landmarks Commission. These persons shall be representative of, but not limited to, the United States Forest Service, Bureau of Land Management, the Deschutes County Building Department and the American Institute of Architects.

SECTION 2. Officers, Meetings, Rules and Procedure.

(A) Within thirty days from adoption of this ordinance, the Deschutes County Board of Commissioners shall make such appointments as are called for in Section 1 and shall notify each appointee of the first regular meeting to be held within at least sixty days of ordinance adoption. The Board shall designate

one member of the Landmarks Commission to be temporary chairperson, and the temporary chairperson shall preside over the first meeting and serve until permanent officers have been elected by a majority vote of the entire membership of the Landmarks Commission. The officers so elected shall serve until the date of the first annual meeting, or until their successors are regularly elected and take office. The officers of the Landmarks Commission shall consist of a chairperson, vice-chairperson and secretary.

(B) The annual meeting of the Landmarks Commission shall be held each year during the month of January. In addition, the Landmarks Commission shall meet at least once every four months, and upon the call of the chairperson. The regular time, place and manner of notice of meetings shall be fixed by rules of the Landmarks Commission.

(C) The Landmarks Commission shall establish and adopt its own rules of procedure. The Landmarks Commission shall submit an annual report to the Board of County Commissioners and the city mayors on or before the following February 1st.

(D) Any clerical and staff assistance necessary shall be provided by the Deschutes County Planning Director, his staff and/or pertinent city staff when appropriate.

SECTION 3. Functions and Duties.

(A) The Landmarks Commission shall serve as a hearings body for matters concerning historical districts buildings and sites.

(B) The Landmarks Commission may adopt such rules and regulations as it finds necessary or appropriate to carry out this ordinance.

(C) The Landmarks Commission may act upon requests by any citizen, by owners of buildings or sites, or on its own motion concerning the designation of particular districts, historical buildings or historical sites.

(D) The Landmarks Commission shall recommend removal from any list of designated historical districts, buildings and sites such property as it finds no longer worthy of such designation.

(E) The Landmarks Commission shall have authority to inspect or investigate any district, building or site in the county for which it is requested to designate or which it has reason to believe is an architectural or historical landmark.

(F) The Landmarks Commission shall review all information which it has and shall hold hearings as prescribed in this ordinance.

(G) The Landmarks Commission shall have authority to coordinate historical preservation programs of the city, county, state and federal governments as they relate to property within Deschutes County.

(H) The Landmarks Commission may recommend to the Board of County Commissioners, city council, or the state legislature any changes of law which it finds appropriate.

(I) The Landmarks Commission shall compile and maintain a current list of all historical districts, buildings and sites which have been so designated pursuant to this ordinance with a brief description of the district or site and the special reasons for its inclusion on the list. If lists of archaeological sites are developed, they would not have to be made public, pursuant to appropriate state and federal laws.

(J) The Landmarks Commission shall notify all property owners of sites recommended for designation of such recommendation.

(K) The Landmarks Commission shall have authority to take such steps as it finds appropriate or necessary to make available to the public information concerning its activities and various districts, buildings and sites to be designated pursuant to this ordinance.

(L) The Landmarks Commission shall prepare, review and adopt guidelines, criteria or such other statements of policy as may be appropriate relating to the designation, development or preservation of historical districts, buildings and sites within nine months from the date the Landmarks Commission is fully appointed. Such guidelines criteria or policy statements shall not take effect until reviewed and approved by the Board of County Commissioners.

(M) The Landmarks Commission shall assist and coordinate the work of district advisory councils with respect to historical districts.

(N) The Landmarks Commission shall perform such other duties relating to historical districts, buildings and sites as the Board of County Commissioners may request.

SECTION 4. Designation of Historical Building or Site.

(A) Upon receipt of a request to designate a particular building or site as an historical building or site, or upon direction by the Board of County Commissioners or the pertinent city council, the County Planning Department shall advise the owner of such building or site, abutting owners, the county and pertinent city planning commissions, and shall fix a date and time for a public hearing before the Landmarks Commission and the pertinent city council thereon. The Landmarks Commission shall hear and decide all proposals for designation as an historical building or site.

(B) Each city council in the county shall have the opportunity to hold a public hearing or make a recommendation for any requested designation of an historical site within its adopted urban growth boundary.

(C) At such public hearing the owner of the property involved, the owners of all abutting property, a representative of the Landmarks Commission, a representative from Deschutes County or the pertinent city, and a representative from the city or county building department shall be entitled to be heard, as well as all other interested parties.

(D) Any request for historic designation must be filed with the Landmarks Commission before the date of application for any building, conditional use or any other application or permit which might be affected by such historic designation.

(E) If a city council determines that a building inside the urban growth boundary which has been recommended for designation as an historical building has architectural significance or is of historical importance based upon past or present use, the council may recommend to the Landmarks Commission that such building be designated an historical building.

(F) If the Landmarks Commission determines that a building outside incorporated cities recommended for designation as an historical building has architectural significance or is of historical importance based on past or present use, it may designate such a building as an historical building.

(G) If any historical building has been demolished or destroyed, the county or the pertinent city on its own motion or upon recommendation of the Landmarks Commission, may remove the historical building designation therefrom. If the designation is proposed to be removed from any historical building or site for any other reason than set forth in the preceding sentence, then similar notices, recommendations and hearings shall be held as upon the designation of a building or site as historical in the first instance.

(H) An historical or architecturally significant interior space or other portion of a building may be designated as an historical building in the same manner as provided in this section, and provisions of this ordinance relating to historical buildings shall also be applicable to such designated interior space or other portion of a building.

SECTION 5. Designation of Historical Districts.

(A) Upon receipt of a request to designate any area as an historical district, or upon direction by the county or a city on its own motion, depending on the proposed district location, the County Planning Department shall advise the county or pertinent city planning commission, the county or city building department, and shall fix a date and time for a public hearing before the Landmarks Commission or pertinent city council thereon. The Planning Department shall notify owners within the proposed historical district of such hearing.

(B) At the hearing, the owners of any property involved, the owners of all abutting property, and a representative of the county or pertinent city planning commission and building department shall be entitled to be heard. The Landmarks Commission or city council may hear all other interested parties.

(C) If the city council determines that an area inside the adopted urban growth boundary has architectural significance or is of historical importance based upon past or present use, the council may recommend for designation such area as an historical district.

(D) If the Landmarks Commission determines that an area in the county outside incorporated cities recommended for designation as an historical district has architectural significance or is of historical importance based upon past or present use, it may designate such area as an historical district.

(E) All sites or buildings within a district need not be of historical or architectural significance provided the district as a whole is of such importance or significance.

(F) If the primary or significant buildings within an historical district have been demolished or destroyed, the city council or Landmarks Commission on its own motion, depending on the location of the district, may remove the historical district designation. If the designation is proposed to be removed from any historical district for any other reason than set forth in the preceding sentence, then similar notices, recommendations and hearings shall be held as upon the designation of the historical district in the first instance.

(G) Any request for historic district designation must be filed with the Landmarks Commission before the date of application for any building, conditional use or other application or permit which might be affected by such historic designation.

(H) An historical district advisory council to review permits for exterior remodeling or new construction within the historical district may be formed to submit recommendations to the Landmarks Commission. Any provisions for district advisory council membership and functions shall be made by the Landmarks Commission and submitted as an amendment to this ordinance.

SECTION 6. Designation Not a Recommendation for Fedearl Action.

No recommendation or designation adopted under this ordinance shall be interpreted as a recommendation for classification of any building or structure as a "Certified Historic Structure" for purposes of Section 191(d)(1)(b) or (c) of the Federal Tax Reform Act of 1976. No such recommendation or certification shall be made by any jurisdiction in the county without notice to affected parties and an additional hearing thereon.

SECTION 7. Exterior Remodeling or New Structure.

(A) Whenever a city or county building department receives a building permit application for exterior remodeling of a designated historical building or new construction on a site within a designated historic district, the application shall be transmitted, before action, to the Landmarks Commission. A copy of any application described above received by the Landmarks Commission shall be transmitted to the appropriate building department. Copies of the transmittals shall be sent to the County Planning Department. All applications must be accompanied by plans and specifications; the Landmarks Commission may require additional sketches.

(B) Exterior remodeling regulated by this ordinance shall be deemed to include any change or alteration in color, design, or other exterior treatment. Any proposed change or alteration to the exterior of a designated historical building, or any building in a designated historical district, which change does not require a permit from the building department, shall be submitted to the Landmarks Commission for review and approval of such change. The Landmarks Commission shall approve the change if the treatment proposed is determined to be harmonious and compatible with the appearance and character of the historical building or historical district, and shall disapprove the application if found detrimental as unsightly, grotesque, otherwise adversely affecting the stability of values of adjacent properties or adversely affecting the educational and historical value of the building. Decisions shall be subject to appeal to the Board of County Commissioners on the same terms and conditions as set forth in this section.

(C) At the Landmarks Commission hearing the applicant, a representative of the city or county building department, and the city or county planning commission shall be entitled to be heard. If applicable, a recommendation from the district advisory council, if the application involves any site in a designated historical district, shall be presented. The Landmarks Commission may also hear any other interested party.

(D) If the Landmarks Commission determines that the proposed remodeling or new structure will not adversely affect the character of the district, building and site, or finds that the proposed exterior remodeling or new structure will enhance the historical value of the district, building or site, the Landmarks Commission shall approve the issuance of a permit therefor by the building department, and upon compliance with the building regulations and other regulations of the city or county, such permit shall be issued. If the Landmarks Commission finds such action appropriate, it shall approve the application for a permit for exterior remodeling or for a new structure in an historical district or for new construction in an historical district, or on an historical site, upon conditions which the Landmarks Commission imposes, to promote and preserve the historical or architectural integrity of the district, building or site. Upon conditional approval, the building permit may be issued in accordance with such condition. However, if found necessary and appropriate, the Landmarks Commission may reject the application. In such event the building permit shall not be issued thereafter unless the action of the Landmarks Commission is reversed on appeal as set forth below.

(E) If the Landmarks Commission has imposed conditions on its approval of an application or has disapproved an application as set forth in the preceding subsection, the applicant or the owner or occupant of the building or site involved may appeal the decision of the Landmarks Commission to the Board of County Commissioners by filing with the County Planning Department, with a copy to the city or county building department and the Landmarks Commission, a notice of appeal. Such notice shall be filed within fifteen (15) days after such decision of the Landmarks Commission. A time and date shall be fixed for the appeal hearing, notice of which shall be mailed to the appellant and all parties who appeared at the original hearing. The Board may affirm, modify or reject the Landmarks Commission decision.

SECTION 8. Demolition Permits - Building Condemnation.

(A) When an application is received by the Landmarks Commission for a permit for demolition of any historical building, or the demolition of a structure on a designated historical site or within a designated historical district, the Landmarks Commission shall within thirty days after the application is filed hold a hearing on the issuance of such permit. The applicant, the owner of the property and any occupant of the property shall be entitled to be heard. The Landmarks Commission may hear other interested parties. The Landmarks Commission shall consider the state of repair of the building; the reasonableness of the cost of restoration or repair, taking into account the purpose of preserving the designated historical district, building and site; the character of the neighborhood; and all other factors which it finds appropriate. The Landmarks Commission may reject the application if it determines that in the interest of preserving historical values the structure should not be demolished. In the event the application is granted issuance of the permit shall be suspended for a period fixed by the Landmarks Commission, not to exceed 120 days from the date of application. Within the suspension period, the Landmarks Commission may request an extension of the suspension period by the pertinent city council or the Board of County Commissioners. If the city council or

Board determines that there is a program or project under way which could result in public or private acquisition of the historical building or site and the preservation or restoration of such building or site, and that there is reasonable ground to believe that the program or project may be successful, the Board may extend the suspension period an additional period not to exceed 180 days, to a total of not more than 300 days from the date of application for demolition permit. During the suspension period, no permit shall be issued for such demolition nor shall any person demolish the building or structure, unless the Board has granted an appeal and directed the issuance. If at the end of 300 days the program or project is unsuccessful and the applicant has not withdrawn his application for demolition permit, the city or county building department shall issue the permit, if the applicant otherwise complies with the applicable code and ordinances of the city or county.

(B) Action by the Landmarks Commission suspending issuance of permit for demolition may be appealed by the applicant, the owner or the occupant, by filing a notice of appeal as provided in Section 7 of this ordinance.

(C) Before any action is taken to condemn a building or structure designated as an historical building or site, or any building or structure within a designated historic district, the Landmarks Commission shall review the report of the city or county building department and any other city or county bureau relating to the condition of the building and premises and the extent of its danger, deterioration or decay. The Landmarks Commission shall report on its review and make a recommendation concerning city or county action to the pertinent city council or Board of County Commissioners before official action of condemnation is instituted.

(D) The Landmarks Commission may identify specific structures within a designated historical district which will be exempt from the provisions of this section governing review of a permit for demolition.

(E) The same procedure as stated in this section shall apply to building extraction.

SECTION 9. Record of Demolished Historical Buildings - Artifacts.

(A) If a designated historical building is to be demolished, insofar as practicable and as funds are available, the Landmarks Commission shall keep a pictorial and graphic history of the historical building or historical site with any additional data it may obtain.

(B) To the extent funds are available or the Landmarks Commission may obtain donations thereof, the Landmarks Commission shall obtain artifacts from the building or site which it deems worthy of preservation, such as carvings or other materials it deems of artistic or historical importance.

SECTION 10. Signs and Plaques.

The owner of a designated historical building or site, or the occupant thereof with the consent of the owner, may install an identification plaque or sign indicating the name, date, architect or other appropriate information upon the property, provided that the size, material, design, location and text of such plaque or sign is approved by the Deschutes County Historical Society.

SECTION 11. Redevelopment and Neighborhood Improvement Projects.

In any redevelopment or neighborhood improvement project administered by a department of the city or county or submitted to the city or county for its review and recommendations, proposed action relating to a designated historic district, building or site shall be submitted to the Landmarks Commission for its review and recommendation. A report thereon by the Landmarks Commission shall be filed with the pertinent city council or Board of County Commissioners and a copy shall be sent to the appropriate city or county department.

SECTION 12. Appeals.

Appeals from actions of the Landmarks Commission shall be to the Board of County Commissioners and may be filed by the applicant, the owner, occupant or abutting landowner of the site or district concerned, or by any other person who participated in the initial hearing. Appeals must be filed within fifteen (15) days from the date of action by the Landmarks Commission, shall be filed on a form provided by the Planning Department, and shall be accompanied by the fee set for appeals by the Board of County Commissioners. The appeal shall be conducted according to the terms of County Ordinance PL-9.

This ordinance being immediately necessary to preserve the public health, safety and welfare, an emergency is declared to exist and this ordinance takes effect immediately upon its adoption.

ADOPTED this 12th day of Sept, 1980.

BOARD OF COUNTY COMMISSIONERS

first reading:

second reading:

ALBERT A. YOUNG, Chairman

CLAY C. SHEPARD, Commissioner

ROBERT C. PAULSON, JR., Commissioner

ATTEST:

ROSEMARY PATTERSON
Deschutes County Clerk

NOTICE OF ADOPTION

Must Be Filed Within 5 Working Days
See OAR 660-18-040

Jurisdiction Deschutes County **Local File Number** _____

Date Mailed March 23, 1992 **Date of Adoption** March 18, 1992

Date Proposal was Provided to DLCD November 1, 1991

Type of Adopted Action (Check all that apply)

	Comprehensive Plan Amendment	Land Use Regulation Amendment	New Land Use Regulation
	X		

*** Please Note: This action is a component of Periodic Review.
Please complete (A) for text amendments and (B) for map amendments

A. **Summary of Adopted Action** (A brief description is adequate. Please avoid highly technical terms and zone code abbreviations. Please do not write "see attached."):

(1) An Ordinance amending PL-20, the Deschutes County Year 2000 Plan, to adopt an Inventory of Historic Sites and other Comprehensive Plan text regarding historic sites. (2) An Ordinance amending PL-20, the Deschutes County Year 2000 Plan, as amended, to adopt site specific ESEE Determinations on Historic Sites.

Describe How the Adopted Amendment Differs from the Proposal (If it is the same, write "Same." If it was not proposed, write "N/A."):

1) Divides proposal into (a) adoption of Inventory, and (b) adoption of ESEEs. (2) ESEE eterminations on 2 sites deferred. (3) Some sites determined not subject to process (federal). 4) More complete description of how ESEE Determination meets Goal. (5) Amendments specifically tailored to be incorporated into Plan.

B. **If the Action Amends the Plan or Zone Map, Provide the Following Information for Each Area Which was Changed** (Provide a separate sheet for each area. Multiple sheets can be submitted as a single adoption action. Please include street address whenever possible. Do not use tax lot number alone.):

Previous Plan Designation: _____ **New Plan Designation:** _____

Previous Zone: _____ **New Zone:** _____

Location: _____

_____

Acreage Involved: _____

Does this Change Include a Goal Exception? ____ Yes ____ No

For Residential Changes Please Indicate the Change in Allowed Density in Units Per Net Acre

Previous Density: _____ **New Density:** _____

EXHIBIT B

Affidavit of COID's Jeanette Hartzell-Hill

I, Jeanette Hartzell-Hill, being first duly sworn, say:

1. I am the Administrative Assistant for Central Oregon Irrigation District ("COID"), located at 1055 SW Lake Court, Redmond, Oregon 97756;
2. That in **October 2012**, COID, the State Historic Preservation Office ("SHPO"), and the Federal Bureau of Reclamation ("BOR") entered into a Memorandum of Agreement ("MOA") to perform a system-wide historic analysis of COID's irrigation facilities and to protect the best historic resources which illustrate irrigation systems' construction and use to colonize the Western Frontier;
3. That in **December 2013,** COID filed Text Amendment 13-4 ("TA 13-4") with Deschutes County to allow the operation, maintenance, and piping of irrigation systems within the Suburban Residential 2 ½ Zone; that TA 13-4 specifically mentions that COID is proposing to pipe 4500 feet of its Pilot Butte Canal within said Zone, and that this is part of ongoing improvements of the modern utility facility;
4. That in **January 2014**, COID contracted with ICF International's Christopher Hetzel, Senior Architectural Historian, to perform a professional, system-wide historic resource analysis, and to prepare a Multiple Property Document ("MPD") to submit to SHPO and the National Register of Historic Places for designation of a historic landmark location on each of COID's two main canals;
5. That in **February 2014**, COID, SHPO, and BOR signed a revised MOA to seek appropriate nomination and protection of historic resources;
6. That in **March 2014**, Hostile Nomination Filed with Deschutes County to designate the segment of the Pilot Butte Canal that was proposed to be piped as a historic resource in Deschutes County's Goal 5 Inventory of Historic Resources, without COID's support or authorization;
7. That in **April 2014**, Deschutes County found that they were unable to process the application without COID's authorization, finding that it was incomplete and resulting in its rejection;
8. That in **May 2014**, COID, through their legal counsel, preemptively wrote to the City of Bend, requesting that any historic designation nomination that may be received by the City for the purpose of designating the subject segment of the Pilot Butte Canal as a historic resource be denied on the grounds that the property owner (COID) objects to the property's designation, pursuant to OAR 660-023-0200(5), and that a historic designation process by COID is already in progress;
9. That in **November 2014**, the property owners adjacent to the proposed piping project submitted a new Goal 5 Inventory Amendment Application to Deschutes County for the purpose of designating approximately 4200 feet of the Pilot Butte Canal that is subject to the proposed piping by COID;
10. That in **November 2014**, property owners adjacent to the proposed piping project also submitted a separate hostile nomination to SHPO for a National Register of Historic Places designation of 7,234 feet of the Pilot Butte Canal, including the proposed piping section;
11. That in **December 2014**, Deschutes County Staff rejected the hostile Goal 5 Inventory Amendment Application on procedural grounds;

12. That in **January 2015**, COID submitted the draft MPD to SHPO, 2 years in advance of MOA requirements;
13. That in **January 2015**, the Deschutes County Board of County Commissioners ("BOCC") was asked to consider Deschutes County Staff's December 2014 denial of the hostile Goal 5 Inventory Amendment Application, and that consideration is still currently in progress;
14. That in **February 2015**, the Deschutes County Historic Landmarks Commission was asked to provide local comments to SHPO regarding the hostile nomination of 7,234 feet of the Pilot Butte Canal to the National Register of Historic Places, which will be discussed at their February 2, 2015 meeting;
15. That in **February 2015**, the City of Bend Landmarks Commission has also been asked to provide local comments to SHPO regarding the hostile nomination of that portion of the Pilot Butte Canal to the National Register of Historic Places, which will be discussed at their February 17, 2015 meeting; and
16. That on **February 19, 2015**, the application for the Hostile Nomination to the National Register of Historic Places is to be considered by SHPO's State Advisory Committee on Historic Preservation.

Jeanette Hartzell-Hill
Administrative Assistant
Central Oregon Irrigation District
1055 SW Lake Court
Redmond, OR 97756

SUBSCRIBED AND SWORN TO before me on this 2nd day of February, 2015.

OFFICIAL STAMP
LESLIE ANN CLARK
NOTARY PUBLIC- OREGON
COMMISSION NO. 923699
MY COMMISSION EXPIRES JANUARY 15, 2018

Notary Public for Oregon

EXHIBIT C

FILED

JUN 09 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SWALLEY IRRIGATION DISTRICT,

Plaintiff - Appellee,

v.

GARY ALVIS; GALEN BLYTH; MEGHAN BLYTH; GARY DEJARNATT; ROXANNE DEJARNATT; DAVID M. HANCOCK; JOHN P. ROBBINS; B. NEIL ROSS; CHRISTINE A. ROSS; MATTHEW J. SUMMERS,

Defendants - Appellants,

and

STEWART C. BENNETT; JOHN S. BRASSFIELD; BRIAN CHRISTEN; PATRICIA L. CHRISTEN; DAVID A. DELANEY; SHEILA D. DELANEY; ANTHONY M. PERRY; CARL J. RAPP; SHELLY R. RAPP; GARRETT M. RICE; LARRY W. SCARTH; NICHOLAS W. SHIMP; GUY VERNON,

Defendants.

No. 08-35263

D.C. No. 6:04-CV-01721-AA

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted June 3, 2009**
Portland, Oregon

Before: GOODWIN, O'SCANNLAIN, and FISHER, Circuit Judges.

Several landowners appeal from the district court's grant of summary judgment to Swalley Irrigation District. The facts are known to the parties and need not be repeated here, except as necessary to explain our decision.[1]

The court is satisfied that with respect to both the land subject to the Act of March 3, 1891, 43 U.S.C. § 946, and the so-called "Section Sixteen" land, Swalley's right of way is not limited to the construction of open canals or ditches. *See* 43 U.S.C. § 951; *Jones v. Edwards*, 347 P.2d 846, 848 (Or. 1959); *Kell v. Oppenlander*, 961 P.2d 861, 864 (Or. Ct. App. 1998) (quoting *Bernards v. Link*, 248 P.2d 341, 349 (Or. 1952)); Restatement (Third) of Prop.: Servitudes § 4.10

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] Though the pipeline may be installed by the time this case is submitted, Swalley's request for declaratory judgment is not moot. There is still an "occasion for meaningful relief" insofar as affirmance of the district court's judgment shields Swalley from any future claims for relief. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) (internal quotation marks and citation omitted).

(2000). Accordingly, the conversion of the existing canal into a pressurized pipeline is permissible so long as it does not increase the burden on the landowners' property.

Here, the landowners have not presented evidence establishing that their property will be devalued by the proposed conversion. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). The pipeline will not extend beyond Swalley's existing right of way. Removal of any aesthetic benefits provided by the open canal merely eliminates an incidental benefit provided by Swalley's use of the easement; such action does not place an additional burden on the landowners' property.

Accordingly, the judgment of the district court is

AFFIRMED.

Matt Martin

From: Jeff Perreault <jeff.a.perreault@gmail.com>
Sent: Friday, February 06, 2015 11:51 AM
To: Matt Martin
Cc: Bruce White; Nick Lelack; Peter Gutowsky; Tom Hignell; David Doyle
Subject: Submittal to written record
Attachments: 20150206 Written Submittal - Jeff Perreault.docx

Matt,

Please submit the attached to the written record for the Board of County Commissioner hearing on January 28th, 2015 regarding CDD's denial of our application for historic designation of a reach of the Pilot Butte Canal.

Many thanks,

Jeff

Jeff Perreault
20980 Country View Ln.
Bend, Oregon 97701
541.639.7448

February 6, 2015

Jeff Perreault
20980 Country View Ln.
Bend, OR 97701

Commissioners,

I'm writing today with regard to the CDD staff decision to deny our application for historic designation of a section of the Pilot Butte Canal within the SR 2.5 zone governed by Title 19 of the Deschutes County Code.

It's strange that a short, ~4500' section of just one of our major canals would cause so much heartburn to our community, but it's because it's fraught with baggage from a process that was well intentioned when it was discussed back in the 1980's and as it began to be put into process in the 1990's.

Every plan is good until the first shot is fired, and the same could be said for the "conserved water" efforts that Juniper Ridge was ostensibly a part of. We stop water from being "lost" in the canals, and we put that water back into the rivers in our area. If only it was that simple.

I'm not writing to litigate TA 13-4; that's still in process and we'll have time to speak more about the merits of it next month. I'm writing to show that TA 13-4 doesn't have direct application to the properties affected by the historic designation.

As you know, TA 13-4 is overtly a request to change DCC Title 19 to allow piping of irrigation canals as an outright Permitted Use. Covertly, it's an attempt to do an end run around the more restrictive Conditional Use language of Title 19. I say covertly because on the face of COID's request there are no specific properties listed. Were their application limited to the overt language CDD staff wouldn't have rejected the request for historic designation on the basis of multiple applications.

When questioned about this exact component of the issue CDD staff responded that, in fact, there was more to TA 13-4 than anyone other than COID, CDD staff, DC Planning Commissioners, and you, the Board of County Commissioners, knew. There were supplemental documents filed with the application that specified that they were requesting TA 13-4 so that they could pipe a section of the historic and aesthetic Pilot Butte Canal for the purposes of expanding their existing hydropower facility at Juniper Ridge. No one that I've talked outside of CDD staff was aware of these supplemental materials, including attorney Bruce White. They were also never published on the County website because they weren't associated with any specific hearing per se.

The project itself, which I'll refer to as JR II, was quite some distance down the tracks towards happening in the summer of 2013. Numerous non-public meetings had been held. Numerous meetings for which the public weren't precluded from attending were held, but none were publicly noticed. Funding from numerous public agencies has been negotiated. Finally, a Land Use Compatibility Statement (LUCS) had been issued by CDD staff stating that destroying this part of the historic Pilot Butte Canal would be consistent with the area affected by the proposed project.

Something fortunate happened along the way. Bob Borland is both a long-time member of the COID board and an old friend of Jim Curl. Jim lives along the stretch of the Pilot Butte Canal that was being targeted by JR II. Knowing that, and respecting their friendship, Bob stopped by Jim's house to let him know of the upcoming project. Jim, recognizing the significant adverse effect such a project would wreak on the area, retained Bruce White and filed an appeal with the Land Use Board of Appeals (LUBA) to object to the issuance of the LUCS.

LUBA accepted the appeal, heard the case, and rejected the validity of the LUCS on numerous grounds, one of those being that the project isn't simply for piping (not that that would have been allowed anyway), but that the intent of the project was to expand a hydropower facility into urban and suburban residential districts.

And therein lays the rub. JR II is a hydropower project. This is evident because of a few key features:

- The need for a forebay, or stilling pond, to reduce air in the water,
- The need for a depth of water at the intake pipe to be 2.5x the circumference of the pipe to prevent air from being introduced via a vortex.
- The need for massive flanking earthen berms extending hundreds of feet upstream from the intake on either side of the canal to increase head.

Given the rejection of the LUCS there will be no JR II hydropower project as it was previously envisioned. Craig Horrell has repeatedly stated, both publicly and privately, that there is no project design on the table for JR II.

The Deschutes River Conservancy (DRC) is another of the parties that had been misled by COID in their representation of JR II as being a "conserved water" project. It turns out that there are no guarantees that water that will be prevented from reaching the aquifer were this reach of the Pilot Butte Canal to be piped, at least none that could be enforced by a public agency.

The Oregon Water Resources Department (OWRD) understands this, and made that clear at a recent public meeting when they stated that compliance with the COID/NUID transfer agreement would fall to the North Unit Irrigation District (NUID) to ensure. This was for a number of reasons, but included that there wouldn't be the same type of permanent instream transfer as there is with the Deschutes River (because of some of the complexities involved with the Crooked River and various other entities, both Federal and State), and because OWRD isn't sufficiently staffed to enforce such a transfer were it to occur.

Recognizing this, the DRC recently announced its withdrawal of support from the COID/NUID transfer agreement going forward. The DRC exists to create and/or support enforceable opportunities to restore water to our region's streams. The DRC isn't interested in "good faith" efforts for which there will be no enforcement mechanism in place to guarantee compliance.

What this all makes clear is that there is no project in place to pipe this reach of the historic Pilot Butte Canal. Recall the language of 2.28.060(A)(2) that's being cited by staff:

> Any request for historical or cultural designation must be filed with the County planning division before the date of application for any building permit, or any other application or permit **which might be affected** by such historical designation.

Since there is no project on the table to pipe for the purposes of hydropower generation, as has been the stipulated purpose of the covert component of the TA 13-4 application by COID, then there is no way that having an historic designation be conferred as adversely affect the application of TA 13-4.

We can't stop moving forward because of something that may or may not happen in the future. I therefore ask that you reject CDD's decision to deny the acceptance of the application for historic designation based on there being a prior application affecting specific properties.

Many thanks again, and as always, for the work that you do, and for giving us a chance to participate in the process of making this a better community for all of us.

Matt Martin

From: Jim Powell <jhp@bendbroadband.com>
Sent: Friday, January 30, 2015 3:22 PM
To: Board
Cc: Nick Lelack; Peter Gutowsky; Matt Martin
Subject: January 26 BOCC Hearing - Historical Designation of a portion of the Pilot Butte Canal
Attachments: WaterDelivery_July2007.pdf; ATT00001.htm

Commissioners

After viewing the above mentioned hearing from the Board's video archive, I would like to enter the attached document into the record for your consideration. Though it bears the date of 2007, the document specifically covers easements for the purpose of conveying irrigation waters in Washington, Idaho and Oregon, referencing laws and decisions, including the unpublished decision of *Swalley Irrigation District v. Alvis* in 2006. The document suggests that these types of easements are "rights of way" and do not constitute "ownership" by the easement holder. It also addresses the issue of "improvements", "right to upgrade" and "maintenance", making the point that in general, the right to "improve" is limited by any increased burden on the servient owner. It also iterates that state courts have been split on whether an easement holder acts within the scope of its easement when it upgrades its irrigation ditches and, specifically, as to whether piping constitutes an undue burden. Not specifically mentioned is the tenet held by other law firms that improvements within easements may be limited by the original easement patent, an approach adopted by courts regarding piping in some other western and mid-western states. The document also points out that the Endangered Species Act may affect water conveyance easements, particularly those involving the federal government. I am uncertain if the recent listing of the spotted frog will impact canal created habitat in the county.

Some of the scope of the document exceeds the considerations present for the historical designation hearing but has educational applicability to the TA-13-4 issues and the provisions of DCC 18.120.050.C. I hope it helps with clarifying or as a starting point for discussion for some of the obfuscation created by the use of selective words during hearings on the water/canal issue.

Source: http://www.stoel.com/files/WaterDelivery_July2007.pdf

The Water Report™

Water Rights, Water Quality & Water Solutions in the West

In This Issue:

Upcoming Stories:

TMDLs & Numeric Nutrient Endpoints

Interstate Allocations

Tribal Instream Claims Quantification

& More!

WATER DELIVERY CANALS, DITCHES, AND PIPELINES

THE LAW OF EASEMENTS IN IDAHO, OREGON, AND WASHINGTON

by David E. Filippi (Portland, OR); Michael O'Connell (Seattle, WA); & Kevin Beaton (Boise, ID) (Stoel Rives LLP)

INTRODUCTION

Delivery of water for irrigation in Idaho, Oregon, and Washington depends on complex systems developed over many years. The canals, laterals, ditches, and pipes that make up these systems often cross land owned by many persons other than those providing or receiving water. To build, operate, and maintain their water delivery systems, water users must secure and maintain the right to use the property of affected landowners. Without the necessary easements and rights-of-way, water suppliers cannot fulfill their function of delivering water to their end users.

Water delivery systems are currently threatened from within and without. The external threats include encroachments by new development and restrictive environmental regulations. There are also internal threats arising from water users' own failure to adequately understand and maintain the legal rights provided by their easements. This article provides an outline of the potential issues facing water suppliers' easements for irrigation in Idaho, Oregon, and Washington.

OVERVIEW OF CANAL, DITCH, AND PIPELINE RIGHTS

To protect the right to use canals, ditches, and pipelines to deliver water for irrigation purposes, it is important to understand what an easement or right-of-way is, and what it is not. Landowners have a possessory interest in land; they are entitled to exclude others from it. In contrast, most easements only authorize the use of property for specific purposes. The underlying land, and any related right not conveyed in the easement, belongs to someone else.

Easements and Rights-of-Way

An easement is a nonpossessory interest in the land of another that entitles the owner of the easement to limited use of another's land without interference. The land crossed by the easement is referred to as the "servient estate" because it is burdened by the easement. The land that benefits from the easement, such as land irrigated from a ditch easement, is know as the "dominant estate." Because an easement is an interest in land, to be binding it must generally be in writing. *See* IC 9-503; ORS 93.020; RCW 64.04.010. Frequently, however, irrigation ditch easements are not memorialized by a written agreement (see discussion below).

A right-of-way is a specific type of easement that allows the holder of the right-of-way to pass over, through, or across another's land. Most easements for canals, ditches, and pipelines are rights-of-way. In some cases, the easement authorizes such broad use of the land that all other uses are excluded. In these situations, the holder of the easement may actually be the owner of the land itself and maintain the right to exclude others completely. Early irrigation developers sometimes acquired full "fee simple" title (i.e. title to the land)

The Water Report

(ISSN pending) is published monthly by Envirotech Publications, Inc. 260 North Polk Street, Eugene, OR 97402

Editors: David Light David Moon

Phone: 541/343-8504 Cellular: 541/517-5008 Fax: 541/683-8279 email: thewaterreport@hotmail.com website: www.TheWaterReport.com

Subscription Rates: $249 per year Multiple subscription rates available.

Postmaster: Please send address corrections to The Water Report, 260 North Polk Street, Eugene, OR 97402

rather than an easement (i.e. rights-to-use only) for major canals. When there is any doubt, however, ditch and canal rights are interpreted to be mere easements, not fee estates. *See Hall v. Meyer*, 270 Or 335, 527 P2d 722 (1974); *Little-Wetzel Co. v. Lincoln*, 101 Wash 435, 172 P 746 (1918).

Ditches were not always developed by any formal written agreement between the parties. Sometimes either an oral agreement or an informal letter authorizing a neighbor to use another's land for his or her personal purposes were employed. For example, in *Shaw v. Proffitt*, 57 Or 192, 109 P 584 (1910), Shaw wrote a letter to Failing asking for an irrigation right-of-way across Failing's land. Failing wrote back, saying, "go ahead, the more ditches you build the better it will suit me." 57 Or at 197. In a subsequent suit by the buyer of Failing's property, the court held that Failing's letter had granted Shaw a legal right-of-way.

Generally, a license acquired by one individual to transport water across another's property is personal to the individual who received it and is not transferable. However, over time, ditches created by oral agreement or license have sometimes become part of a broader, regional delivery system. In Oregon and Idaho these licenses may become irrevocable and transferable if a substantial amount of money and labor is spent to improve them. *See McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P 1096 (1914) (court refused to quiet title [i.e. settle scope-of-rights] to an irrigation ditch built pursuant to landowner's permission when the ditch builder failed to show any investment dependent upon landowner's permission); *Shaw*, 57 Or 192. Under these conditions, the licenses are essentially treated as easements.

In Washington, however, a parol (i.e. oral, unwritten) license does not become irrevocable even if the licensee invests a substantial amount of money on improvements. *Rhoades v. Barnes*, 54 Wash 145, 102 P 884 (1909). In this case, Barnes had received permission to lay 300 feet of pipe across Hornibrook's property in order to tap a preexisting pipeline. Hornibrook later sold his property to Rhoades, and when water supplies were insufficient, Rhoades stopped the flow of water to Barnes. Barnes then sued for injunctive relief, but the court rejected his claim, holding that a parol license "may be revoked by the licensor at any time, irrespective of the performance of acts under the license, or the expenditure of money in reliance thereon." 54 Wash at 147-48.

Easements: Appurtenant and In Gross

An appurtenant easement is one that benefits a specific parcel of land. In such cases, the easement is inseparable from the land to which it appurtains. Typical examples of appurtenant easements are easements for driveways and utilities, and for conveying water to a specific place of use such as a house or farm. The right to use the appurtenant easement is conveyed when the benefited property itself is conveyed. Appurtenant easements benefit all the landowners in an irrigation district, for example, and the right to the use of the system is conveyed when the land itself is conveyed. Easements in gross, on the other hand, are easements unrelated to possession or ownership of any particular parcel of property. Irrigation easements are typically appurtenant, but those granted directly to an irrigation district may be in gross. *See, e.g., Abbott v. Nampa School District No. 131*, 119 Idaho 544, 808 P2d 1289 (1991).

The characterization of an easement as appurtenant or in gross is important because easements in gross often cannot be assigned. The courts generally construe easements as appurtenant, but ultimately the intent of the parties controls the interpretation of the type of easement created. *Nelson v. Johnson*, 106 Idaho 385, 679 P2d 662 (1984) (easement appurtenant in nature because the parties clearly intended for the easement to benefit cattle ranch); *Tone v. Tillamook City*, 58 Or 382, 114 P 938 (1911) (pipeline right-of-way was appurtenant easement); *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash 608, 618, 173 P 508, 511 (1918) ("It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant.").

Hall, 270 Or 335, provides an example of a situation in which the use of an irrigation easement turned on whether it was appurtenant or in gross. In that case, Peterson sold the west portion of his property to Meyer, but reserved for himself an easement for a pipeline to convey water from a spring on the west parcel to the east parcel. Peterson later sold the east parcel and the easement to Markham. Markham kept the land but sold the easement to Gibson, who owned a parcel directly to the south. Hall bought Gibson's land and the easement, and extended the pipeline to bring water to the south parcel. Meyer then cut the pipeline. Hall sued and lost. The Oregon Supreme Court held that the easement language was not specific enough to create an "easement in gross" that could be transferred from the east parcel to Gibson's land to the south, which Hall had purchased. 270 Or at 339. Instead, it was an "easement appurtenant" to the east parcel owned by Markham and could be used only to convey water to that parcel. *Id.*

Creating Easements

Numerous federal and state laws allow easements to be granted by the federal government, state governments, and private parties. Easements granted under different laws often differ in the scope of the rights they convey. This section reviews the laws authorizing the major classes of easements and describes the scope of rights for each class.

Easements

Reserved Rights-of-Way

1866 Act

Vested Rights

Patent Reservation

1891 Act

Rights Granted

Purposes

Federal Law

Most of the easement rights held by irrigation districts derive from federal grants. The variety of federal statutes authorizing easements and rights-of-way can be divided into those relating to public land law and those relating to reclamation law.

Public Land Law

In the second half of the 19th century, the United States (US) recognized that much of the land west of the 100th meridian would not be valuable without irrigation and that developing irrigation systems required rights-of-way for water delivery systems. For this reason, most deeds from the US (called "patents") reserved rights-of-way for irrigation. The reserved rights-of-way were held by the US until otherwise conveyed. The conveyance of the irrigation easement to water users was often made automatically by statute to any person whose rights to use the water had been legally established (i.e. "vested").

RS 2339 Rights-of-Way

During early western settlement, persons desiring to appropriate water from the public domain and to construct ditches for its conveyance simply did so. Although the US Supreme Court relatively quickly recognized the property rights of these early water users, it was not until 1866 that Congress enacted a law formally granting the right to water conveyance easements across the public domain.

THE 1886 STATUTE, AS AMENDED, PROVIDES:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section." 43 USC § 661.

The effect of this statute was to grant an easement across federal land to the holder of any vested water right. The public domain remained open for this use until the United States conveyed or otherwise reserved federal lands. Any patent of the land was made subject to these ditch and canal easements, which are now referred to as RS 2339 rights-of-way. The language of reservation in the patent typically reads, "Subject to any vested and accrued water rights, for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts." *See, e.g., Ulrig v. Crane Creek Irr. Dist.*, 44 Idaho 779, 260 P 428 (1927). Once the land was patented, no new ditches and canals were authorized, but all existing ones were effectively "grandfathered."

General Right of Way Act of 1891

A quarter-century after RS 2339, Congress enacted a slightly more detailed law regarding easements across the public domain. The General Right of Way Act of 1891 (1891 Act) gave broader and better-defined rights, and required reporting to the government.

THE 1891 ACT'S KEY PROVISION READS AS FOLLOWS:

"The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals, and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right-of-way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right-of-way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." 43 USC § 946.

The effect of this provision was to grant to duly organized ditch and canal companies rights-of-way across public lands and reservations. The sole authorized purpose of such rights-of-way was at first

irrigation, but the 1891 Act was subsequently amended to include a number of "subsidiary" purposes, such as domestic uses, transportation, and water power.

THE 1891 ACT ALSO REQUIRED THE MAPPING OF EASEMENTS:

"Any canal or ditch company desiring to secure the benefits of sections 946 to 949 of this title shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 43 USC § 947.

Because of this requirement, even today the master title plats maintained by the Bureau of Land Management (BLM) have clearer information on easements under the 1891 Act than on those created under RS 2339. It is important to remember, however, that failure to comply with this filing requirement does not necessarily invalidate the easement. *Roth v. United States*, 326 F Supp 2d 1163, 1174 (D Mont 2003) held that the 1891 Act easement across unsurveyed land vests upon construction.

Federal Land Policy and Management Act

With the exception of the reclamation laws, which are discussed below, no statute departed from the basic framework of RS 2339 and the 1891 Act until Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976. The fundamental difference between FLPMA and the earlier acts is that the earlier acts were direct grants from the federal government to those using the public domain, whereas FLPMA only authorizes the Executive Department to make such grants if, in its discretion, it determines that is the appropriate course of action. With FLPMA, Congress repealed RS 2339 and the 1891 Act and transitioned to a permit-based system.

AS IT RELATES TO WATER DELIVERY, FLPMA PROVIDES:

"The Secretary [of the Interior], with respect to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for: (1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." 43 USC § 1761(a).

The US Department of the Interior has issued regulations implementing this provision. *See* 43 CFR § 2800. Today, anyone wishing to acquire an easement across federal lands must complete environmental and other reviews before the government will grant the easement.

Reclamation Law

The policy embodied in RS 2339 and the other public land statutes discussed above was one of granting easements over unimproved federal land to encourage *private* development of the land. The policy underlying the reclamation laws contemplates a different scenario, in which the *federal government* builds large, capital-intensive projects to attract whole groups of settlers and thereby develop entire areas of the arid west. Because of this basic policy difference, the easements based on the reclamation laws involve a higher degree of federal control than those based on the public land laws.

Unlike public land laws, the reclamation laws do not make outright easement grants. Instead, they authorize the US Bureau of Reclamation (Reclamation), in its discretion, to reserve to the United States easement rights across public land needed for reclamation projects (43 USC § 417), and to acquire such rights from private land owners (43 USC § 421). Reclamation project works such as water distribution canals, were often constructed by private or quasi-municipal parties, such as irrigation districts, acting under federal contracts rather than directly by the United States. Through such partnerships, easements reserved under 43 USC § 417 eventually accrue to the benefit of irrigation districts and their member landowners.

The reclamation laws also apply to land patented out of the public domain after August 30, 1890. The act of that date reserves rights-of-way for reclamation project water conveyance systems across lands patented to private parties under the public land laws: "In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States." 43 USC § 945. Interestingly, this provision was enacted 12 years before the Reclamation Act first authorized the construction of ditches and canals for federal projects.

Easements

Discretionary Grants

Finally, Reclamation is authorized to grant discretionary rights-of-way for purposes not directly related to a particular project.

THESE DISCRETIONARY RIGHTS ARE DESCRIBED AS FOLLOWS:

"The Secretary, in his discretion, may…(b) grant leases and licenses for periods not to exceed fifty years, and easements or rights-of-way with or without limitation as to period of time affecting lands or interest in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project: Provided, That, if a water users' organization is under contract obligation for repayment on account of the project or division involved, easements or rights-of-way for periods in excess of twenty-five years shall be granted only upon prior written approval of the governing board of such organization. Such permits or grants shall be made only when, in the judgment of the Secretary, their exercise will not be incompatible with the purposes for which the lands or interests in lands are being administered, and shall be on such terms and conditions as in his judgment will adequately protect the interests of the United States and the project for which said lands or interests in lands are being administered." 43 USC § 387. This provision is implemented by regulations that set out a detailed application, approval, and payment process to obtain these easements. *See* 43 CFR part 429.

State Laws

State Law

Following the federal government's example, Idaho, Oregon, and Washington all enacted laws granting rights-of-way over state lands for ditches and canals to encourage the construction of irrigation systems. *See, e.g.*, IC 42-1104, 58-601; ORS 273.761, 541.030; RCW 79.36.540. For the most part, these state laws track federal law. For example, Washington's law provides: "A right of way through, over and across any state lands is hereby granted to any irrigation district, or irrigation company duly organized under the laws of this state, and to any association, individual, or the United States of America, constructing or proposing to construct an irrigation ditch or pipe line for irrigation…" (RCW 79.36.540).

Requirements

Like the 1891 Act, all three states require the filing of a map or field notes of a survey, or both, of the proposed easement. *See, e.g.*, IC 58-601; ORS 273.761(4); RCW 79.36.550. Washington also requires payment of the "full market value" of the easement, RCW 79.36.560, while Idaho may require reasonable compensation. IC 58-601.

By Conveyance

Written Agreements

The most common way to create an easement is by express grant or reservation. Typically, a landowner grants an easement to an irrigation district, for example, in a written easement agreement that is then recorded with the county clerk.

An easement can create or convey full ownership or only a nonpossessory right of use. Conveyance of a strip of land that does not limit the use in any way may convey full fee title. This type of conveyance would be unusual for irrigation easements, but such easements undoubtedly do exist, especially for main canals. When there is uncertainty about whether the strip of land is held only as an easement or in full fee title, courts tend to find that it is an easement to avoid separating ownership of isolated strips of land.

Unambiguous Terms

The extent of the rights granted or reserved by an easement should be carefully described in the easement agreement. If the terms used in the easement are unambiguous, the words of the easement control the uses that can be made. *See, e.g.*, *Fox v. Miller*, 150 F 320 (9th Cir 1906) (because Idaho easement was for "logging purposes," the easement holder was not restricted to transporting logs by road, flume, or train and could float logs down a stream located within easement). Oral testimony contrary to the unambiguous terms of the easement will not be allowed. *See Minto v. Salem Water, Light & Power Co.*, 120 Or 202, 250 P 722 (1926). Because easements are perpetual and may one day be held by parties not alive today, an oral agreement on the main points of the easement is insufficient and could lead to litigation in the future.

"Parol Evidence"

In *Minto*, 120 Or 202, 250 P 722, the water company acquired an easement from Minto authorizing it to lay city water supply pipes across his property and to build certain filtration cribs and other devices. As the city's water needs grew, the water company expanded its operations on Minto's land, building a storage pond above the filtration cribs and constructing certain aboveground facilities. Minto sued in trespass. The water company acknowledged that the easement document itself did not expressly grant the right to these expanded operations, but argued that the circumstances surrounding the signing of the easement and the intentions of the parties at the time showed that the purpose of the easement was to allow the company to do whatever was necessary to provide clean water to the city. The court held that none of this "parol evidence" (i.e. oral, unwritten) could be considered. Focusing on the text of the easement, the court concluded that the expansion was not allowed and that the water company was liable for trespass.

Washington Deed Required

Washington state law requires easements to be conveyed by deed. RCW 64.04.010. In *Kesinger v. Logan*, 113 Wash 2d 320, 779 P2d 263 (1989), Kesinger, the owner of the servient estate, brought an action to quiet title to a 20-foot-wide strip of land that an irrigation district claimed was part of its canal easement

Easements

Constructive Notice

Irrigation District Power

Condemnation Power

Reservoir Storage

Individual's Condemnation

Use of Another's Ditch

across one side of Kesinger's property. The district relied on the terms of the easement contract, which stated that the easement included the disputed area, and to Kesinger's chain of title, which referenced the same contract. The court, however, held that Kesinger could not be estopped from asserting ownership of the disputed 20-foot-wide area when the easement had not been conveyed by deed pursuant to RCW 64.04.010. Since the property's legal description encompassed the disputed area, the court quieted title in favor of Kesinger. Courts have, on occasion, quieted title to easements that were not conveyed by deed (*see Kirk v. Tomulty*, 66 Wash App 231, 831 P2d 792 (1992) where quiet title was obtained to a road easement not conveyed by deed, because there had been partial performance by one side and acceptance of benefit by other). However, water suppliers in Washington should ensure that easements are conveyed by deed.

Because an easement is an interest in land, the document creating the easement may be recorded in the county deed records if the document satisfies the state's statutory recording requirements. *See* IC 55-801 through 55-818; ORS 93.600-.808; RCW 65.08.030-.180. Recording is crucial because it gives constructive notice of the easement to third parties (other parties who are not part of the agreement). After recording, anyone who deals with the servient estate will be legally held to know that the easement exists, even if the easement itself is undeveloped.

Private Parties

Irrigation districts in all three states have broad powers to acquire easements and other rights from private parties by lease, purchase, and eminent domain. *See* IC 43-304; ORS 545.239; RCW 87.03.010. Idaho, for example, gives irrigation districts "the right to acquire, either by purchase, condemnation, or other legal means all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works." IC 43-304.

By Eminent Domain

If negotiations with private landowners prove unsuccessful, some special districts, such as irrigation districts, are authorized to acquire easements and other interest through the power of eminent domain. IC 43-304; ORS 545.239; RCW 87.03.140. Oregon's statute provides an example of these three states' nearly identical provisions.

THE OREGON STATUTE PROVIDES:

> "The board of directors and its agents and employees have the right to enter upon any land in the manner provided by ORS 35.220 to make surveys, and may locate the necessary irrigation or drainage works and the line for any canals and the necessary branches for the works or canals on any lands that may be considered best for such location. The board also has the right to acquire, by lease, purchase, condemnation or other legal means, all lands, water, water rights, rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canals and works proposed to be constructed by the board. The board also has the right to so acquire lands, and all necessary appurtenances, for reservoirs, and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of the district." ORS 545.239(1).

All three states have also granted the right of condemnation to individuals in order to secure easements for irrigation ditches. IC 42-1106; ORS 772.305; RCW 90.03.040. Idaho, for example, provides that "[i]n case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain." IC 42-1106.

Irrigation districts and landowners in these states may also condemn and then use another's canal. IC 42-1102; ORS 772.310; RCW 90.03.040. To secure an easement on another's canal by eminent domain in Idaho and Washington, the use of the canal must be necessary. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P2d 122 (1980); *State ex rel. Ballard v. Superior Court, Kittitas County*, 114 Wash 663, 195 P 1051 (1921). In *Ballard*, Richards irrigated his land with water from the Richards' ditch, which started at a common point with the Lund ditch, both of which crossed Ballard's property. To irrigate another part of his property, Richards sought an easement to carry 50 inches of water through the Lund ditch and extend the Lund ditch nearly 400 feet. Ballard argued that Richards could irrigate the other part of his property using the existing Richards' ditch simply by constructing a 2,000-foot-long flume elevated 10-to-20 feet above the ground. The court held that because the flume "would hardly be feasible or practicable," a reasonable necessity existed for the easement to be condemned. 114 Wash at 664.

Condemnation suits are instituted in local courts having jurisdiction over the land being condemned. IC 7-706; ORS 35.245; RCW 8.20.010. The primary issue, assuming the irrigation district's condemnation authority is not contested, is the determination of "just compensation" for the needed easement.

Easements

Prescription Requirements

Prior Use

Necessity

Dedication

"Servient" Rights

Contemplated Uses

Monitor Actions

Historic Maintenance

By Prescription

It is possible to create easements by prescription. The requirements are similar to those for adverse possession. If the prescriptive actions (*i.e.*, use of the property for water delivery) are open, notorious, and adverse to the rights of the underlying landowner, and continuous and uninterrupted for the statutory period, the owner of the delivery system may acquire an easement. The statutory period in these three states differs: Oregon and Washington require 10 years, but Idaho now mandates 20 years. *See* IC 5-203; ORS 105.620; RCW 4.16.020.

By Implication

Easements can also be created by implication either through prior use or by necessity. Prior use applies to situations in which a landowner conveys a portion of a tract of land without addressing the buyer's right to continue to use easements across the portion retained by the seller. When a parcel of land could not otherwise be physically accessed from a public right-of-way, ways of necessity can be created through a statutory procedure in Oregon and Washington. ORS 376.150-.200; RCW 8.24.010-.050. Idaho common law similarly allows for the creation of easements by necessity. *Cordwell v. Smith*, 105 Idaho 71, 665 P2d 1081 (Idaho App 1983). Easements may also be implied through the platting of property on which roads and utility easements are dedicated to the public.

RIGHTS AND DUTIES UNDER EASEMENTS AND RIGHTS-OF-WAY

Exclusivity of Use

Unless the instrument creating an easement expressly creates an exclusive easement, the rights of the easement holder are nonexclusive. *See Hayward v. Mason*, 54 Wash 649, 652, 104 P 139, 140 (1909) (ditch easement was nonexclusive because there was no language in the deed indicating "that the right of way granted was an exclusive one"). The owner of the underlying land (the "servient owner") may make any use of the land that is consistent with and does not unreasonably interfere with the rights of the easement owner. *Reynolds Irr. Dist. v. Sproat*, 69 Idaho 315, 206 P2d 774 (1949). In that case, an irrigation district sought to enjoin the Sproats from using the district's Pyke & Roscoe ditch, which crossed the Sproats' property. The court affirmed the trial court's decision that the district owned the irrigation ditch. On rehearing the case, however, the court held that this did not prevent the Sproats from using the ditch. Although the Sproats had not expressly reserved the right to use the ditch in the easement document, they had the right to use it so long as their use did not "interfere with the dominant estate." 69 Idaho at 333.

The rights of the easement holder and the servient owner are relative to each other, not absolute. If the use by the servient landowner was or should have been contemplated by both parties when the easement was created, it is considered a type of use that is reasonable and should be allowed. The courts look to the express words used in the easement to determine what uses were contemplated.

In *Chevron Pipe Line Co. v. De Roest*, 122 Or App 440, 858 P2d 164 (1993), *modified* 126 Or App 113 (1994), Chevron owned an easement for an interstate petroleum products pipeline. The pipeline was buried at depths varying from 1.5 to 3.5 feet. De Roest acquired the servient estate and gradually placed fill on it until the pipeline was 10.5 to 22.5 feet below ground. De Roest also parked heavy equipment on the easement. The court noted that a rider to the easement recognized that the servient estate was used for a sawmill and that lumber was stored on the easement. In light of this fact, the court refused to enjoin De Roest's actions even though it increased Chevron's "costs, access time, safety risks and liability exposure." 122 Or App at 446. De Roest's use did not interfere with Chevron's use in any way that was not contemplated when the easement was granted. One factor that influenced the court's decision was that De Roest's infilling of the pipeline took place over a long period of time, during which Chevron did not complain. Thus one lesson from this case is that easement holders should monitor potential encroachments and not "sleep on their rights."

The lesson that past inaction may inhibit future use of the easement is reinforced by *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 20 P3d 702 (2001). In that case, the irrigation district's historic maintenance practices resulted in the servient owner's expanded use of the district's easement. The easement document granted the district an easement for a lateral ditch crossing the servient estate and a 40-foot easement for maintenance purposes. As part of Washington Federal's attempt to subdivide the servient estate, it began constructing a sidewalk and fence along the north side of the lateral. The district sued to stop construction, arguing that it would interfere with its ability to repair and maintain the lateral using heavy equipment. The court held that since the district had used only a pickup truck to maintain the lateral for the past 20 years and could maintain the lateral from the lateral's south side, the sidewalk and fence would not unreasonably interfere with the district's easement rights.

Easements

Perpetual Term

Historic Location

"Floating" Easement

Reasonable Actions

Broad Language

Idaho's Right to Change

Width Issues

Duration

Unless expressly limited in time, an easement continues until terminated by abandonment or one of the other termination methods discussed below. Water conveyors should make sure when they acquire a new easement that the written agreement specifically states that the term is perpetual and that it states, as clearly as possible, the types of conditions that would constitute abandonment.

Location of Easement and Changes

When the location of an easement is not specified in the document creating it, the location may be determined by how the parties have used the land since the easement was created. For example, in *White Bros. & Crum Co. v. Watson*, 64 Wash 666, 117 P 497 (1911), the White Brothers' predecessor had appropriated the waters of a creek on federal property and carried the water by a ditch and flume to his property. Watson then acquired his land subject to the White Brothers' RS 2339 right-of-way. Five years later, a flood destroyed the ditch and flume and made it impossible to divert water from the creek at the original location. The White Brothers then sought to construct a cement dam and lay a pipeline 76 feet above the original location. The court refused to permit the White Brothers to proceed, holding that "[t]he manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way — in short, the easement — became fixed and determined by the facts as they existed when [Watson's] homestead entry was allowed." 64 Wash at 669-70.

A "blanket," "floating," or "roving" easement is produced when the instrument creating the easement simply describes the land that it affects with no attempt to specifically locate the easement. Reserved easements in federal patents, such as in *White Bros.*, were always blanket easements. The guiding principle is that an ambiguous instrument will be interpreted in light of the practical construction given to it by the parties. Unless the owner of the servient estate locates the easement, the owner of the easement may do so in a manner that will accomplish the intended purpose with reasonable, minimum levels of damage or interference to the servient estate. *McCue v. Bellingham Bay Water Co.*, 5 Wash 156, 31 P 461 (1892).

This principle guided the court in *Quinn v. Stone*, 75 Idaho 243, 270 P2d 825 (1954). Quinn obtained an easement from Stone's predecessor in interest to construct two ditches from a pump. Originally, one ditch was to run in a northerly direction and one was to run in a northwesterly direction. Quinn quickly built a ditch running to the north, but it was unsatisfactory and was quickly discarded. Quinn then built a second ditch running to the northeast. Use of this ditch over the years caused sink holes to develop, rendering it ineffective, so Quinn began building a third ditch running to the northwest, to which Stone objected, as it would interfere with his farming operations. The court held that a ditch running to the north and then the west would be feasible and would not unreasonably interfere with Stone's use of the property.

In *Spear v. Cook*, 8 Or 380 (1880), Spear sold to Cook all the water in Spear Creek, along with an easement to convey the water across Spear's land. The easement deed gave Cook the right to build, maintain, and operate "all claims, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of [Cook]." *Id.* at 380. Cook initially built a six-inch wood flume on small trestles across Spear's property that could carry only a portion of the waters of Spear Creek. Spear had no problem with this. Three years later, however, Cook built a much larger flume with a walkway wide enough for people to walk along, nailed in places to Spear's trees. Cook began floating wood down the new flume. The wood often jammed in the flume, causing water to spill over and damage Spear's property. Spear sued and lost. On appeal, the Oregon Supreme Court affirmed. The main reason for the court's decision was the very broad easement language, which contained no limits on the location, type, or use of the water conveyance. The court held that Spear had to live with the new flume and was entitled to an award only for actual damage caused to his trees and property.

Idaho gives servient owners the right to change the location of irrigation channels, provided the change does not "impede the flow of the water therein, or...otherwise injure" the dominant estate. IC 42-1207. In *Simonson v. Moon*, 72 Idaho 39, 237 P2d 93 (1951), the servient owner cut off one lateral ditch and extended another ditch to the point at which the prior ditch had entered the dominant estate. Because the newly lengthened ditch lacked the capacity to simultaneously serve both landowners, the court held that this change impeded the flow of water to the dominant estate and violated the statute authorizing the servient owner to change the lateral's location.

Another common issue associated with locating easements is determining the width of the easement. If the width is not specified, it is constrained by "the line of reasonable enjoyment," which is what is "reasonably necessary and convenient for the purpose for which it was created." *Everett Water Co. v. Powers*, 37 Wash 143, 152, 79 P 617, 621 (1905). The original width of the easement can be expanded "if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands." *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash 2d 873, 884, 73 P3d 369, 374 (2003) (relying on *Patterson v. Chambers' Power Co.*, 81 Or 328, 340-41, 159 P 568, 572 (1916)).

Access, Maintenance, and Other Secondary Rights

Irrigation ditch owners typically need to enter the property across which the ditch flows to inspect and, if necessary, repair the ditch. Such rights are often referred to as "secondary easements" and their nature and scope are generally matters of common law. *See* Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 990 at 1750 (2d ed 1912). In Idaho, the common law precept of secondary easements for irrigation systems has been codified. *See* IC 42-1204.

The right and duty to maintain and repair an easement generally rests on the party receiving the benefit from the easement. Unless expressly forbidden, easements are presumed to include the right to enter the servient landowner's property for purposes of inspection, maintenance, and repair of the easement. *Gorrie v. Wiser Irr. Dist.*, 28 Idaho 248, 143 P 561 (1915); *Carson v. Gentner*, 33 Or 512, 52 P 506 (1898); *Baskin v. Livers*, 181 Wash 370, 43 P2d 42 (1935). For example in *Carson*, Carson had taken control of a ditch across state-owned lands and used it to divert water for mining purposes in 1876. Seven years later, Gentner settled on the property and subsequently obtained a homestead patent from the state. The patent did not contain an express reservation of water or ditch rights. In 1892, Gentner refused to let Carson on Gentner's property to repair the ditch. Carson sued to enjoin Gentner from interfering with Carson's ditch rights and won. On appeal, the court held that Carson had a vested ditch right under an Oregon statute similar to RS 2339, and held that the right to clean and repair was not dependent on any express reservation in a deed to the patentee.

The easement holder's failure to maintain and repair an easement violates the rights of the servient owner and could be a liability should the servient owner's property be harmed. In *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 277 P 542 (1929), the servient owner's pure-bred bull died after falling into "a gulch of considerable dimensions" created by the canal company's failure to maintain a waste ditch. 47 Idaho at 623. The canal company argued that the 1891 Act gave it the right to exclusive possession of the right-of-way, which meant that the bull had trespassed. The court rejected this argument, holding that the company "was under the duty of maintaining its waste ditch in substantially its original condition…The failure of [the company] to repair or guard amounts to actionable negligence." *Id.* at 631.

Oregon and Idaho have different approaches regarding contribution from the servient owner and easement holder for the costs of repairing and maintaining an easement used by both parties. In Oregon, such costs can be apportioned equitably based on use of the easement by the servient and dominant estates. *Van Natta v. Nys*, 203 Or 204, 234, 278 P2d 163, 177 (1954). In Idaho, however, the easement holder has the duty of maintaining the easement even if the servient owner uses it, but this "does not mean that the easement owner is required to maintain and repair the easement for the benefit of the servient estate." *Walker v. Boozer*, 140 Idaho 451, 456, 95 P3d 69, 74 (2004). Contribution for maintenance costs incurred by the servient owner is available if the easement owner's level of maintenance creates "an additional burden on the…servient estate." *Id.* Courts in Washington have yet to directly address this issue.

Permitted Uses and Modification of Use

An easement does not convey the unlimited right to use the covered property. The rights of the easement owner are measured by the purpose and character of the easement. The use of the easement is limited to the use that is reasonably necessary and convenient for the intended purpose of the easement. As noted above, in *Fox v. Miller*, 150 F 320 (9th Cir 1906), the easement language broadly described the use of the Idaho right-of-way as "logging purposes." The court therefore held that the right-of-way holder was not restricted to transporting logs by road, flume, or tram and could float logs down a stream located within the easement. Of course, the intended purpose is not always clear from the easement language itself. Interpreting an express easement often requires an investigation of the intentions and circumstances of the parties at the time of the original grant or reservation. These interpretive issues are particularly problematic for irrigation easements, because many of them are very old and the character of the areas where they exist has likely changed dramatically over the years.

In *Jewell v. Kroo*, 268 Or 103, 517 P2d 657 (1973), the Jewells owned property for which a spring supplied irrigation water. A prior owner granted a neighbor the right to use 500 gallons per day from the spring. The spring was located in a ravine; its water was retained by a three-foot-high rock and earthen dam. The Kroos bought the neighboring property and wanted to use the spring under the terms of the earlier agreement. To do so, they removed the rock dam and replaced it with a much taller concrete dam, all without the Jewells' permission. The court found that a larger reservoir was required to enable full use of the 500 gallons per day, and that the changes made on the Jewells' land were consistent with and necessary for the Kroos' use.

Generally, unless the easement contains an express statement to the contrary, use of an easement may be adjusted to conform to newly arising needs that the parties reasonably should have expected to develop in the natural use of the land under the easement. *See, e.g., Boydstun Beach Assoc. v. Allen*, 111 Idaho 370,

Easements

723 P2d 914 (Idaho App 1986); *Logan v. Brodrick*, 29 Wash App 796, 631 P2d 429 (1981). This principle is limited, however, by the rule that an easement owner may not materially increase the burden or impose new burdens on the underlying landowner. Balancing these concerns is not always easy.

The use of prescriptive easements may also be adjusted. Just as with express easements, adjustments to use of prescriptive easements cannot place an unreasonable burden on the servient estate. *See Firebaugh v. Boring*, 288 Or 607, 607 P2d 155 (1980); *Gibbens v. Weisshaupt*, 98 Idaho 633, 570 P2d 870 (1977).

Improvements

Right to Upgrade

In general, an easement owner has the right to improve an easement, but only to the extent that the improvement does not increase the burden on the servient owner. *Guillet v. Livernois*, 297 Mass 337, 8 NE2d 921 (1937). "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance." *Wright v. Austin*, 143 Cal 236, 239, 76 P 1023 (1904). State courts across the country are split on whether an easement holder acts within the scope of its easement when it upgrades its irrigation ditches. For example, in *Papa v. Flake*, 18 Ariz App 496, 503 P2d 972 (1972), the court held that lining an existing ditch with concrete was within the scope of the easement. A California court, however, has held that lining a ditch with Gunite (to limit leakage) was outside the scope of the easement. *Krieger v. Pacific Gas & Elec. Co.*, 119 Cal App 3d 137, 173 Cal Rptr 751 (1981).

Idaho Improvements

Of the three states examined herein, easement holders in Idaho have the clearest right to improve the water delivery systems located on easements. An easement holder (and the servient owner) has "the right to place [a ditch, canal, lateral, or drain] in a buried conduit within the easement or right-of-way on the property of another…so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but no longer than thirty (30) days after the completion of construction." IC 42-1207.

In addition, Idaho courts have held that other improvements can fall within the scope of secondary easements. In *Abbott*, 119 Idaho 544, a school district sought to bury an irrigation ditch running across its property in order to construct a new elementary school. The easement owner approved the burial of the ditch, provided that a concrete inlet structure and safety/trash screen were constructed within the easement but on the adjacent property owner's land. Abbott, the adjacent property owner, sued after construction began, alleging that the new features would increase the burden on his property. The Idaho Supreme Court affirmed the trial court's conclusion that the improvements "were within the scope of the easement and did not enlarge the use of the easement or constitute an unreasonable increase in the burden of the easement on the servient estate." 199 Idaho at 550. *See also Reynolds Irr. Dist.*, 69 Idaho at 334, 206 P2d at 786 (suggesting that easement holder could improve its ditch if improvement is done to increase effective use of water or to prevent waste).

Burden v. Efficiency

Although irrigation districts in Oregon lack the statutory authority to bury preexisting ditches and canals, a federal District Court in Oregon recently issued an unpublished decision holding that a canal easement secured under the 1891 Act can be converted to a buried pipeline. In *Swalley Irrigation Dist. v. Alvis*, No. Civ. 04-1721-AA, 2006 WL 508312 (D Or Mar. 1, 2006) (unpublished), the irrigation district sought declaratory relief when landowners objected to its plans to replace five miles of a canal with a pipeline buried within the original easement. The irrigation district stressed that in replacing the canal with a pipeline the easement is still used for irrigation, and it promotes water conservation, clean water supplies, and the efficient delivery of irrigation water. Focusing on the language of the 1891 Act, the court noted that even though it only referred to canals and ditches, the right-of-way granted was expressly for irrigation purposes. Relying on Oregon common law, the court held that the irrigation district's method of use was not limited to open canals and ditches. A pipeline would be used for the same purpose as the existing ditch and would not increase the burden on the servient estates. Although this decision is unpublished and nonbinding as precedent, it may be indicative of the judiciary's current perspective.

Method of Use

Other Oregon cases pertaining to easement uses also suggest that improvement is allowed. In *Baumbach v. Poole*, 266 Or 154, 511 P2d 1219 (1973), the Oregon Supreme Court indicated that Oregon courts had adopted the general rule that the grant of an easement includes the right to do whatever is necessary for repairs. In that case, easement owner (Poole) wanted to subdivide his property, but needed a "better road" to meet local ordinances. 266 Or at 156. He constructed an improved road over a 50-foot easement he had purchased from the plaintiff. The court held that the road expansion had damaged the plaintiff's property, but only because Poole inadvertently pushed dirt outside his 50-foot right-of-way and had removed several small trees. However, the construction of an improved road over what was likely a dirt or gravel 50-foot easement was not deemed to be outside the scope of the easement owner's rights. *See*

Needed Repairs

Easements

Improved Methods

Washington Questions

Changes & Improvements

Prescriptive Easement Change

Site Specific

Duty of Care Varies

"Invitees"

also Hotchkiss v. Young, 42 Or 446, 451, 71 P 324, 326 (1903), which held that the easement holder had right to "level, gravel, plow, pave, and even grade [right-of-way], and for the latter purpose dig up and use soil so as to adapt it to the use accorded, and to the nature of the way granted or reserved."

In *Bernards v. Link & Haynes*, 199 Or 579, 248 P2d 341 (1952), the plaintiff landowners attempted to extinguish an easement across their land that had been granted to a railway company for the purpose of transporting logs by rail. Over time, the easement owner had begun transporting logs along the easement by logging trucks instead of railways. The plaintiffs argued that the use had changed because the means of transportation had changed. The court disagreed. Citing a long line of English and American cases, the court held that "[e]asements, which are one of the numerous instrumentalities by which the day's work is done, would thwart progress instead of facilitating it unless those who have easements can avail themselves of the newer and improved methods in the use of the easements." 199 Or at 592. The court relied heavily on the historical shift from horse-drawn conveyances to the automobile. Case law resoundingly supports the proposition that an easement originally intended for transportation of person or property is not extinguished merely because the mode of transportation changes due to technological advancement. By analogy, piping or lining of ditches could be considered a technologically advanced way of transporting water and may not represent a substantially different use of the easement.

The situation is murkier in Washington, if for no other reason than the dearth of relevant case law. The closest case is *Logan v. Brodrick*, 29 Wash App 796, 631 P2d 429 (1981), in which the scope of an express easement was at issue. In 1965, the Brodricks granted the Logans, who operated a lakeside resort, a perpetual easement for a road across their property. The Logans gradually expanded the resort, resulting in increased traffic on the road, until the Brodricks placed posts in the road to reduce access. This action resulted in an initial court decision limiting increases in the volume of traffic using the easement to "increases in population and use" in the surrounding area. 29 Wash App at 798. After several years of increasing traffic, the Brodricks partially blocked the road with a fence, causing the Logans to sue. In affirming the trial court's decision that the increased volume did not overburden the servient estate, the appellate court held that "[n]ormal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement" and relied on the assumption that "[c]hanges in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated." *Id.* at 800. By analogy, Washington courts could assume that changes and improvements to water delivery systems should be reasonably contemplated by the parties unless the easement contains limiting language.

A case about prescriptive easements also sheds some light on how a Washington court might interpret the scope of an express irrigation easement. In *Benis v. Shoreridge Water Cooperative Co.*, No. 41153-0-1, 1998 WL 466665 (Wash App 1998) (unpublished), Benis purchased a lot on which Shoreridge's 500-gallon water tank had been located for 45 years. When Shoreridge replaced the tank with a larger tank, Benis sued to determine the extent of Shoreridge's rights. The trial court held that Shoreridge had a prescriptive easement, the size of which was limited to the original tank's physical encroachment on Benis's lot. In affirming the trial court's decision, the appellate court noted that "there is no Washington authority quite on point but that American law generally recognizes that prescriptive easements are capable of 'future change and growth in the same way as an easement created by general language in an instrument would be.' The scope of express easements created with general language can change gradually to keep pace with the normal changes in the activities covered by the easement." *Id.* at *6 (citations omitted).

The foregoing cases are intended to demonstrate the types of cases courts in these three states might look to in evaluating the issue of improvements to irrigation ditches. In sum, all the circumstances surrounding the creation of an easement will be examined before a variation will be permitted. Technological and economic changes may well provide a basis for improving permitted uses, but easement holders should carefully analyze each situation before taking any action.

Tort Liability

Easement holders have certain duties toward third parties that enter lands covered by the easement. The scope of these duties depends on whether the third party has been invited for some business purpose of the easement holder (*e.g.*, a party constructing a new diversion structure) or is merely allowed or not prohibited from crossing the land (*e.g.*, when a commonly used path follows an irrigation ditch). Generally speaking, an easement holder's only duty of care toward licensees is not to willfully injure them; on the other hand, for invitees, the easement holder must take precautions to avoid any reasonably foreseeable injury. *Martin v. Houser*, 299 F2d 338 (9th Cir 1962).

In *Martin*, Houser owned an easement across Martin's farm and had constructed an irrigation ditch on it. Martin's son was chasing a stray cow on a path along the bank of the ditch, when he tripped and fell into the diversion structure, injuring himself. Relying on Washington law, the court held that Martin and his

Easements

"Invitees" & "Licensees"

Ordinary Care

"Takings" Clauses

Federal Regulation

Limit on Regulation

ESA Consultation

"Substantial Deviation"

Pre-FLPMA Diversions

"Take" of Species

son were not "invitees" of the easement holder; rather, at most, the easement holder simply did not forbid them to travel in the easement on the path above the ditch. Martin and his son were thus mere "licensees," and as such, Houser owed them only a duty not to willfully injure them. As that had not occurred, Houser was not liable. Easement holders in Washington and Oregon are advised to be aware of any third parties that use the land subject to the easement, to determine whether these parties are invitees or not, and to take appropriate steps if there are any potentially dangerous features of the irrigation ditch or other facilities.

In Idaho, on the other hand, easement holders are held to the standard of reasonable care. In *Rehwalt v. American Falls Reservoir Dist. No. 2*, 97 Idaho 634, 550 P2d 137 (1976), the servient owner sued when the maintenance road along the side of a canal running through his property gave way causing his truck and 480 bushels of wheat to topple into the canal. The Idaho Supreme Court expressly declined to use "the licensee-invitee-trespasser categories" and instead held that the easement owner "is to be held to the general standard to use ordinary care in the management of the easement property." 97 Idaho at 636.

Effect of Subsequently Enacted Law

Easements on private lands are governed by state law and subject to state regulation. An irrigation district's use of such easements, for example, may be regulated in the same way that its use of any of the rest of its property is regulated. The main limits to such regulation are the "takings" clauses of the US and state constitutions and the limits on unreasonable agency action found in state and federal administrative procedures acts.

A somewhat more complex problem arises when federal agencies attempt to regulate use of rights-of-way granted by the federal government. In such cases, easement holders may argue that they have vested or "grandfathered" rights to continue to operate their easements exactly as they did at the time the easements vested. Unfortunately, this overstates the case. Courts that have considered the matter have held that federal right-of-way holders are subject to "reasonable regulation" by federal agencies, regardless of when the right-of-way was acquired. *See, e.g., Adams v. United States*, 3 F3d 1254, 1260 (9th Cir 1993) ("Forest Service still has the authority to reasonably regulate" a vested RS 2339 water easement); *Grindstone Butte Project v. Kleppe*, 638 F2d 100 (9th Cir 1981) (in exercising discretion to impose terms and conditions on pre-FLPMA rights-of-way, the Secretary of the Interior must comply with the National Environmental Policy Act).

In *Elko County Bd. of Sup'rs. v. Glickman*, 909 F Supp 759 (D Nev 1995), the court added that regulations that prohibit the use of an easement, or are so stringent as to amount to prohibition, are not "reasonable." *Id.* at 764 (citing *United States v. Doremus*, 888 F2d 630, 632 (9th Cir 1989)). In *Elko*, a group of landowners and ranchers in Elko County, Nevada sued the US Forest Service (Forest Service), seeking to enjoin its interference with the landowners' use of RS 2339 ditch rights across national forest land. The landowners had attempted to maintain and improve century-old diversion facilities at springs located in the Humboldt National Forest. The government brought misdemeanor charges against some landowners and allegedly threatened others with criminal prosecution. The US District Court for Nevada denied the irrigators' requested injunction and held that, even assuming the ranchers had valid RS 2339 rights-of-way, they were still required to obtain a special use permit from the Forest Service before performing any ditch maintenance or improvement in the national forest. The court did note, however, that the Forest Service was not at liberty to prohibit the ranchers from exercising their vested rights or to regulate them so strictly that a de facto prohibition was imposed.

Endangered Species Act

The Endangered Species Act (ESA), 16 USC § 1531, *et seq.*, can affect ditch, canal, and pipeline easements involving the federal government. ESA Section 7(a) requires federal agencies to consult with the Secretary of the Interior or Commerce Secretary if any agency action "could jeopardize any endangered or threatened species, or destroy or adversely modify habitat of such species." 16 USC § 1536(a)(2). This section, however, does not apply to easements created pursuant to RS 2339 or the 1891 Act unless the easement holder wants to take an action that "requires a substantial deviation from the [original] grant." 43 CFR 2807.11(b). In *Western Watersheds Project v. Matejko*, 468 F 3d 1099 (9th Cir 2006), a conservation group alleged that the BLM had violated section (7)(a) by acquiescing to diversions of water for irrigation purposes using six easements created pursuant to RS 2339 and the 1891 Act. The Ninth Circuit disagreed, holding that this did not qualify as an "agency action," as the BLM could only regulate pre-FLPMA "diversions if there is a 'substantial deviation in use or location.'" *Id.* at 1110 (citations omitted).

Note, however, that section 9 of the ESA, which prohibits any person from "taking" listed species, applies to the use of *all* easements. 16 USC § 1538. Water providers should be cognizant that the creation, maintenance, and use of private easements could result in the "take" of listed species, and take actions to minimize liability exposure.

Easements

Notice of Burden

Property Inspection

Appurtenances

Subdivided Land

Written and Oral Release

Extinguish Easement

Intent to Abandon

Nonuse

Loss of Easement

Transfer of Easement Rights

A transfer of servient property to a third party does not free the property of the burden of the easement unless the grantee is a bona fide purchaser without knowledge, or actual or constructive notice of the servitude. Recording is a crucial step in protecting easement rights and avoiding disputes. A purchaser of servient property or any other third party automatically has constructive notice of easements properly recorded in county deed records. IC 55-811; ORS 93.710; RCW 65.08.070. A purchaser will also be considered on notice of any existing servitudes apparent from a physical inspection of the property. *See* IC 42-1102; *Silvernale v. Logan*, 252 Or 200, 207, 448 P2d 530, 533 (1968) (parties are charged with constructive knowledge of easement if they should have known, "by using reasonable observation and intelligence," that property was subject to easement); and *Peterson v. Weist*, 48 Wash 339, 93 P 519 (1908). Thus, a purchaser would likely take title subject to unrecorded easements for such things as pipelines or ditches when the existence of such easements might be inferred from inspecting the property.

An easement appurtenant to land is automatically transferred by a transfer of the estate, or portion thereof, to which it appurtains. Such easements cannot be transferred independently of the dominant estate.

When a dominant estate is subdivided, each grantee is given a right to all appurtenances. Therefore an easement appurtenant to the entire property will continue to be appurtenant to each of the subdivided parcels. An increased burden on the servient estate that might unreasonably interfere with the servient owner's rights, however, would not create easements identical to the underlying easement. Unless specifically provided otherwise, the underlying easement is apportioned between the grantees in proportion to the conveyance to each. *See Ruhnke v. Aubert*, 58 Or 6, 113 P 38 (1911) (water right passes in same proportion as land sold bears to entire tract); *Hoffman v. Skewis*, 35 Wash App 673, 668 P2d 1311 (1983) (subdivided parcels entitled to use easement for ingress and egress); and *Russell v. Irish*, 20 Idaho 194, 118 P 501 (1911) (appurtenant water right passes to subdivided land in same proportion as land was divided).

Termination of Easements and Rights-of-Way

An easement can be extinguished by a conveyance in which the easement holder releases its interest in the servient estate. The release should be written and should comply with the formalities of the statute of frauds (requirements under contract law). If, however, an easement holder orally releases the servient estate and the owner of the servient estate, in reasonable reliance, substantially changes its position to its detriment, then the oral release will be binding on the easement holder. The easement holder in that event is equitably estopped from denying the release. *See, e.g., Heg v. Alldredge*, 157 Wash 2d 154, 137 P3d 9 (2006); and *Pfaendler v. Bruce*, 195 Or App 561, 98 P3d 1146 (2004). An easement is also extinguished when its stated duration has expired or when the specific purpose for which it was granted can no longer be served by its continued existence. Also, certain easements may be canceled by the landowner if the easement holder has breached a material term of the easement document.

Forfeiture and Abandonment

An easement ceases to exist when it is abandoned. This does not mean, however, that an easement holder must make continuous use of an easement once the interest is created. Abandonment requires proof that the easement owner *intended* to permanently abandon the easement. A variation in the use made of the easement does not necessarily indicate that intent. Nonuse alone is also insufficient evidence of intent to abandon. *See, e.g., Heg*, 157 Wash 2d 154; *Powers v. Coos Bay Lumber Co.*, 200 Or 329, 263 P2d 913 (1953); and *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 P 990 (1898).

If the need to use an easement has not yet arisen, the easement will not be deemed abandoned by the mere passage of time. *See, e.g., Quinn*, 75 Idaho 243 (failure to construct irrigation ditch does not show intent to abandon easement). However, nonuse is relevant evidence of intent to abandon, unless the nonuse is due to forces beyond the easement owner's control. Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* ¶ 905[2] at 9-32 (1988). Nonuse for a substantial duration may give rise to the inference of intent to abandon. A greater degree of evidence will probably be required to establish abandonment when such a finding would result in forfeiture of a valuable right.

Prescription

Rights to easement use are subject to hostile takeover. An easement may be lost by "prescription" if the use by the owner of the servient estate satisfies all the elements required for the creation of an easement by prescription (see above). The only difference between the prescription necessary for termination and that necessary for creation is that adversity may be more difficult to establish when proving termination of an easement. Because the owner of the servient estate is entitled to use the servient land as owner of the land, the prescriptive period will not begin unless the use by the owner of the servient estate is clearly inconsistent with the use of the easement. Damming ditches and locking headgates may constitute such inconsistent use. Irrigation easement holders subject to such behavior can avoid losing their easements either by formally permitting the behavior and thus rendering it not adverse, or by challenging it in court.

Easements

Federal Lawsuit

No Damage Required

Exclusive Rights (Third Parties)

Authors' Note: Parts of this article are based on materials included in a workbook entitled *"Easements for Water and Land Use"* (October 2005), prepared by David Filippi and Stoel Rives LLP, and are included here with permission by the Oregon Water Resources Congress, for which the workbook was prepared. Portions of this article were previously published in the Oregon *Insider* (December 2006 and January 2007), which are incorporated here with the permission of the *Insider*. The authors also wish to recognize the efforts of Eric Martin, a 2007 summer law clerk in Stoel Rives LLP's Portland office, in the preparation of this article.

PROTECTION OF EASEMENTS AND RIGHTS-OF-WAY

The following section briefly reviews common forms of legal actions that water conveyors might use to resolve disputes and provides a basic understanding of the potential legal means of protecting their rights. Parties involved in litigation should always consult with counsel at the earliest possible stage.

Quiet Title

In Idaho, Oregon, and Washington, a suit to quiet title is a statutory civil action in which the court determines the ownership of and right to possess a parcel of real property. *See* IC 6-401; ORS 105.605; RCW 7.28.010. If the action concerns federal land, an easement owner may bring suit under the Quiet Title Act (28 USC § 2409a). This statute provides a limited waiver of federal sovereign immunity by allowing a private plaintiff to name a federal agency as a defendant in an action to "adjudicate a disputed title to real property in which the United States claims an interest." *Id.*; *see Adams v. United States*, 3 F3d 1254 (9th Cir 1993) (quiet title suit brought by holder of public highway easement crossing US Forest Service land). Potential plaintiffs should be aware of the 12-year statute of limitations under this Act. The period runs from the first time the plaintiff possesses a reasonable awareness that the government claims some interest adverse to the plaintiff. *See Overland Ditch & Reservoir Co. v. United States*, No. Civ. A. 96 N 797, 1996 WL 33484927 (D Colo Dec. 16, 1996) (citing *Knapp v. United States*, 636 F2d 279 (10th Cir 1980)).

Declaratory or Injunctive Relief

Due to the statutory requirements of a quiet title action, irrigation districts and other easement holders often seek to resolve disputes through suits for declaratory or injunctive relief. *See, e.g., Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 72 P3d 868 (2003); *Ericsson v. Braukman*, 111 Or App 57, 824 P2d 1174 (1992); and *Sunnyside Valley Irr. Dist.*, 149 Wash 2d 873. A declaratory judgment is an enforceable statement of the rights and duties between the parties to the suit. An injunction is an enforceable prohibition of certain action. These forms of relief are appropriate for an easement holder seeking, for example, a determination that a particular easement is valid, and an injunction prohibiting the landowner from interfering with the use of the easement.

This type of action is brought as a suit in equity and does not require the plaintiff to allege that any actual damage has yet occurred — only that there is a substantial threat that it will occur. For instance, such a suit may be appropriate when residential development is gradually encroaching on an irrigation canal or when a landowner has sent the easement holder a letter stating that the owner plans to lock its gates and not permit the easement holder access to maintain or repair its canal.

Trespass

Trespass is an action that affords the plaintiff damages and injunctive relief for a defendant's unauthorized entry onto real property in which the plaintiff has exclusive rights. An easement holder generally does not have an exclusive interest in the land covered by an easement. *See Coulsen*, 47 Idaho 619. A trespass action generally does not lie against the landowner; instead, quiet title, declaratory, or injunctive relief is appropriate. But trespass actions may be brought against third parties with no claim to the land. *Bileu v. Paisley*, 18 Or 47, 21 P 934 (1889) (owner of sheep that fouled mining water ditch liable in trespass to ditch owners).

Private Nuisance

Nuisances are either "private" or "public." In either case, the touchstone of liability is whether the defendant has "unreasonably interfered" with the plaintiff's enjoyment of a public or private property right. Any person whose property or personal enjoyment of his or her property is affected by a private nuisance may maintain a claim for damages. IC 52-111; ORS 105.505; RCW 7.48.020.

As is the case for trespass, nuisance actions are generally not the most direct or appropriate means of resolving disputes with landowners, but they can be effective when third-party actions interfere with an easement holder's rights under an easement. For instance, a nuisance action may be appropriate when third parties not subject to the terms of the easement are polluting an irrigation ditch, interfering with access to the ditch, or endangering the lateral support for the ditch.

Challenge to Agency Action

As discussed above, government agencies will sometimes attempt to regulate an easement holder's use of its easement rights in a way that substantially interferes with the water conveyance goals. If such matters cannot be resolved by informal negotiation with the agency, litigation may be pursued under the state or federal administrative procedures acts. The easement holder's claim is typically that the agency's regulatory decision or action is unreasonable (*i.e.*, "arbitrary and capricious") or unauthorized by statute.

FOR ADDITIONAL INFORMATION:
DAVID E. FILIPPI, Stoel Rives LLP (Portland, OR), 503/294-9529 or email: defilippi@stoel.com;
MICHAEL P. O'CONNELL, Stoel Rives LLP, (Seattle, WA) 206/ 386-3792 or email: moconnell@stoel.com
KEVIN J. BEATON, Stoel Rives LLP, (Boise, ID) 208/ 387-4214 or email: kjbeaton@stoel.com.

