

# Utah Easements

Through the Lens of an  
Attorney/Surveyor



Mark Gregersen

Conference of the Utah Council of Land Surveyors

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# I am not your attorney

This presentation is not intended to provide legal advice.

Every case is different. Seek legal advice from an attorney familiar with the facts of your particular case.



# Biography of Mark Gregersen

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Dually licensed as attorney and land surveyor, but would rather hang out with surveyors.

# Landowners

**Tim Johanson, Johanson Survey**

**stars as**

**Mr. Copper, Owner of Copper Acres**

**Steve Dale, West Valley City Surveyor**

**stars as**

**Mr. Green, Owner of Green Acres**





# Copper Acres, Green Acres, and Black Street

As you can see, Copper Acres is surrounded by cliffs, with access only through Green Acres.



# Road Map

- |   |                                |             |
|---|--------------------------------|-------------|
| 1 | What is an Easement?           | 10:00-10:15 |
| 2 | Creation by Express Grant      | 10:45-11:00 |
| 3 | Creation by Implic. or Prescr. | 11:00-11:15 |
| 4 | Transfer                       | 11:15-11:30 |
| 5 | Scope                          | 11:30-11:45 |
| 6 | Duty of Surveyor               | 11:45-12:00 |

1

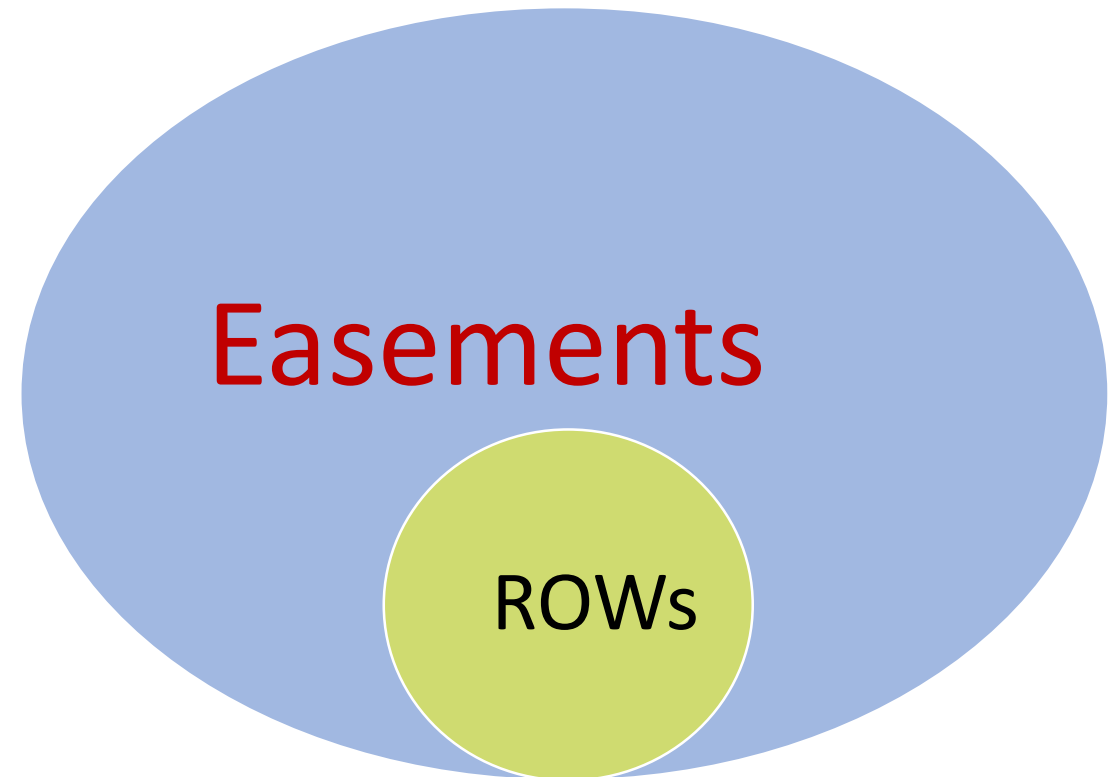
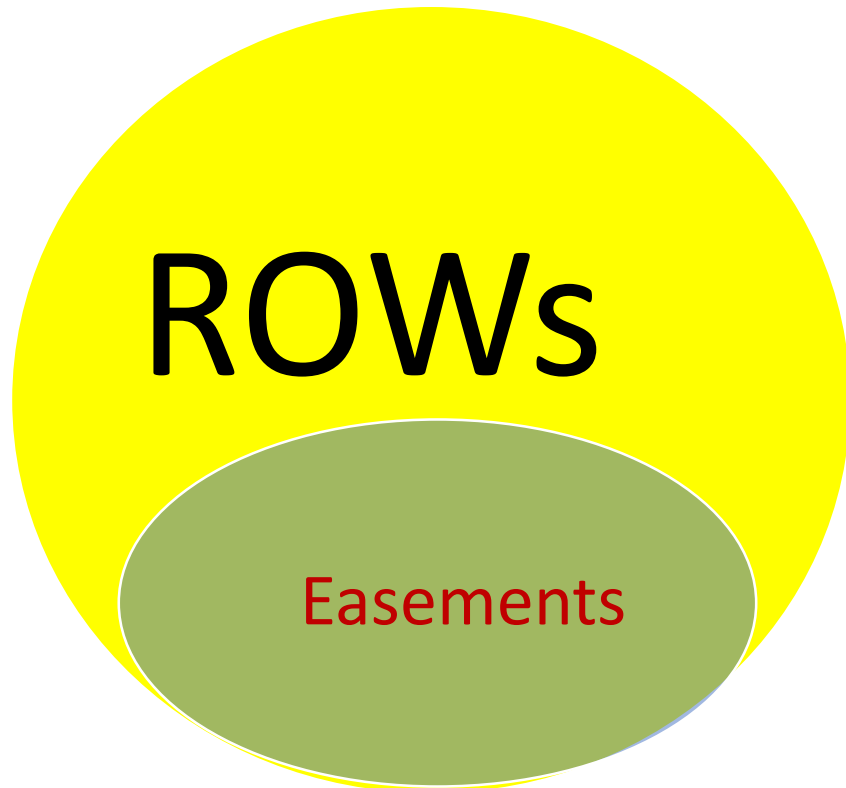
# What is an Easement?

10:00-10:15

# Which is a type of the other?

“All **easements** are rights of way, but not all rights of way are **easements**.” Robillard, Utah Easements p.15, 2005.

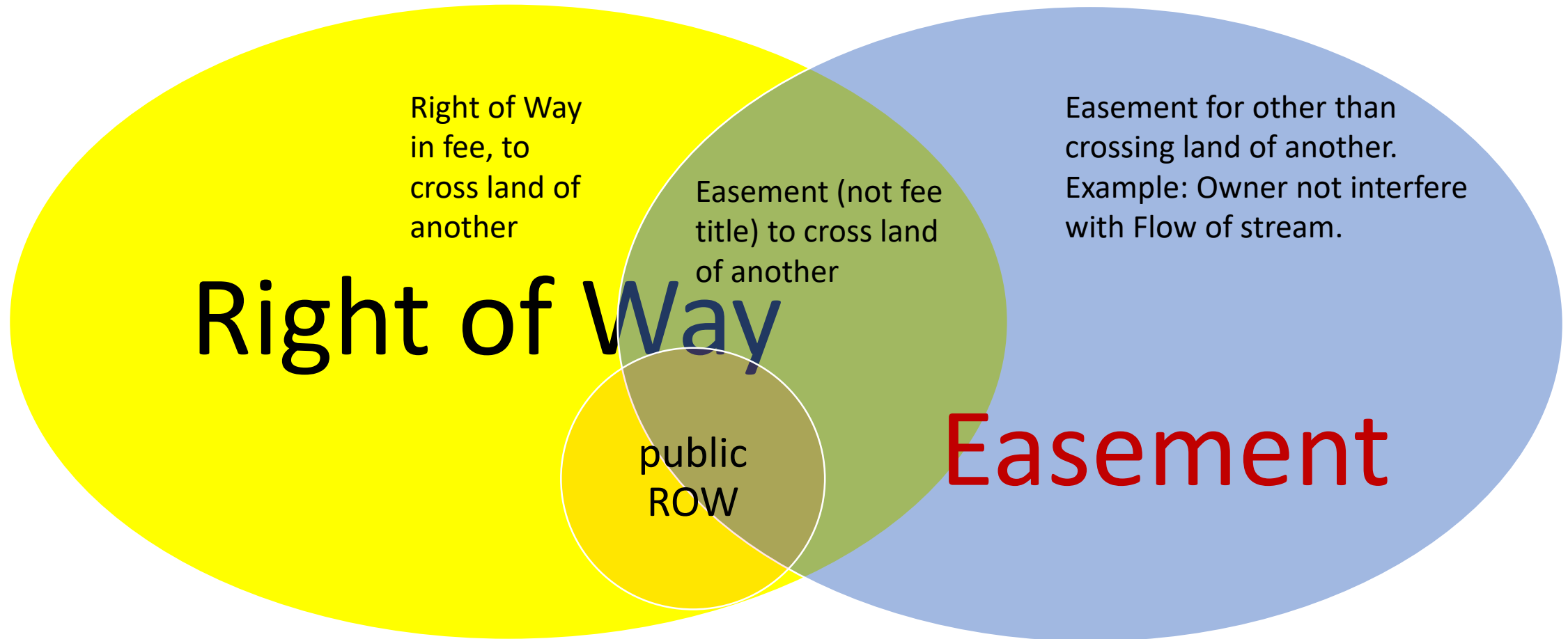
“A right of way is a peculiar type of **easement**.” Robillard, Utah Easements, p.15, 2005.





ROW: describes what it lets you do.

Easement: describes whether is fee interest.



# Interests in Land

Estates  
(possessory)

Non-Estates  
(non-possessory)

Freehold

Non-Freehold  
(tenancy)

Easements

Profits a Pendre

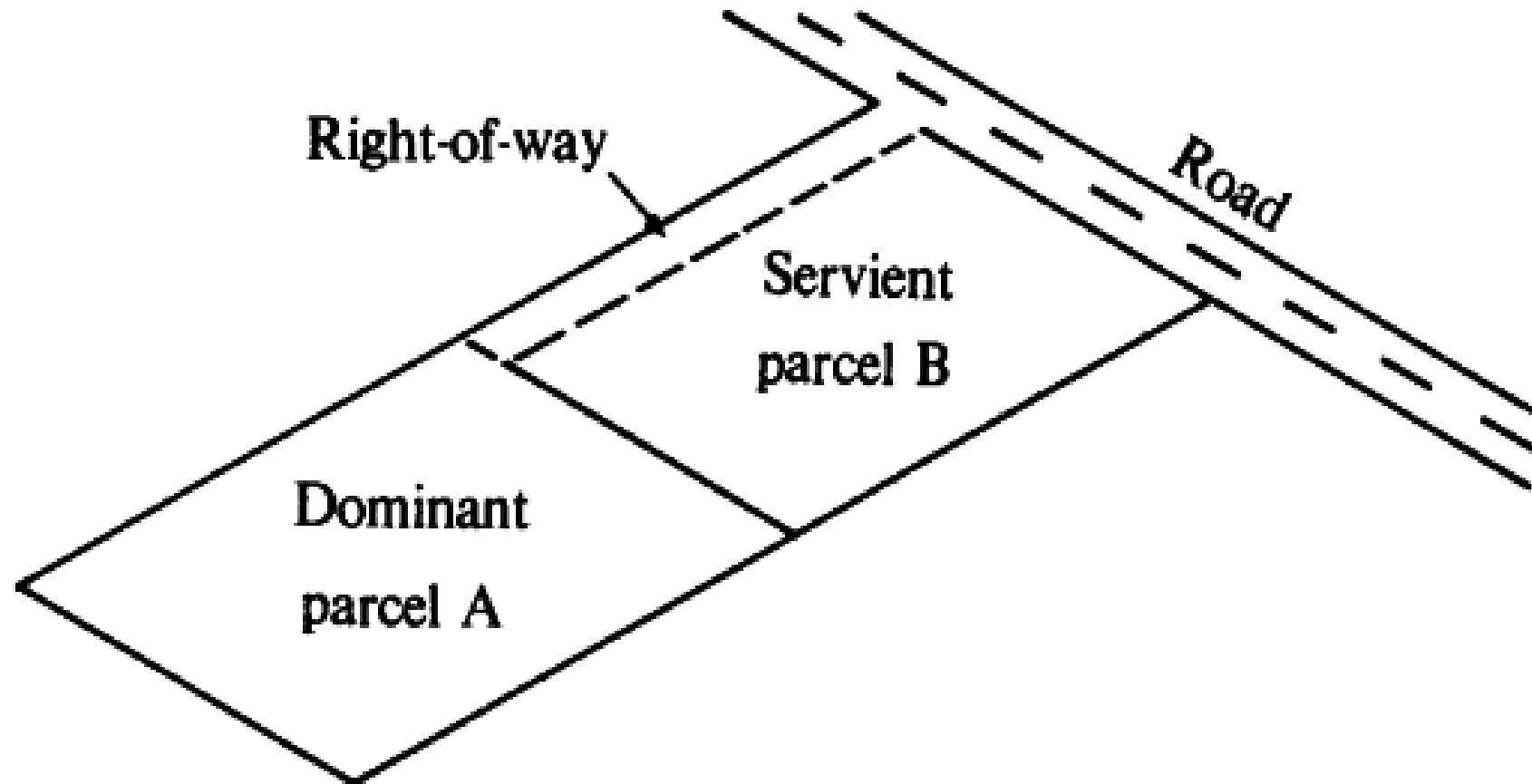
Fee

Life

Covenants

Servitudes

The Land Crossed, is the **Servient** Estate



2

# Express Grant

10:45-11:00

Let's see how our  
Landowners are getting  
along.

# Creation: by express grant.

## Facts

- Mr. Green hereby grants and conveys to Mr. Copper (Grantee), a right of way and easement, upon Green Acres, for ingress and egress over Green Acres, to provide access to Copper Acres.

## Question

- What rights does Grantee receive?  
What rights does Grantor retain?

## Answer

- Holder of easement has RIGHT TO USE a tract of land (called the servient tenement) for a SPECIAL PURPOSE, but has no right to POSSESS AND ENJOY the tract of land.
- Owner of servient tenement continues to have the right of full possession and enjoyment, but cannot interfere with the right of special use.



# Holder of easement has what rights?

## Question

- Can Mr. Copper as owner of easement across Green Acres, let his horse graze on the easement? Sun bathing on easement? Park his car?

## Answer

- No. Holder of easement has RIGHT TO USE a tract of land for the SPECIAL PURPOSE, but has no right to POSSESS AND ENJOY the tract of land.

# Holder of easement has what rights?

## Question

- Can **Mr. Green**, who owns the **servient tenement**, require that **Mr. Copper** obtain **Mr. Green's** permission before crossing **Mr. Green's land**? Install a toll gate? Build a house in middle of **easement**?

## Answer

- No. **Owner of servient tenement** continues to have the right of full possession and enjoyment, but cannot inter with the right of special use.

# Creation: express (solar easement)

## Facts

Mr. Copper signs a deed to Mr. Green, which Mr. Green records. The deed says that it gives Mr. Green a solar easement. The deed:

- says Copper Acres is subject to the easement.
- says Green Acres is benefitted by the easement.
- describes angles at which the easement extends over Copper Acres.

Does this deed create a valid solar easement?

## Rules

The writing, filed with County Recorder, shall include:

- description of property subject to solar easement. [here, servient estate of Copper Acres]
- description of property benefiting from solar easement. [here, dominant estate of Green Acres]
- description of vertical & horizontal angles (measured from the solar energy system) at which the easement extends over the property subject to easement. [easement]

Utah Code section 57-13-2.

# Creation: express

## *Express Grant*

(in favor of **Grantee**)

- Mr. Green as owner of Green Acres and Copperacres, deeds Copper Acres to Mr. Copper, with an **easement** over Green Acres.

## *Express Reservation*

(in favor of **Grantor**)

- Mr. Copper as owner of Copper Acres and Green Acres, deeds Green Acres to Mr. Green, but reserves to himself (Mr. Copper) an **easement** over Green Acres.

3

# Creation by Implication or Prescription

11:00-11:15

Creation: Implied (1. Intended based on use that existed when estates severed, or 2. By necessity.)

*Implied Grant*

(in favor of **Grantee**)

- Mr. Green as owner of Green Acres and Copper Acres, deeds Copper Acres to Mr. Copper, with no mention of an **easement** over Green Acres.

*Implied Reservation*

(in favor of **Grantor**)

- Mr. Copper as owner of Copper Acres and Green Acres, deeds Green Acres to Mr. Green, but fails to expressly reserve to himself (Mr. Copper) an **easement** over Green Acres.



# Creation: prescription (canal)

## Facts

For decades, Mr. Copper has accessed a canal which flows across Green Acres. Mr. Green demands that Mr. Copper cease accessing the canal. Mr. Copper claims because Mr. Copper's access to the canal was open, continuous, and adverse for more than 20 years.

Mr. Green says though he never actually permitted Mr. Copper to use the canal, Mr. Green has been neighborly and cordial when Mr. Copper used the canal, and therefore Mr. Copper's use of Mr. Green's canal was not adverse.

Question: Does Mr. Copper have a prescriptive easement to access the canal?

## Rules

- A party claiming a prescriptive easement must prove that his use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years. The owner of the servient estate has the burden to show that the use was initially permissive, even if there were neighborly accommodation and cordial relations.

Valcarce v. Fitzgerald, 961 P.2d 305 (1998) (Canal Easement by Prescription).

# Creation: prescription (public road)

## Facts

- Mr. Copper and the public at large, cross Green Acres continuously for over 10 years.
- Has this created a public road?

## Answer

- A road crossing private property becomes a public right of way if it is used by the public continuously for 10 years.

Utah Code section 72-5-104.

4

Transfer

11:15-11:30

# Transfer: silent as to easement

## > Dominant Estate

### Facts

- Grandpa Green owns Green Acres, and conveys to Ebenezer Copper, his heirs, successors and assigns the right to use a strip 20 feet wide on the West edge of Green Acres for ingress and egress to Copper Acres.
- Ebenezer Copper conveys dominant tenement Copper Acres to Mr. Copper. Ebenezer Copper forgets to mention anything about the easement which allows vehicles to cross Green Acres.

### Questions

- 1) Was the easement which Grandpa Green gave Ebenezer Copper, appurtenant?
- 2) When Ebenezer Copper conveyed Copper Acres to Mr. Copper, did Mr. Copper receive the easement?

### Answer

- 1) Yes, Grandpa Green created an easement appurtenant. Because there is ambiguity as to whether the benefit was intended to attach to Copper Acres or Ebenezer Copper individually, a court would apply the construction preference and hold that the benefit was intended to appurtenant.
- 2) Yes, this is an easement appurtenant, so the benefit runs with the land.

# Transfer: silent as to easement > Servient Estate

## Facts

- Mr. Green transfers servient tenement Green Acres, to Sgt. Schultz, who recently finished staring on Hogan's Heros. Mr. Green forgets to mention the easement. Mr. Copper tells Sgt. Schultz than Mr. Copper has an easement across Green Acres. Sgt. Schultz says, "I know nothing!"

## Question

- Did Sgt. Schultz receive Green Acres subject to the easement?

## Answer

- Perhaps. The burden of an easement runs with the land (the servient estate) unless the grantee is a *Bona Fide* Purchaser without notice (actual, constructive, or inquiry).



# Transfer: to 3<sup>rd</sup> party

## Facts

- Mr. Copper conveys easement to Mrs. Purple, who lives on Purple Acres which is south of Copper Acres. **Question**
- Does Mrs. Purple receive an easement?

## Answer

- No. An easement appurtenant, cannot be transferred to a 3<sup>rd</sup> party.



# Transfer: no dominant estate

## Facts

- Mr. Green grants an easement to Railroad A, for tracks to cross his property. Railroad A then sells this easement to Railroad B.

## Question

- Is this an easement in gross, and can it be transferred?

## Answer

- Yes, this is an easement in gross, since it is not appurtenant to any dominant estate.
- Normally an easement in gross is personal and cannot be transferred. However, a commercial easement in gross, such as a RR or power line, can usually be transferred. See Crane v. Crane, 683 P.2d 1062 (Ut. 1984).

5

Scope

11:30-11:45

# Scope: intent is key to interpretation

## Rules

- First look at intent of parties, so far as it can be gathered from the deed. The objective intent.
- But if deed is ambiguous (its language is susceptible of more than one interpretation), then evidence of subjective intentions can be considered.
  - Courts will then look into surrounding circumstances.

# Scope: when deed is silent as to details?

> general rules of interpretation

## Facts

- General language is used, to create the easement:
  - “a right-of-way over Green Acres”

What exactly does this mean?

## Answer

1. Ambiguities are resolved in favor of the grantee, unless the conveyance is gratuitous. Here, grantee would be owner of Copper Acres as dominant estate.
2. Subsequent conduct of the parties respecting the arrangement is relevant.
3. The parties are assumed to have intended a scope that would reasonably serve the purposes of the grant AND to have foreseen reasonable changes in the use of the dominant estate.

# Scope: when deed is silent as to details?

> **where** is easement located

## Facts

- General language is used, to create the easement:
    - “a right-of-way over **Green Acres**”
- SO: Where is the easement located?

## Answer

1. If an easement is created but not specifically located on the servient estate, an easement of sufficient width, length, and direction to make the intended use reasonably convenient will be implied.
2. The owner of the servient estate may select the location of the easement so long as his selection is reasonable.

# Scope: when deed is silent as to details?

> what special purposes

## Facts

- General language is used, to create the easement:
  - “a right-of-way over Green Acres”

Does this allow travel AND utilities?

## Answer

1. The courts will generally interpret an easement as a grant for ingress and egress, and for the installation of utilities necessary for dominant estate holder to live on the property.
2. This is especial true if the dominant estate owner did in fact install a road & utilities, and the servient estate holder accepts and tolerates these.

# Scope: change in use

> nature of use

## Facts

- Grandpa Green owner of Green Acres, grants an access easement to Ebenezer Copper who owns Copper Acre, during days of horse and buggies. Through inheritance, Copper Acres is now held by Mr. Copper, and Green Acres is now held by Mr. Green.

## Question

Does Mr. Copper have the right to drive a motorized vehicle across the easement?

## Answer

- Probably. It is anticipated that circumstances will change.
- But if the easement says it is only to allow horse and buggy, then the easement is limited to horse and buggy.

# Scope: change in use > intensity of use

## Facts

- Mr. Copper buys an easement for access across Green Acres. Suddenly, Mr. Green sees that Mr. Copper has construction equipment in place. Mr. Copper plans to construct apartments on Copper Acres.

## Question

Must Mr. Green allow across Green Acres, traffic from:

- 4-plex?
- 100 unit apartment?

## Answer

- Mr. Green probably **needs to** allow traffic from **4** units.
- Mr. Green probably **need not** allow traffic from **100** units.



# Scope: change in use

> expansion of dominant estate

## Facts

- An **easement** exists across **Green Acres**, so that **Mr. Copper** can access the **dominant estate: Copper Acres**.
- Next, **Mr. Copper** buys **White Acres** which adjoins **Copper Acres** to the east. **Mr. Copper** constructs a building across both **Copper & White Acres**. Then **Mr. Copper** uses the **easement** across **Green Acres** to access both **Copper Acres** and **White Acres**.

## Question

Is this a misuse of the **easement**?

## Answer

- The extension of an **easement** to non-dominant property, is a misuse of the **easement**.
- Use of the **easement** by both parcels can be “enjoined” (stopped per court order).
- But this is not a forfeiture of **easement**, because once the buildings is altered to not permit use by other part of building, then the **easement** may again be used.

DND Neffson Company v. Galleria Partners, 745 P.2d 206 (Ariz. 1987).

But see, Brown v. Voss (Washington 1986).

# Scope: Location

> **Blanket** (floating)

## Facts

- **Mr. Copper** builds house, but has no utilities. **Mr. Green** gives **power company** a blanket **easement**.

## Questions:

- Where is the **easement**?
- How long?
- How wide?

## Answer

- When deed not say length, width, location, but merely says **right of way** over a certain parcel, then **easement** extends over only area reasonably necessary to effect purpose of **easement**.
- Court will fix location:
  - where power poles & lines,
  - width sufficient to install, maintain & repair.

# Scope: Easement v. Fee

## Facts

Deed to **Mr. Copper** says **Mr. Copper** has a right of way across **Green Acres**, but the deed is silent as to whether the right of way is:

- in fee, or
- a mere easement.

**Mr. Copper** claims to have fee title to this private lane.

## Answer

“Right of way” usually means only **easement**, not fee. If instrument leaves intent in doubt, look at circumstances of parties at time when **Mr. Copper** executed the deed. Some factors:

- amount paid.
- particularity of description.
- limitations upon use.
- how the parties have treated the property.

See, Northwest Realty v. Jacobs, 273 N.W.2d 141 (S.Dak. 1978).

# Negative Easement: stream

## Facts

- Mr. Green as owner of Green Acres, grants an easement for the flow of an artificial stream.

## Question

Is this a valid easement? Can Mr. Green interfere with the stream? Can Mr. Copper go boating on the stream?

## Answer

- This creates a negative easement, which does not grant its owner Mr. Copper, the right to enter upon the servient tenement. It does entitle the privilege holder to compel the possessor of the servient tenement to refrain from certain activity upon the servient estate.

# Negative Easement: view

## Facts

- Just south of Copper Acres is Blue Lake. Mr. Copper grants an easement that Mr. Copper will not block Mr. Green's view of the lake.

## Question

Is this a valid easement? Can Mr. Copper interfere with Mr. Green's view of Blue Lake? Does the easement allow Mr. Green to enter onto Copper Acres?

## Answer

- This creates a negative easement, which does not grant its owner Mr. Green, the right to enter upon the servient estate. It does entitle the privilege holder to compel the possessor of the servient estate to refrain from certain activity upon the servient estate.

6

# Duty of Surveyor

11:45-12:00

# Surveyor's Duty as to Easements: **Search** for Documents?

## Facts

- **Mr. Surveyor** says that to perform a survey, any documents as to **easements** which affect the property, must be provided to Surveyor; and **Mr. Surveyor** need not go research them himself.
- Is **Mr. Surveyor** being reasonable?

## Answer

It Depends:

- "... the surveyor must be provided with ... : ... Any recorded **easements** benefitting [or] burdening the property". Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (2/23/2016), par. 4.
- "Surveyors should: ... search for relevant title records which may include ... **easements** ...." UCLS Standards of Practice for Boundary Surveys, Section 4(1)(2) (2010).

# Surveyor's Duty as to Easements: Have deed. **Label** as Easement? Title Opinion?

## Facts

- While undertaking a survey of **Green Acres**, **Mr. Surveyor** locates a deed which refers to a **right-of-way**,
- On his plat, must Mr. Surveyor identify this as
  - an Easement?
  - a right-of-way?
  - neither?

## Answer

Whether a surveyor should label an item as an **Easement**, likely:

- Depends on several factors, and
- Is a matter on which opinions differ.

“Surveyors are not ... required to give title opinions.” UCLS Standards of Practice for Boundary Surveys, Section 4(1)(2) (2010).



# Surveyor's Duty as to Easements: See tracks. Label as Easement?

## Facts:

- While conducting fieldwork on **Green Acres, Ms. Surveyor** observes a pathway showing vehicle access from an adjoining property.

## Question:

- Must **Ms. Surveyor** show this pathway's:
  - location and extent?
  - ownership or nature?

## Answer:

The fieldwork shall include the following ... :

### B. Rights of Way and Access

iv. The location and character of vehicular, pedestrian, or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property observed in the process of conducting the fieldwork (e.g., driveways, alleys, private roads, railroads, railroad sidings and spurs, sidewalks, footpaths).

v. Without expressing a legal opinion as to ownership or nature, the location and extent of any potentially encroaching driveways, alleys, and other ways of access from adjoining properties onto the surveyed property observed in the process of conducting the fieldwork.

Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (2/23/2016), par. 5.

# Surveyor's Duty as to Easements:

## Dedication of utility easement

### Facts

- Mr. Surveyor prepares a Subdivision Plat, with an Owner's Dedication which says owner conveys an **easement** for utilities.
- Is this dedication sufficient?

### Answer

The following owner's dedication is a preferred example:

The undersigned owners hereby convey

- to any and all public utility companies a
- perpetual,
- non-exclusive

**easement** over the public utility easements shown on this plat ...

UCLS Final Subd. Plat Guidance Document / Model Standard, par. 8 (2014).

# Termination (extinguishment)

## Facts

Mr. Green claims, and Mr. Copper denies, that Mr. Copper one day told Mr. Green that Mr. Copper hereby released the easement. Is the easement extinguished by Release?

Mr. Copper ceases using the easement for a period of 20 years. Is the easement extinguished by Abandonment?

Mr. Green blocks off the easement with a gate, for 20 years, during which Mr. Copper does not object. Is the easement extinguished by Prescription?

## Answer

Release requires compliance with statute of frauds.

Lunt v. Lance, 2008 UT App 192, ¶ 28:

In determining whether a easement has been abandoned, the court focusses on the actions and intentions of the dominant estate holder. An easement is abandoned only where the easement holder releases its rights with evidence of a **clear and convincing** intent to no longer exercise the easement rights.

An easement is extinguished by Prescription where there is **clear & convincing** proof of adverse use by the servient estate holder for more than 20 years without objection by the dominant estate holder.

# Right-of-Way in Fee

## Facts

- **Black Street** was created when **Mr. Black** who owned the entire area, recorded a subdivision plat, on which **Black Street** was dedicated as a public street.
- **Mr. Green** tells neighbors they cannot park on Black Street, because **Mr. Green** owns the fee, and the public merely has an easement.
- The City Council votes to **Vacate** and Abandon the public's interest in **Black Street**. Who now owns the fee title, and/or easement as to this land?

## Answer

- **Dedication of streets vests fee** in the municipality, for public use.

Utah Code 10-9A-607.

- Public dedications have a reversionary interest.
  - Dedicated public streets will typically revert to the owner of the abutting property.
  - **Vacation** does not impair any right of way or easement of any lot owner.

Utah Code 72-5-105.



End

12:00

# Thanks to Helpers

**Tim Johanson, Johanson Survey**

**stars as**

**Mr. Copper, Owner of Copper Acres**



**Steve Dale, West Valley City Surveyor**

**stars as**

**Mr. Green, Owner of Green Acres**

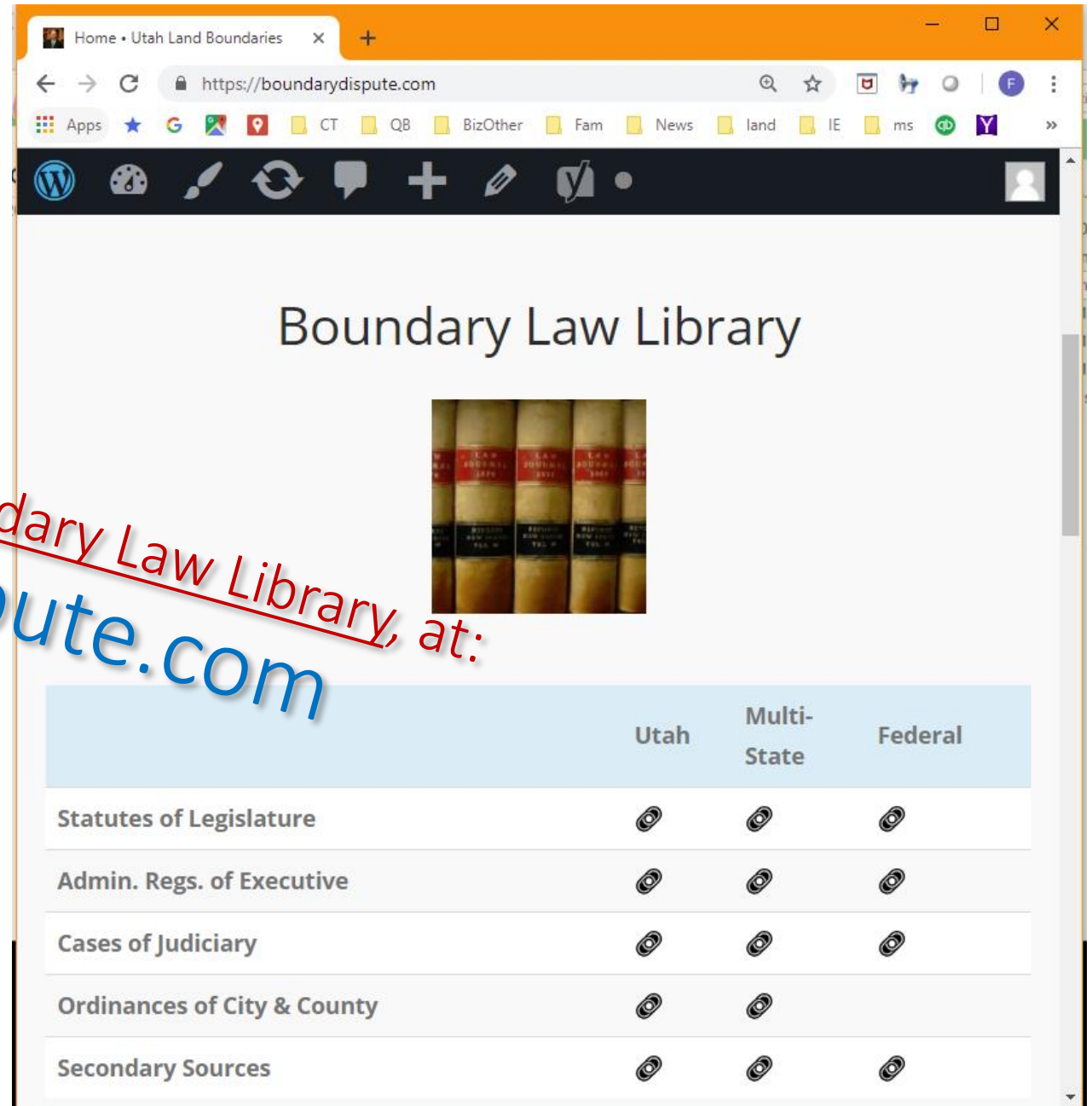


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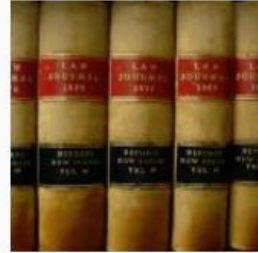
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Through the Lens of an Attorney/Surveyor  
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