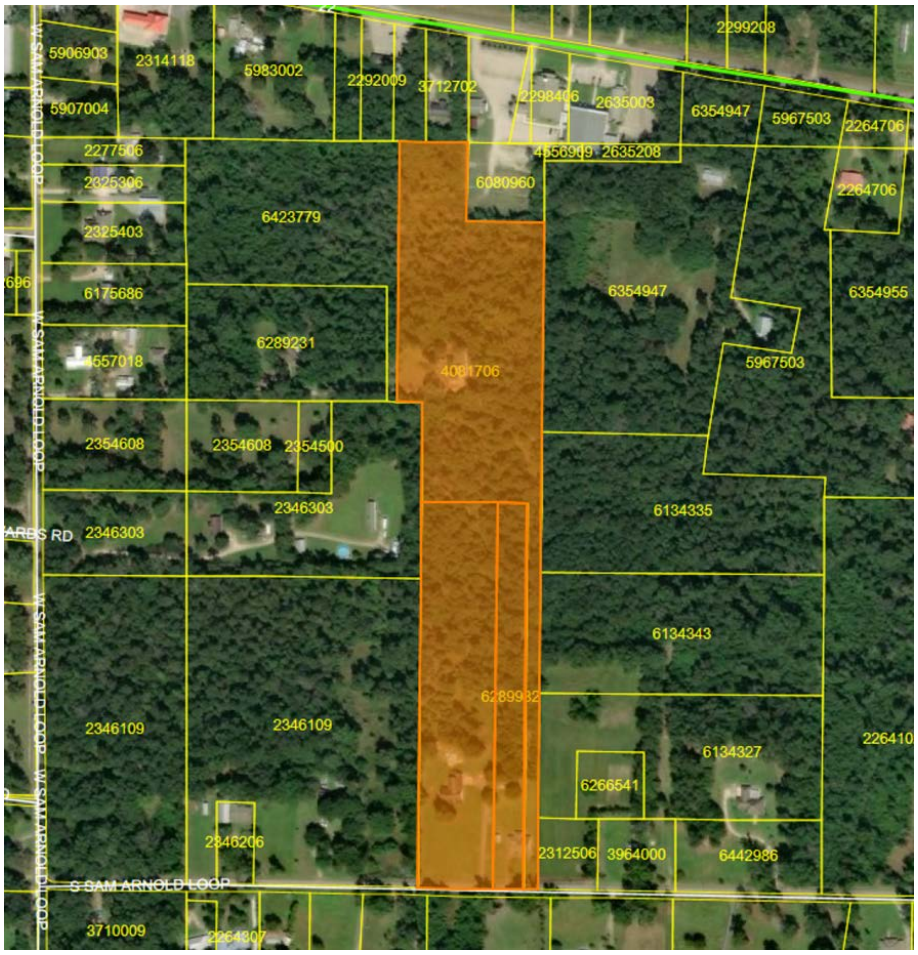
The Federal Land Rights Series Edition 17 – Tangipahoa controversy highlights troublesome nature of uninformative easement documentation throughout the West

Everyone who has occasion to deal with land rights at the professional level understands that an easement creates rights which favor at least one dominant party or estate and encumbers a given servient estate, but to what extent does the easement allow the dominant estate holder to exert full or complete control over the burdened portion of the servient estate, and how important is it to clearly define both the benefits and any limitations that are associated with an easement when it is created? In this edition we will explore this question, observing both the problematic consequences of inadequately defined easements, and the difficulties that are encountered when language suggesting the creation of a right of total control is employed, in the private easement context, as opposed to those easements which have been created to provide public corridors for utility or transportation purposes. In so doing, we will discover the inherent complexity that is embodied in the seemingly simplistic easement concept, focusing on the importance of recognizing that terms of modification which appear in easement documentation can apply either to the parties or to the activities associated with the easement, which introduces the need to read all existing easement language thoughtfully, along with the need to take great care not to either expand or restrict the intentions of the parties, when language defining a new easement is composed. We will also explore the meaning and practical application of the powerful concept of exclusivity in the private easement context, and learn how it can impact and alter rights pertinent to control over the easement area, mindful that exclusive easements represent a unique hybrid within the easement realm, putting in place both affirmative and negative easement rights, with potentially complex variations, that are dependent for legal support upon the strength and the clarity of the language with which those rights were framed. Our featured case (Seilham v Commonwealth Land Title Insurance – 360 F Supp 3d 412 - 2018) is the most interesting easement case to recently emerge from the federal judicial system in the PLSS region, involving multiple surveys and illustrating that even the best efforts of land surveyors to support proper easement creation can be diminished, when the evidentiary value embodied in their products goes unrecognized. As we will observe, easement conveyances between family members are frequently bungled, very often being documented without sufficient foresight and in the absence of astute professional guidance, which has the unfortunate effect of leaving the rights held by both the dominant and servient parties unclear, making conflict virtually inevitable, when some of the relevant land eventually passes by conveyance to subsequent parties, who are unfamiliar with both the historical usage of that land and the intent that motivated the easement's creation.

During the 1950s, the Arnold family acquired an estate of substantial size in Tangipahoa Parish, Louisiana, and quite naturally as they aged over the subsequent decades, the patriarch and matriarch of that family granted portions of their land to their children. In 1979, a survey of a portion of the Arnold property was conducted, in apparent anticipation of a conveyance by the senior Arnolds to Martinson, who was one of their married daughters. The Martinson parcel, which was carved out at this time, had no frontage upon any public road, and thus would be landlocked without an access easement, so not surprisingly the Arnolds evidently directed the surveyor to depict an access easement on his survey. The easement location was evidently controlled by an existing road, which ran east along the southern boundary of their land from the public highway that bounded their property on the west, and the survey showed the

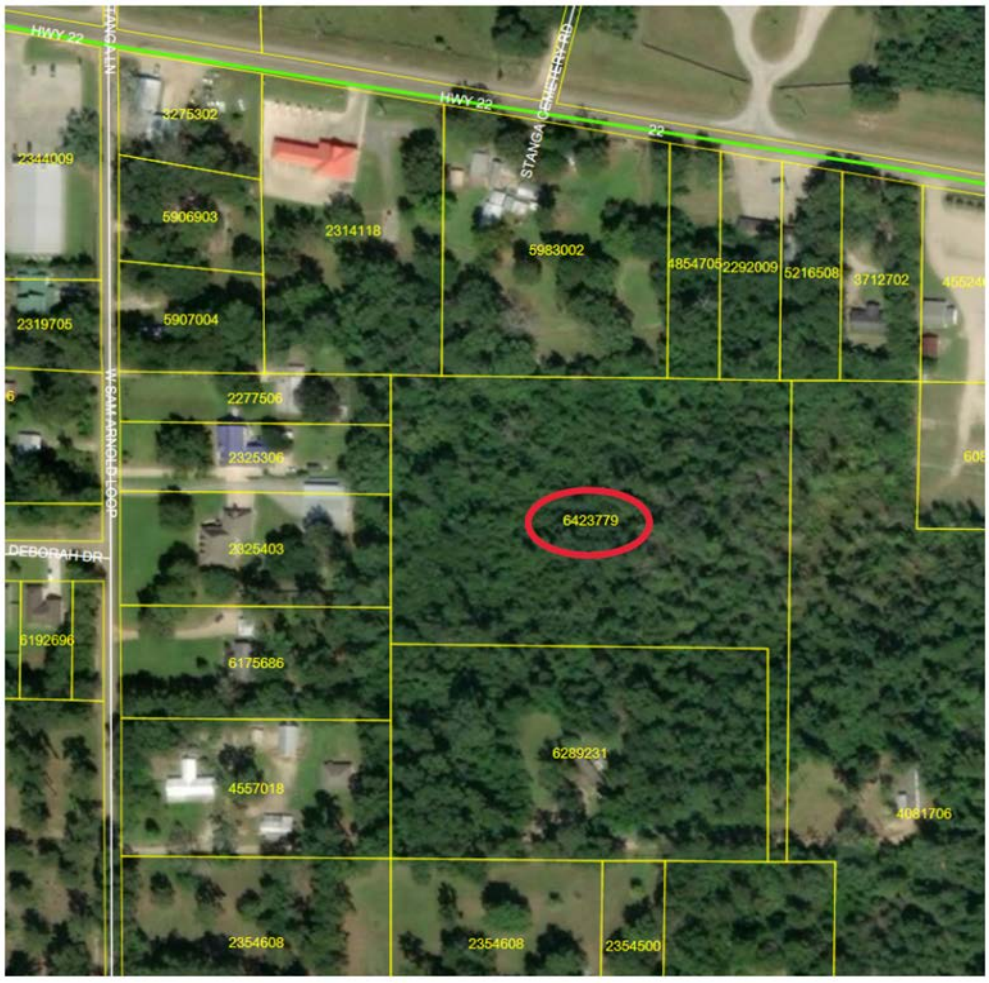
easement location, presumably with complete accuracy, enabling the old road, which had already been used by the senior Arnolds for over 20 years to reach their house, situated at the eastern end of their property, to also serve as the designated route of legal access to the Martinson parcel, which it crossed. Although the origin of the old road was shrouded in the mist of time, no contention over its use had ever arisen, and it had long been used on a regular basis by drainage district personnel, along with the Arnolds, presumably to reach drainage structures located on the remote easterly portions of the Arnold property, and perhaps on adjoining properties farther to the east as well, but the Arnolds used it only for typical residential access purposes. In 1980, when the senior Arnolds deeded the Martinson parcel to their daughter, they made an effort to assure that adequate legal access serving that parcel would be available, by including a paragraph in their deed to her, stating that it was their intention to create "a servitude" connecting with "the existing public road", and that paragraph appropriately concluded with a reference to the 1979 survey, specifying the location of the contemplated access route through illustration. Although that survey presumably identified both the easement area and its purpose with sufficient clarity by means of adequate labeling, and the entire length of the relevant road was within the boundaries of the Arnold property, enabling them to legally make the intended easement grant without any involvement on the part of any other parties, seeds of future trouble were nonetheless planted, because the survey was not recorded, leaving both the easement's location, and the exact nature of the purpose it was intended to serve, without the publicly visible confirmation which the survey had been designed to supply.



Martinson was not the only offspring of the Arnolds however, and in 1982 they conveyed another parcel, lying between the Martinson parcel and the public highway, comprising the southwestern portion of their estate, to their married son Jeffrey. Evidently no thought was given to access easements at this time, presumably because Jeffrey's parcel fronted upon a public right-of-way and thus required no access easement. As a result, Jeffrey's deed from his parents, which was apparently prepared without the assistance of a competent attorney, said nothing at all about the existing road, which passed through the southern portion of his parcel, or about the easement that had been created in 1980, even though that road plainly represented a legal burden upon his parcel. Although Jeffrey was obviously aware of the road's presence, and presumably he also knew that his sister, his parents and others had a right to use it, the chain of title which originated at this point in time included no indication whatsoever of the existence of any access rights encumbering his parcel. In 1983 the senior Arnolds granted another parcel (shown below) occupying the space between the 2 aforementioned parcels, to Naramore, who was another one of their married daughters, and because this parcel, like the Martinson parcel, had no pubic road frontage, they once again sought to provide legal access for Naramore by citing the 1979 survey in their deed to her. Like their deed to Jeffrey however, this deed also neglected to mention that the portion of the road crossing Naramore's parcel also represented an access easement serving the Martinson parcel, as well as the land further to the east that had been retained by the senior Arnolds, so at this point another chance to clarify the presence of the Martinson access easement in legally binding conveyance documentation was missed. Conditions remained peaceful going forward however, as the road bearing these multiple easements was evidently put to only minimal use over the ensuing years, so no grounds for complaint ever arose among the aforementioned members of the Arnold family. But then in 1993 Jeffrey conveyed his parcel to Aikman and Seilham, who were husband and wife respectively at that date, making use of the old road a potential source of friction, since the land bearing its entrance was no longer under the sole control of the members of the Arnold family. Nonetheless, no tension arose between the newcomers and the Arnolds for many years, during which time the use of the old road by the Arnold family members apparently remained relatively modest, and it would appear that their use of that road may even have diminished to some extent with the passing away of the elder generation.

In 2004 Aikman and Seilham refinanced their parcel and in 2005 they obtained title insurance provided by Commonwealth Title, which covered all easements of record, but not surprisingly cited no easements created by any of the Arnolds, since the chain of title to the subject property bore no indication that the Arnolds had ever created any easements, and did not reveal the existence of the 1979 survey, which neither Aikman nor Seilham had ever seen or been given. Then in 2008, after the road in question had stood largely idle for 15 years, Naramore conveyed a portion of her parcel to her married daughter Steib, and another survey was done, apparently in support of that conveyance. The unspecified surveyor who conducted the 2008 survey evidently had no difficulty in locating evidence of the easement that had been created by the Arnolds nearly 30 years earlier, and faithfully perpetuated it on his survey, apparently based upon the information that appeared on the 1979 survey, but Aikman and Seilham remained unaware that the easement existed, since this 2008 survey was naturally provided only to those who had ordered it, Naramore and Steib, and they did not know that the easement's existence was unknown to Aikman and Seilham. Conflict finally erupted in 2010, when Martinson decided to log her parcel, after concluding that use of the old road for logging was justified, apparently because the Tangipahoa Parish Engineer had confirmed to her that the road represented a public

easement. Although that information provided to Martinson was presumably accurate, she appears to have misunderstood it, and made the false assumption that the road in question was public for all purposes, rather than being limited to drainage district usage. Aikman promptly responded by blocking the road, convinced that no easement existed in that location, after the western portion of the road, crossing his parcel and comprising his driveway, was damaged by logging trucks and other heavy machinery. Even after yet another survey was done in 2011, once again depicting an access easement embracing the existing road, in full accord with the 1979 & 2008 surveys, thereby clarifying the easement's existence to Aikman and Seilham, controversy persisted, due to the radically increased use of the road, which made the formerly quiet easement area a source of torment to the servient parties, who understandably felt they had been unjustifiably blindsided. Seilham reacted by demanding assistance, pursuant to her title coverage, from Commonwealth Title, on the advice of her attorney, who informed her that a search of the public records which he had conducted revealed no evidence that any of the Arnolds held any easement on her property, and shortly thereafter the Arnold family members responded by filing an action against Aikman and Seilham in the Louisiana court system, seeking a decree requiring the road to be unblocked and kept open.



Before we proceed to observe the outcome of the Louisiana litigation thus initiated, centered as it was upon the existence and scope of a surveyed yet minimally documented easement, we will briefly review some cases from other PLSS states, which have transpired during the modern era, in chronological sequence, illustrating how remarkably problematic control over easements can be, especially when the concept of unilateral control over an area bearing an easement is interjected. An easement is not land itself, by definition an easement is a right which was created to either facilitate land use that would otherwise be unauthorized, or to limit land use that the fee title holder would otherwise be authorized to make, so the easement concept holds meaning only in the context of land use, as opposed to fee ownership of land. The foundational component of fee title is the right to acquire and convey land itself, and no easement can have any impact upon any fee title holder's rights in that regard, but the creation of an easement upon a fee estate can introduce either explicit or implicit limitations upon the estate holder's capacity to grant other rights amounting to easements within an established easement area. Every easement creates a scenario involving overlapping land rights, and typically a scenario involving shared land use as well, in which no single party has complete control over the land use that can take place within the easement area, but the concept of exclusivity has the capacity to eliminate the shared land use component of that equation, tipping the balance of power between the dominant and servient parties to a potentially dramatic extent. Conflicts stemming from shared use of any given area bearing an easement are not limited to those issues which may arise between the easement's grantor and its grantee however, or even between successors of the grantor and the grantee, because another source of easement friction arises, pitting one easement grantee against another, when additional easements are created on top of existing easements. Typically, any number of easements can be created upon the same ground, either for the same purpose or for differing purposes, the sole limitation being that only the current fee title holder is capable of creating additional easements, but although the seniority of the oldest easement covering any particular location enables its holder to successfully protest any direct interference with his authorized activities within that area, the mere presence of his easement does not typically enable him to insist that no more easements can be created, facilitating land use by others, within that same area.

Our discussion of the complexity associated with control over easements begins with one of the most influential easement cases in our nation's history, set in California as World War II loomed on the horizon, and decided less than a year before Californians were beset with fears that their coastline would soon be invaded, in the wake of the attack on Pearl Harbor. During the 1930s, Pasadena sought to extend water service beyond the limits of that city, to a growing residential area situated between Pasadena and Arcadia, so Pasadena acquired numerous waterline easements from various property owners in that area, and then installed equipment within those easements, which were all described as being 5 feet in width. No controversy over the location of these easements existed, and the Pasadena pipes were all properly placed within each easement, but a competing water provider, California-Michigan Land & Water (CMLW) saw an opportunity, because the pipes installed by Pasadena did not occupy the full 5 foot width of the easements. Promising lower water rates, and with the approval of all the property owners who had granted the aforementioned easements to Pasadena, CMLW proceeded to install its own network of water pipes within those easements, about 1 foot away from the Pasadena pipes, and commenced serving its new customers. Pasadena was thus forced to file an action, seeking to have CMLW judicially compelled to remove their pipes from the Pasadena easements, on the grounds that those easements were meant to serve only Pasadena, maintaining that the property

owners, after having granted easements to Pasadena, retained no right to allow any other party, such as CMLW, to make use of the same area for the same purpose. The contention set forth by Pasadena was rejected at the trial court level however, so Pasadena took the matter to the Supreme Court of California (CASC) leading to what would become the most widely renowned Twentieth Century ruling on the subject of easement control. Does an initial grantee of an easement, upon ground which bore no easements at the time when the initial easement acquisition occurred, have a right to presume or expect that he will never have to share that area with any other grantees of subsequently created easements covering the same area, or can the scope or parameters of a documented easement effectively reflect an intention relating to the exclusivity of the anticipated land use by the easement grantee without ever expressly defining the acquired right as being exclusive?

In City of Pasadena v California-Michigan Land & Water (110 P2d 983 - 1941) a deeply divided judicial panel answered that question in the negative, by a margin of 4 to 2. In the view of the majority, the fault resided with Pasadena, not with either the property owners or CMLW, because Pasadena had prepared the easement documentation, and thus had full control over its contents. The easements granted to Pasadena were not expressly described as being exclusive, but Pasadena argued that they were all implicitly exclusive, for the benefit of Pasadena alone, since any other use of the easement area, for water pipes or any other form of underground utility service, constituted an unlawful interference with their right to use the entire easement area, to its full specified width. The majority rejected that argument, on the basis that if Pasadena had intended to acquire an exclusive right, they should have put the property owners on notice of that intent, by explicitly describing their easement as being exclusive unto Pasadena, in the language of each easement conveyance, which they had neglected to do. Thus Pasadena was forced to live with the consequences of its own omission to clearly and directly inform the property owners that the right being acquired by Pasadena was one which entailed total control over the easement area by the grantee, depriving the property owners of their right to grant any other easements in the same location. Because the documentation created by Pasadena failed to plainly notify the property owners of Pasadena's expectation that no other parties would be allowed to use the 5 foot strips for utility purposes, the property owners, as the fee title holders, had not legally relinquished their fundamental right to create an unlimited number of easements upon their lands, in granting the rights which had been obtained by Pasadena. But what made this ruling especially evocative and important was the dissenting opinion, which revealed judicial willingness to uphold the concept of easement exclusivity even in the absence of the term "exclusive", when circumstances suggest that exclusivity was either most appropriate or actually intended. Thus significant judicial divergence emerged at this time, over the applicability of extrinsic evidence to the determination of the scope of the rights relating to any given easement, and the extent to which courts can effectively reform easement documentation based upon judicial analysis of intent, when controversy over the meaning of the language of that documentation highlights its deficiency, necessitating judicial clarification.

Additionally, when the area which any given easement is intended to cover is expressly described, in a manner that limits its use to a specified portion of the servient estate, creating clearly defined easement boundaries, another question relevant to exclusivity arises, regarding the true legal force and effect of those boundaries. The dissenters in the Pasadena case pointed out that the very act of defining easement boundaries with specificity, which is not a legal requirement of easement creation, could very well be viewed in any given instance as an

indication of an intention to definitively segregate the easement area from the remainder of the servient estate, effectively granting a right of complete control over the delineated area to the easement grantee, subject to enforcement against the grantor as the servient party, thereby introducing a form of exclusivity vested in the easement holder. This concept has never been widely embraced however, thus today no presumption of exclusivity typically arises from the mere presence of well defined easement boundaries, reference to easement boundaries is instead judicially perceived only as a way of restricting the anticipated land use, to be made by the easement grantee, to a suitable locus situated within the described area, rather than representing a grant of control over every bit of the outlined area to the grantee of the easement. The Pasadena case also clarified that even when the initial easement grantee is a public entity the easement cannot be construed as being fully public in character, and therefore subject to use by anyone, when the land rights thereby acquired were never intended to be shared with the public at large, despite the fact that the easement fulfills a purpose which is publicly beneficial, on the contrary, the fee title holder retains the right to control who can or cannot make use of the easement area, in the absence of any element of exclusivity embodied in the easement. Nonetheless, the mere fact that any given easement is not public in a broad sense, regardless of who the easement holder might be, does not mean that the easement must be regarded as exclusive, in the absence of adequate language defining it as being exclusive in some respect. Thus no matter how an easement area is described, the rights held within that area by the fee title holder, at any given point in time, are typically truncated rather than being entirely negated by the easement's presence, resulting in a potentially volatile shared use situation, should any owner of the servient estate ever decide to make some use of the land within the easement area, either physical or financial, rather than voluntarily leaving that area to the sole use of an initial easement holder.

The Pasadena case provides broad perspective on the spectrum of rights associated with the creation of an easement, indicating that the right of the servient estate to exert control over an easement area, including the right to grant comparable rights in the same area to others, is not curtailed, unless explicitly limited in that regard by the original easement conveyance, and neither use of the easement area by the owners or members of the servient estate, nor by third parties authorized by them, may be prevented by the dominant parties who hold the easement, in the absence of evidence of an explicit agreement to that effect. The servient estate is presumed to retain all rights to the entire easement area, including the right to decide who may be excluded, where such rights have never been expressly relinquished, while the easement holder or holders, as owners or members of the dominant estate, obtain only the right to make use of the specified portion of the servient estate for the specified purpose or purposes, by virtue of their easement acquisition, they obtain no right of control over the land within the easement area, beyond the right to make unimpeded use of that land for their particular designated needs. Thus the Pasadena ruling provides a poignant reminder that fee title stands as the primary factor with regard to control over land use, even in locations where rights held by others have been legitimately created, clarifying that the terms "dominant" and "servient" have distinct limitations, and do not denote that the dominant party holds any right equating to complete control over the land which has been subjected to use. To the contrary, the brand of dominance with which the easement holder is imbued relates solely to his capacity to make unhindered use of the burdened ground to the extent that his needs require such use, while the state of servience imposed upon the fee title holder refers only to the fact he or she must allow the dominant party to make the agreed use of the land, and must take no steps to hinder or prevent that use. But the utility

context, in which the Pasadena controversy arose, obviously represents just one of the many branches of the expansive easement concept, typically involving public rights, often upon or within property privately held in fee, and as we will see going forward, judicial application of the principles which were in play in that case is subject to numerous qualifying factors, when easements of other kinds, for private purposes and derived from agreements between private parties, require adjudication, due to disagreement between those parties or their successors over the degree to which they are entitled to control activity with the easement area.

Federal judicial input on the subject of easement control, highlighting both the significance and the ambiguity embodied in the concept of easement exclusivity, was provided during the 1970s, in the condemnation context. The Wrights owned land near the Mendocino National Forest in northern California, and their property had no public road frontage, so they acquired an access easement, enabling them to use a private road which ran from a nearby public highway past their tract, along its way toward that federally reserved forest land. The easement acquisition made by the Wrights was never questioned in any respect, and no issues arose regarding their rights associated with that road for several years, until the US Forest Service (USFS) decided to acquire the road in fee through condemnation, in order to allow USFS to remove all of the existing privately installed gates along that road, to provide unimpeded public access to the federal property lying at the end of the road. All of the land owners whose properties were traversed by the road were properly compensated by the US, and the condemnation process was completed in the typical manner, but no compensation was provided to the Wrights, because their tract was not crossed by the condemned road, and federal personnel deemed it necessary to pay only those property owners who held fee title to some portion of the road for this public taking of some of their land. The Wrights protested however, pointing out that their access easement upon that road was expressly described in their deed as being "exclusive", and demanding compensation, because the gates had been federally removed and the road had been thrown open to public use, dramatically increasing the level of traffic on the old road, which in turn reduced or eliminated the state of solitude and isolation in which they had been living on their tract. The Wrights were denied any compensation at the federal trial court level, on the grounds that only the fee title holders who owned the lands crossed by the road at issue were entitled to payment for the federal acquisition of that road, forcing them to appeal the matter. Does a party who holds an easement that is defined as being exclusive in nature, providing that party with a legal interest in an existing roadway, which has historically served numerous other parties as well, have any right to compensation when that road is converted from a privately controlled path of access to a highway open for public use, even though no portion of that road lies within the estate held in fee by that party?

Just as in the Pasadena case, the legal question presented here produced conflicting judicial responses, once again indicating the depth of the complexity which the concept of exclusivity introduces to the realm of easement law. In United States v 10.0 Acres and 33.4 Acres (533 F2d 1092 - 1976) 2 of 3 members of the Ninth Circuit appellate panel who were confronted with this scenario answered that question in the affirmative, determining that the Wrights were right, they were entitled to compensation, for the loss of their right to exert control over the use of the road at issue, which had been governmentally taken from them, and that the federal project team had wrongly ignored the fact that the easement which the Wrights had acquired was genuinely exclusive in nature, despite frequent use of that road by many other parties. In an effort to justify the federal decision to pay the Wrights nothing, the federal legal team pointed out that the

Wrights still had the right to use the road to access their land, just as they always had, insisting on that basis that nothing was actually taken from them, while also suggesting that the easement held by the Wrights was not truly exclusive, and was therefore wrongly described in their deed as being exclusive, because it had long been shared by multiple private parties, and the dissenting Ninth Circuit Justice agreed with that federal position, finding that the Wrights had really lost nothing. But the majority, focusing upon the fact that the US had no basis upon which to attack the validity or legitimacy of the easement acquisition that had been made by the Wrights, held that the presence of the word "exclusive" in their deed was decisive. Even though the Wrights had acquired no right to prevent others who held an equal right to use the road from using it, they had in fact acquired a right to exclude all other parties, who held no documented right to use that road, so the Wrights were the holders of a limited right of exclusion, until the US threw the road open to the public, thus the Wrights had indeed suffered a compensable loss of a valuable property right at federal hands. In so holding, the majority declined to allow federally presented extrinsic evidence, verifying that the Wrights had never been the sole users of the road in contention, to negate the reference to exclusivity in their deed, just as the CASC majority had refused to embrace any extrinsic evidence supporting exclusivity in the Pasadena case. Thus both the power of the presence, and the consequences of the absence, of the term "exclusive" were judicially established in the Golden State with respect to easement documentation, but as we will see, future cases would soon require courts of other states to deal with numerous variations on the theme of easement control (FN 1).

While employment of the term "exclusive" in easement documentation holds the potential to alter the balance of power with respect to control over the use of the easement, and can be indicative of an intention to bestow a right of unilateral easement control upon a particular party, it is very often ambiguously used, leaving both the scope of the easement, and who really controls it, subject to judicial interpretation. Ankeny and George owned adjoining properties in Douglas County, Oregon, and in 1967 they decided to settle a dispute they were having over Ankeny's use of a road that crossed the George tract by creating, signing and recording an easement agreement authorizing Ankeny's use of that road. Attorneys for both sides collaborated on the easement language, and the resulting document defined Ankeny's access easement as being exclusive in nature. Both parties continued to use the road over the ensuing years however, and neither party attempted to restrict use of the road by the other, so no controversy arose until 1975, when Coombs acquired the former Ankeny tract. After reading the easement agreement, and noting the presence of the word "exclusive" therein, Coombs informed George that in his view the language of the agreement provided him with the sole right to use the road, thereby notifying George that he would no longer be able to make any use of that road. In response, after having his property surveyed and being informed that the legal description which appeared in the easement agreement did not accurately follow the existing path of travel, leaving part of the road outside the described easement area, George filed an action against Coombs, asserting on that basis that he had the right to prevent Coombs from using the mistakenly described portion of the road. The trial judge ruled that the description error was inconsequential and did not legally operate to enable George to prevent Coombs from using the road in question, because the agreement clearly allowed use of the old road without regard to its location, but ruled in favor of George on the easement control issue, informing Coombs that he had no right to prevent George from using the road. Can the legal meaning and impact of the term "exclusive", when it appears in easement documentation, be judicially analyzed and construed in the light of extrinsic evidence, regarding the actual intentions of the parties who

chose to employ that term, for the purpose of limiting the exclusionary force of that word, and is the fact that an attempt to numerically outline an easement's location failed to accomplish that objective either wholly or partially fatal to the easement's existence?

Both parties elected to appeal the aforementioned trial court ruling in George v Coombs (562 P2d 200 - 1977) bringing the case before the Supreme Court of Oregon (ORSC) which proceeded to fully uphold the treatment of the issues by the lower court. The ORSC agreed that the mere fact that the legal description which was intended to cover the road at issue was inaccurate had no legal impact upon the rights of the parties relating to the existing road, because there was no suggestion that the road's location had ever been materially altered either substantially or deliberately, so the sole issue was who had the right to use the road under the terms of the 1967 agreement, which both parties agreed was still in full effect, and the resolution of that issue hinged entirely upon the meaning assigned to the key word "exclusive". After acknowledging that the presence of that term can be indicative of the creation of a right of complete exclusion vested in a particular party, typically the dominant estate holder, the ORSC found that no such exclusionary right had been created. George wisely presented testimony, from an attorney who had composed the easement agreement language, which clarified that when the agreement was documented the element of exclusivity was intended to refer only to the nature of the use which could be made of the road, and not to the identity of the road users. Given the ongoing use of the road by George after the agreement, the ORSC deemed that vitally informative testimony to be both relevant and acceptable, enabling it to serve as the foundation for his victory on the easement control issue. Because Coombs was not present when the agreement was forged, he was unaware, even after reading that document, of its true intent, which was to limit the use of the easement by Ankeny to minimal residential use, and it was that objective, the ORSC recognized, which had resulted in the inclusion of the word "exclusive" in that document, rather than any intent to prevent George, as the servient estate holder, from using the road as well. Thus through the use of extrinsic evidence, the ORSC clarified the real meaning of the term "exclusive" to the relevant parties at the moment of their agreement, verifying that it served as a limitation upon the right of the dominant estate relating to the easement, rather than comprising a limitation upon the servient estate. In so ruling the ORSC staunchly protected the rights of the servient estate, just as did the CASC in the Pasadena case, but most importantly, unlike both the CASC and the Ninth Circuit, the ORSC did so through the use of extrinsic evidence, effectively negating the assumption made by Coombs, as the easement holder, that the term "exclusive" could only operate to his benefit (FN 2).

When an easement is created for the benefit of the party who created it, typically by means of a reservation of rights by a grantor, as opposed to an easement which was created upon the land of the grantor to serve others, such as an adjoining property owner in need of access, the burden upon the party composing the easement language is elevated, in accord with the principle that any party who engages in the creation of rights for his own benefit bears a burden to do so with complete clarity. Montana provides us with a case which illustrates both the power of the exclusive easement concept, and the importance of recognition of its capacity to eviscerate a servient estate, when a right of total exclusion is created with a level of clarity that is sufficient to withstand judicial scrutiny. Macpherson acquired a large tract on the outskirts of Helena in 1960, comprised of steeply sloping land, and he naturally built his house on the highest ground, which was situated in a rear corner of his property, requiring the construction of a long and winding driveway, with several switchbacks, to reach his home from the only public road that

served his tract. Over the next 20 years, he sequentially sold off several parcels lying between his house and the public road, at the opposite end of his tract, all of which were crossed by his driveway, reserving an access easement serving his retained parcel in each conveyance. Macpherson eventually sold a parcel directly adjoining the parcel bearing his house, and once again he reserved an easement for "ingress and egress by the first parties", which he identified as "exclusive", to insure that no one could ever block his use of the upper portion of his long driveway. When Smoyer acquired that parcel however, he proceeded to park on a portion of the driveway that passed through his parcel, hindering use of the driveway by Macpherson, and forcing Macpherson to file an action, seeking judicial confirmation of his right to make sole use of the driveway. Macpherson asserted that the exclusive easement he had created enabled him to legally prevent Smoyer from making any use whatsoever of the portion of the Smoyer parcel bearing the driveway, while Smoyer insisted that as the fee owner of the relevant land, he had an undeniable right to make use of his entire parcel, including the driveway. Can the use of easement language clearly intended to create an exclusionary right enable the dominant party, as the holder of that right, to completely exclude all other parties from the easement area, even allowing the dominant party to bar the owner of the servient land from using the easement area for its intended purpose?

In Macpherson v Smoyer (622 P2d 188 - 1980) the Supreme Court of Montana (MTSC) examined the aforementioned conveyances which had been made by Macpherson, and concluded that he had appropriately created a genuinely exclusive access easement in the documentation of those conveyances, by adequately communicating the fact that the easement in question was devised solely to serve the parcel bearing his house, upholding a lower court ruling in his favor. Smoyer not surprisingly protested that allowing the appearance of the word "exclusive" in that documentation to prevent him from making any use at all of some of the land he had acquired was unjustified, but the MTSC was unsympathetic to his assertions, finding that the documentation which Macpherson had created served to provide any party acquiring the Smoyer parcel with clear notice that Macpherson retained a right of total control over all use of the driveway, by anyone for any purpose, including the purpose of vehicular accommodation, which that easement was plainly intended to serve. Noting that there were no physical circumstances standing in contradiction to Macpherson's clearly stated intent to maintain full control over any and all use of the relevant portion of the circuitous driveway, the MTSC found it impossible to agree with Smoyer that his fee title to the contested area provided him with the legal capacity to make shared use of that area, along with Macpherson. Where a right of total exclusion has been satisfactorily expressed in relevant documentation, the MTSC thus clarified, the dominant estate can exert sole control over the entire area which has been subjected to the easement, becoming in effect the holder of a possessory right, while leaving the servient land owner with nothing more than a reversionary right to unburdened fee title to that area, in the event that the easement should ever cease to exist for any reason. As the outcome seen here demonstrates, where a servient estate is carved out of a dominant estate, any amount of the acreage comprising the servient estate can represent nothing more than an empty fee acquisition, when the dominant party expressly retains control over any and all use of an exclusive easement area within the servient parcel. In reality, in this instance it was Macpherson's problematic parcel design, employing simplistic rectangular parcel boundaries, without sufficient regard for the configuration of the winding driveway, that constituted the real root cause of controversy, but that factor was legally inconsequential, because Smoyer had accepted his parcel with both open physical notice and documentary notice of this problematic

access scenario, requiring him to live with the consequences of that uninformed decision on his part (FN 3).

Although both the balance of power and the mutual duties accompanying shared land use, which come into existence whenever an easement is created or conveyed, typically involve primarily the dominant and servient estate holders at any given point in time, establishing the scope of any easement soundly and clearly can be equally important to third parties, who had no role in its creation, but who may subsequently step into the shoes of either the grantor or the grantee, or may otherwise become entangled with the benefits and burdens associated with the dominant and servient estates. Accordingly, many matters pertinent to an easement's scope, which were not a source of controversy when the easement was created, can introduce conflict when previously uninterested parties eventually come upon the scene, bringing previously unconsidered perspectives and attitudes into play. Garner owned property in rural Kootenai County, in northern Idaho, where land access is often problematic for reasons stemming from both climatic conditions and terrain that is typically difficult or even impossible to navigate. In 1968 Garner decided to invest a substantial amount of money in providing his property with reliable year round access, and he began by acquiring access easements from 2 neighbors, whose lands he needed to cross, then he built a road leading from a public highway to his property, within the 2 easement parcels he had just acquired. Garner wanted to insure that he would never have to share his new road with anyone, so he requested exclusive easements, and both of his neighbors complied with that request, granting him easements which were expressly described as being exclusive in nature. Garner used the road he had built without incident while his neighbors retained ownership of their tracts bearing his road, and they never made any use of it themselves, because they understood that the reference to exclusivity in their deeds to Garner amounted to a pledge that they would never use that road. In 1977 however, after acquiring all of the land previously owned by Garner's neighbors, Latham elected to challenge the exclusivity of Garner's easement, and he filed an action seeking a judicial order requiring Garner to allow Latham to use the road. The trial judge, upon noting the language of exclusion in Garner's deeds, awarded victory to him, directing Latham not to travel upon Garner's access road, but Latham persisted, taking the matter to the Supreme Court of Idaho (ISC). Is the fact that an access easement holder went to the expense of building a roadway within his easement, in a location where no road had ever previously existed, rather than merely acquiring a right to use an existing road, indicative of an intention on his part to maintain sole and complete control over that road, when supported by easement documentation which identifies his easement as being "exclusively" for his use?

The case of Latham v Garner (673 P2d 1048 - 1983) was destined to become the most influential judicial ruling expressly centered upon the exclusive easement concept in the context of private land use in the PLSS states. Despite the fact that Garner's easement deeds very plainly indicated that his access easements had been created solely for his benefit, and a right of exclusion with regard to both easements had clearly been bestowed upon him, as the holder of the dominant estate, the members of the ISC were deeply divided on the central issue, which was the legal effect of the exclusionary language appearing in those deeds, and 4 of the 5 Justices deemed it necessary to separately communicate their diverging legal positions. A majority of 3 Justices deemed it unjustifiable to allow Garner to apply the right of exclusion which he had acquired to Latham, after Latham had acquired the servient estate, even though Latham had notice of the easements burdening the land he had acquired, thereby justifying Latham's suspicion that the

lower court ruling against him would not withstand appellate review, by only the narrowest of margins however. Although Garner had the right to exclude Latham, and any other third parties, before Latham made his land acquisitions, once Latham became the servient estate owner, the majority held, Garner could no longer prevent him from using the Garner roadway, because the power to exclude the owner of the servient property cannot be acquired by obtaining anything short of fee title. In the eyes of the majority, dominant and servient parties to any given easement stand as equals, with regard to their own actual use of the easement area, neither of them can justifiably prevent the other from using the easement area for its designated purpose, and when the element of documented exclusivity is introduced it operates merely to bar either of them from granting any additional rights within the easement area to any third parties. Rather ironically, all of the ISC Justices agreed that extrinsic evidence was relevant to the judicial focus upon the issue of potentially total unilateral control over the easement, introduced by the documented reference to exclusivity, and the majority concluded by expressly directing the trial judge to give fuller consideration to all such evidence upon remand. The dissenters however, were entirely comfortable with the conclusion reached by the trial judge, who had found that none of the extrinsic evidence contradicted Garner's position, and were satisfied that Garner really was meant have complete control over all use of the easement. Nonetheless, nearly every western court dealing with the exclusive easement topic in the private context since 1983 has cited this ruling, mindful that any document purporting to convey an exclusionary right, without specifying which party holds that right, is inherently ambiguous, and has concurred with the proposition, set forth with especially powerful effect here, that a mere reference in a deed to an easement as being "exclusive" fails to convey any right of absolute exclusion (FN 4).

While the Latham case provides judicial perspective upon a scenario involving the legal implications which arise with regard to easement control when the servient estate is conveyed, a Washington case adjudicated 15 years later demonstrates that the same issues regarding easement usage, focused on the existence or absence of shared land rights, can emerge when the dominant estate is conveyed as well. Fearing owned a landlocked tract in rural Benton County, which she accessed by way of an undocumented roadway that began within her tract and then passed across the rear portion of several adjoining properties before reaching a public highway. In 1993 Fearing decided to sell her property, but she was informed at that time that her tract had no legal access, so she quite appropriately directed her attorney to acquire access easements on her behalf from each owner of the properties that were crossed by the road she had long been using. Her attorney however, apparently being unfamiliar with easement law, evidently just copied some easement language he found in an existing access easement deed, which happened to contain the phrase "exclusive easement", so the easements he acquired for Fearing were all defined as being exclusive in character, since all of the easement grantors signed the documents he had prepared without raising any objection to the presence of the term "exclusive" therein. Harris then acquired the Fearing estate in 1994, enhanced by the newly created access easements, confident that he had thereby obtained complete control over the old road, and promptly proceeded to inform all of the easement grantors that they could no longer use the Fearing access road, because it represented an exclusive easement, vested solely in Harris, giving him total control over all use of that road. Barkubein and Johnson, who were among the several easement grantors, refused to comply with that order from Harris however, so he was compelled to file an action, seeking a judicial decree barring them from making any use of the road in question. The trial judge quite naturally examined all of the relevant deeds, and proceeded to fulfill the request made by Harris, ordering Barkubein and Johnson to cease all use of the

contested roadway, by means of summary judgment, on the grounds that the presence of the word "exclusive" in each deed plainly prevented any of the easement signers from asserting that the Harris easement was not under the full and absolute control of Harris. Does a decision by an easement grantor to agree to grant an exclusive easement, supported by duly authorized and recorded documentation confirming the creation of an easement of that nature, legally bar or estop that party from ever asserting any right to make use of the easement area?

The vanquished defendants were cognizant of their rights, and wisely proceeded to place the case of Harris v Barkubein and Johnson (1998 WL 272779) before the Court of Appeals of Washington (WCOA). The defendants had presented evidence clarifying that the road at issue was in fact used by all of the parties whose properties it crossed, including Fearing and themselves, for many years, under the erroneous assumption that it was a public right-of-way, because garbage trucks regularly used it for trash pickup, but the trial judge had declined to accept that evidence, due to the appearance of the word "exclusive" in every relevant deed. Not surprisingly however, the WCOA recognized that the road in contention had never been used in any exclusive manner, having quite obviously been used by numerous parties throughout its history, until the creation of the problematic deeds, purporting to strip that private right-of-way of its commonality, and transfer sole control over its use to the predecessor of Harris. The challenged plaintiff nonetheless maintained that he had legitimately acquired easement rights which were clearly defined as being exclusive, so his right to exert total control over that private right-of-way could not be denied, without doing legal violence to all of the deeds which the defendants had executed. After noting that the language defining the right-of-way which had been granted by the defendants was created by an attorney who apparently had no comprehension of the potential legal impact of that language, while acting as an agent for the plaintiff's grantor, the WCOA informed Harris that his victory could not stand, reversing the summary judgment and sending the matter back to the trial court level for proper adjudication. In so doing, the WCOA agreed with the defendants that the circumstances suggested no intention on the part of any of the easement grantors to bestow any right of exclusion upon Fearing, deeming the trial judge's decision to disregard that circumstantial evidence to be fatal judicial error, because the objective of all easement adjudication is to ascertain the true intentions of the parties, in order to determine what the language they used actually meant to them. Because the term "exclusive" is inherently ambiguous, the WCOA stated, citing the Latham and Wilkoske cases among others, the trial judge had wrongly refused to allow the defendants to present their evidence explaining its meaning to them, so they had to be given an opportunity to prove, through the employment of extrinsic evidence, that the element of exclusivity appearing in the relevant deeds was actually understood by them, as the easement grantors, to operate as a limitation upon the rights they granted to Fearing, rather than limiting their own existing easement rights. In addition, the WCOA concluded by noting that Harris had failed to carry his burden of inquiry regarding the true meaning of the relevant easement language, and that any prescriptive rights held by the defendants, facilitating their ongoing use of the road in contention, were not legally negated when they conveyed easements to Fearing, directing those previously unaddressed issues to be properly addressed upon remand (FN 5).

As many of the cases we have already reviewed suggest, due to the well established relevance of extrinsic evidence in the resolution of easement disputes, judicial observation of who authored the language defining any given easement, and what motivated that easement's creation, can become key factors in judicial assessment of the scope of a contested easement, providing crucial

insight regarding the objective which the easement was created to accomplish, and thereby shedding light upon the meaning which the easement language was crafted to convey. Proto-Cam owned urban property which that company used for industrial purposes in a congested commercial district in Grand Rapids Michigan, where reliable access is at a premium and is essential to business operations. When vacation of a certain platted public street abutting the Proto-Cam property was proposed Proto-Cam objected, leading to negotiations between attorneys representing Proto-Cam and those representing another business operation, located on the opposite side of the street in question, which favored the proposed vacation. As a result of those efforts to reach a mutually agreeable outcome, an easement was produced, in which the owner of that neighboring business granted Proto-Cam the right to use that platted street as an access route serving Proto-Cam's manufacturing facility, enabling Proto-Cam to continue making use of the former public right-of-way after it was vacated, and once that matter was settled, the proposed street vacation was formally finalized in 1998, Proto-Cam's objection having been withdrawn. The easement language, composed by an attorney employed by the grantor and approved by the owner of Proto-Cam, specified that the interest being created was "an exclusive easement ... exclusively reserved for Grantee for the purposes of ingress, egress and parking (which) shall not be used for any other purpose ... Grantor shall not interfere with Grantee's use for the purposes set forth herein". After the easement grantor's property was acquired by 940 Monroe LLC however, and construction work on that property commenced, directly across the former street from Proto-Cam's facility, the easement area became severely congested, as construction vehicles parked along the roadway, which made it difficult or impossible for trucks serving the Proto-Cam plant to enter and exit, leading Proto-Cam to file an action charging 940 Monroe with trespassing. Can judicial evaluation of evidence of prior events, leading up to and surrounding the creation of an easement, provide context illustrating the intended meaning of the words appearing in the documentation of that easement, and thereby form a valid basis for conclusive judicial determination of the legal force and effect embodied in the easement?

The trial judge tasked with ascertaining the true legal scope and extent of the rights acquired by Proto-Cam when the easement at issue was executed had to determine whether a right of total exclusion had been conveyed to Proto-Cam by the predecessor of 940 Monroe or not, in order to resolve the trespassing assertion made by Proto-Cam. If the easement rights granted to Proto-Cam included a genuinely exclusionary component, then 940 Monroe could be deemed guilty of trespassing, even though 940 Monroe held fee title to the land upon which all of the relevant events took place. Noting that the language of the easement in question was composed by the easement's grantor, and that the overall objective which motivated the easement's grantor to create the easement was the need to achieve agreement on the street vacation issue, which once resolved was distinctly beneficial to that grantor, the trial judge concluded that the Proto-Cam easement was in fact completely exclusive, and therefore allowed Proto-Cam to bar 940 Monroe and their construction personnel from making any use of the vacated right-of-way whatsoever. 940 Monroe protested that the references to exclusivity in the language of the easement were not intended to benefit Proto-Cam, and instead were intended to communicate the idea that use of the easement area by Proto-Cam was limited to "ingress, egress and parking", indicating that no other use of that area could be made by Proto-Cam. In addition, 940 Monroe pointed out that the phrase "Grantor shall not interfere with Grantee's use" would be entirely superfluous, and its inclusion in the document at issue would be pointless, if the easement had been intended to prevent the grantor and the grantor's successors from ever using or even

entering the easement area at all. But the trial judge was unconvinced, and the Court of Appeals of Michigan (MCOA) fully upheld that lower court ruling in Proto-Cam's favor (Proto-Cam v 940 Monroe LLC - 2004 WL 2913616) agreeing that such problematic easement language must be construed in a manner most advantageous to the grantee, due to the fact that the grantor was responsible for the composition of that language, leaving successors, such as 940 Monroe, unable to escape its legal consequences. Interestingly, in so doing the MCOA cited the Latham ruling, in which no right of exclusion was found to exist, and in which the troublesome exclusionary easement language was prepared by the grantee rather than the grantor of the easement, demonstrating the strong inclination of all courts to emphasize the gravity of the task of preparation of conveyance documentation, and to hold those who take on that task responsible for providing complete clarity therein (FN 6).

Although the virtually inevitable presence of ambiguity makes creation of truly secure exclusive easements highly problematic, and our courts persistently strive to prevent the apparent injustice which can result when a grantee of land discovers that he can make no use of it at all, leaving him with an utterly empty fee title for all practical purposes, as we have seen, a right of total exclusion which has been objectively created and openly proclaimed will be judicially upheld, even when the result is particularly severe. Our last featured case comes, quite ironically, from California, standing as it does in sharp contrast to the Pasadena case, with which our historical review commenced, but as we will observe, this does not signify that confusion afflicts the law, instead it emphatically reminds us of the importance of defining the attributes and limitations associated with easements, and particularly the element of exclusivity, in the clearest possible terms. Gray and McCormick owned adjoining lots in a highly prestigious subdivision in Orange County, designed to accommodate multi-million dollar homes, linked by private streets, but the Gray lot had no frontage upon any of those platted streets. The subdivider had squarely addressed this problem however, before any of the platted lots were sold, by creating a platted easement, allowing access to the Gray lot across the McCormick lot, and the exact nature of this easement was fully defined in a duly recorded "Declaration of Covenants, Conditions, Restrictions and Reservations of Easements", which was created in 1984 and augmented in 1994. McCormick was fully aware that his lot was burdened with an access easement, which was expressly defined in recorded documentation as being exclusive, when he subsequently acquired his lot, but he believed that the reference to exclusivity in that document simply limited the use of the easement to access, rather than barring any servient use of the easement area, which occupied a 90 foot by 16 foot portion of his lot. When Gray later acquired his adjoining lot, and informed McCormick that he intended not only to make use of the easement area, but also to build walls on both sides of it, preventing McCormick from ever again entering that portion of the McCormick lot, McCormick refused to allow the proposed construction work to take place, forcing Gray to file an action, seeking to have McCormick judicially compelled to cease his resistance and allow the construction work to proceed. Does an easement which has been legally defined as being exclusive in character, during the process of subdividing land, and has been deemed to be appurtenant to one particular lot in so doing, enable the owner of that dominant lot to make sole use of the entire easement area, to the total exclusion of the servient estate holder, through the construction of permanent structures upon the easement, effectively truncating the servient property to that extent?

The trial judge, deeming Gray's proposed use of the easement area to be plainly excessive and unjustified, denied his request for judicial confirmation of his exclusionary rights, but in Gray v

McCormick (84 Cal Rptr 3d 777 - 2008) the Court of Appeals of California (CCOA) reversed that ruling, agreeing with Gray that he was the holder of a genuinely exclusive right to make sole use of land situated within the McCormick lot, while rejecting McCormick's assertions that he could not be legally walled out of any portion of the property to which he held fee title. In his defense, McCormick noted that the recorded declaratory documentation, defining the rights of the relevant lot owners, included an indemnification clause, requiring each owner of the Gray lot, as the dominant parties, to "hold harmless" each owner of the McCormick lot, and McCormick argued that this clause would be legally meaningless and useless if he had no right to use or enter the easement area at all, in which event no shared use of that area could ever occur. The CCOA however, explained to McCormick that the indemnification clause did not envision or relate to any mutual use of the easement area, and did not carry any implication that he had any right to enter the easement area for any reason, instead it related only to liability for any injury which Gray might incur while making use of the relevant portion of the McCormick property, thus it could not be construed as eroding the exclusivity of Gray's easement and thereby supporting McCormick's position. For his part, Gray maintained that his proposed construction of walls along the easement boundaries, completely isolating the easement area from the remainder of the McCormick lot, was justified, because McCormick had horses, which he rode around his lot, and Gray presented evidence that McCormick's horses had defecated within the easement area, which Gray deemed to be an unacceptable intrusion upon his exclusive rights to that area. The CCOA agreed with Gray that he had acquired a right to block all use of the easement area by any others, including McCormick, emphasizing that McCormick should have known that he had never acquired any right to make use of that area, thereby leaving the hapless servient lot owner with the ability to utilize only a fraction of the property which he owned in fee. This outcome, which represents perhaps the most extreme example of the operation of the exclusivity concept in the private easement context in the western part of our country, might at first glance seem to herald judicial abandonment of the protection of property rights held by servient parties, when contrasted with the Pasadena case, decided nearly 7 decades earlier, but in reality the key distinction between these superficially opposed rulings is not difficult to perceive. Pasadena, as the dominant party in that earlier ruling, made the mistake of presuming the implied presence of exclusivity, and therefore lost, while in this instance, the exclusive rights of Gray were legitimately founded in clear, comprehensive and unequivocal documentation (FN 7).

Returning at last to Louisiana, and the conflict in Tangipahoa Parish which resulted in the federally adjudicated Seilham case, after observing the importance of proper easement documentation along with the consequences of ambiguous easement documentation, we can see that the senior Arnolds, poorly advised regarding the significance of completeness in easement creation as they evidently were, actually created 2 distinct problems for their descendants and their legal successors, by failing to make vital information relevant to the existence of their access easement readily available in public records, and by neglecting to define its scope of usage in any specific terms. As Naramore, Steib and Martinson, the principal beneficiaries of the easement realized, in order to prevail in their legal action they would need to prove that the easement legally existed, while by contrast their opponents, Aikman and Seilham, as the servient estate holders, would need to prove that the use of the road in question by Martinson for logging was abusive, or exceeded the authority of Martinson, as a dominant estate holder, to make use of that road, in order to prevail. Thus the initial or threshold issue was the easement's existence, but the ultimate issue was which of the contesting parties held the superior right of control over

the easement area, and resolution of that issue hinged upon the scope of the rights which were vested in Martinson when the easement was created. Aikman and Seilham therefore faced the daunting task of proving that the intensive use of the road at issue by Martinson was outside the scope of the rights that were generated by the minimally informative easement documentation which had been created by Martinson's parents over half a century before, and the defendants would have to do so without the powerful legal resources of their title company, since Commonwealth Title had declined to participate in the state court action filed by the descendants of the senior Arnolds. This confrontation thus presented the classic question of the degree to which any sudden, unanticipated and previously unaddressed intensification in the use of the easement rights held by a dominant party can operate as a disruption of the lives of the servient parties, without overburdening the servient estate, and thereby providing its occupants with justification for their demand that the accelerated usage must cease, or as the defendants viewed this scenario, the extent to which an easement holder can control what occurs upon the servient property within the easement area. The result of this legal action (Naramore v Aikman - 252 So3d 935 - 2018) at the state court level, which took 7 years to navigate its way through the Louisiana judicial system, would inform and guide the subsequent adjudication of the federally conducted Seilham litigation.

As we have noted, the presence of the road in contention (shown above) was not a problem for many years, even though throughout that period at least 3 distinct access easements actually burdened the driveway situated upon the westernmost parcel created by the Arnolds, where that road reached a public highway, unknown to the defendants as the owners of that parcel, due to poor easement documentation which was created decades before their arrival, leading them to focus on challenging the existence of the Naramore and Martinson access easements (FN 8). Because the easement documentation put in place during the 1980s, as previously outlined above, which served as the foundation for the access rights of both Naramore and Martinson, made no reference at all to access, ingress, egress, passage or any other form of travel,

the defendants made the key mistake of concentrating their attention and their legal efforts upon the extinction of those easements, while neglecting to expressly argue that use of the road for logging overburdened the easement. Fortunately for the descendants of the senior Arnolds, the implied easement concept has been codified into statutory law in Louisiana, enabling the plaintiffs to easily prove that their easements were created not only in accord with common law tradition, but by operation of statutory law as well, so the position set forth by their opponents was not destined to taste success (FN 9). Any easement created without specificity regarding its usage represents a source of potential danger for all parties concerned, because the intent behind its formulation is thereby rendered speculative, but as the defendants learned to their great chagrin, the absence of any documented limitations upon the use of an easement can operate in favor of the easement holder, particularly where the easement is one which has historically endured and has been put to actual use for decades, building an informative body of extrinsic evidence which can identify that easement's purpose, as well as the legal basis for its existence. Because the Martinson parcel was wooded at all times, the relevant presumption at law dictated that Martinson's deceased parents had envisioned that she might elect to log her land one day, and therefore intended the access route which they provided to her to be available for that purpose, enabling her to reasonably maintain that she had not overburdened the Aikman parcel, even had her opponents chosen to directly challenge her right to utilize her easement, which had previously been limited to residential use, in support of such a commercial enterprise. Concluding that none of the use which had been made by Martinson of her nebulously defined access rights upon the Aikman parcel (shown below) had been unduly intrusive, the trial judge ruled in her favor, ordering the driveway to be kept open, as she had requested, and the Court of Appeals of Louisiana fully upheld her victory, motivating Seilham to attack her title insurer for litigational liability (FN 10).

After learning that her hopes of eliminating the unwanted easement were legally unsound, and that she could do nothing to prevent Martinson's logging operation from proceeding to completion, Seilham turned to her title company, demanding compensation for her trial expenses, and in so doing she charged the relevant title personnel with negligence, for their failure to inform her that her property was so encumbered. Although Aikman and Seilham had previously argued that the easement in question was undiscoverable, as part of their defense against Naramore and her fellow plaintiffs, Seilham was required to reverse her position on that issue, and argue here that the easement was in fact readily discoverable, in order to justify her assertion that the title personnel were negligent in failing to discern its existence. The real problem however, as the federal judge tasked with addressing her accusations recognized, was that Seilham never understood the breadth of the limitations upon her title insurance coverage, which narrowly limited her title company's liability, she simply failed to realize that her title insurance merely assured her that her property bore no easements of record, and left her with no assurance that her property was not burdened by either entirely undocumented or inadequately documented easements, which in fact it was. The futility of Seilham's litigation was finally brought home to her when the federal district court granted summary judgment against her, as requested by the Commonwealth legal team, on the basis that the Naramore and Martinson easements, which had obtained validation at the state appellate court level, were legitimately excepted from her title coverage by Commonwealth, and at last it became clear that Seilham was simply the unfortunate victim of the uninformed decisions that were made by the senior Arnolds during the easement creation process. Although they appropriately employed a surveyor in 1979, when they realized that their land division plan would require access easements, to depict the road which was destined to bear those easements serving the properties they planned to grant to their offspring, they unintentionally prevented their own surveyor's work from exerting any legal force, by neglecting to make his survey a matter of public record, and in so doing they effectively set the booby trap which eventually ensnared Aikman and Seilham. Although they properly defined the relevant easements in locational terms, all 3 of the aforementioned surveys were ultimately legally inconsequential, both the state and federal judges agreed, with respect to both the existence and the scope of those easements, but most critically, it was the failure of the Arnolds to make the 1979 survey available for public review at the appropriate point in time, which many years later prevented title personnel from discovering it, that made all of this lamentable controversy and litigation inevitable.

> As concisely summarized by the federal judge: "*the servitude at issue in this case was created by destination of the owner ... reliance upon the public records* (by Seilham) *is misplaced. The creation of the servitude was not dependent upon an expressed declaration in an act of sale* (a deed) *nor did it have to be identified in a survey recorded in the public records ... transfers of the parcels resulted in the creation of the servitude as a matter of law ... it does not appear in the chain of title to the Aikman property ... it would not be revealed by a standard search ... there is no evidence that Commonwealth was negligent ... Commonwealth did not breach the* (insurance) *contract by not providing defense and indemnity to the Aikmans ... Commonwealth's duty to defend was not triggered ... the* (Louisiana) *court's ruling ... constitutes a sufficient ground for granting summary judgment to Commonwealth*".

As can be readily seen, wise and thorough easement creation, properly targeted at precluding future controversy, requires careful and diligent attention to the manner in which the intentions of the parties are outlined in any proposed easement documentation, and this applies to all information pertaining to easements that appears on plats, surveys, and acquisition exhibits as well as that which appears in deeds or other documents of conveyance. Our judicial system bears the constant burden of establishing and maintaining an optimal balance between the rights of dominant and servient parties and estates, and every judicial effort to ascertain the extent of the rights associated with any easement begins with analysis of all relevant documentation, making both clarity and completeness in the preparation of that documentation just as vital as locational accuracy. The cases we have reviewed herein collectively indicate both the potentially massive power of the phrase "exclusive easement" and the fact that its use carries with it the need to clearly and fully specify the intent which that phrase is meant to convey in any given document. Although the basic meaning of the term "easement" is generally well understood, and it is also widely recognized that easement rights are typically not exclusive in nature, in the absence of the expression of such an intention in the document of conveyance, numerous questions must be addressed by any composer of easement language, to avoid the appearance of ambiguity, and its potentially severe consequences. As we have also had occasion to note, the exclusivity concept is not the only way to put in place directives pertaining to sole control over an area burdened by an easement, nor is it typically the best way of doing so, since the broad ambiguity of the term "exclusive" has been judicially emphasized, limiting its usefulness. Easements which have been labeled as being exclusive in the private context invite and often induce activity which brings the overburdening concept into play, potentially in the form of excessive use by a dominant party, or overburdening by a servient party who grants multiple easements covering the same ground to the detriment of other easement holders. The exclusivity concept also plays a separate but equally important role in the prescriptive context, not just as a component of the development of easements through prescription, but also as a judicially imposed limitation, which can seriously impact the usefulness of either the servient or the dominant estate in any given instance. But for those who are professionally engaged in the easement creation process, the lesson is twofold, the power of any language found in existing documentation which suggests an exclusionary intent must be evaluated and afforded its intended effect, while insuring that any documentation which the professional may be tasked with creating employs such language only when the intent to put a genuine right of exclusion in place is present.

So next time the term "exclusive" pops up on your radar screen, when creation of an easement is proposed in the private easement context, ask yourself:

Is there an intention and agreement to create a right of complete exclusion vested in either party, and if so, does the language make it patently and unequivocally clear which party holds the power to determine how that exclusionary right will be exercised?

If the proposed easement is in fact intended to be exclusive in any sense, what effect upon the usual meaning of the term "easement" is the addition of the term "exclusive" meant to have, is it intended to prevent any use of the easement area by a particular or parties, or alternatively, is it intended to limit the types of activities which the easement is being created to support, and has that intent been plainly communicated?

In creating a right of exclusion, is the intention to bind only the parties who are directly involved in the grant of the easement, or is the intention to create a right to exclude only third parties, and does this appear to be adequately specified in the proposed language?

And perhaps most importantly from the standpoint of a professional land surveyor, in the locational context, is the right of exclusion intended to apply to the entire physical area covered by the easement, or only to some portion of that area, which needs to be properly outlined in the latter instance?

Although its certainly true that the parties themselves and their legal advisors, rather than the surveyor, ultimately control the language which will be used to create any given easement, a well informed land surveyor can flag unclear and therefore problematic language they may have unwisely chosen, potentially saving the parties from themselves as it were, and thereby assisting in the successful fulfillment of the team mission, to put in place clearly defined rights, which will be unlikely to produce litigation down the road.

Footnotes

1) A few other cases featuring federal involvement of one kind or another, which are also informative on the topic of easement control and exclusivity, are noted here.

In Oregon Mesabi v C D Johnson Lumber (166 F2d 997 - 1947) which involved the creation and acquisition of a right-of-way for a proposed road across the land of one logging company, to facilitate logging operations upon the adjoining land of another competing logging company, through a statutory condemnation procedure, the Ninth Circuit clarified that condemnation of an exclusive easement requires distinct proof that such an intensive right, exceeding the scope of a typical non-exclusive easement, is justified, and that the creation of an exclusive easement in the condemnation context requires enhanced compensation, due to the intensive burden which the element of exclusivity places upon the servient estate. This case also includes a noteworthy discussion pertaining to the use of land surveys as evidence.

The case of Wilkoske v Warren (875 P2d 1256 - 1994) required the Supreme Court of Wyoming (WYSC) to evaluate dominant and servient rights associated with an access road leading to an abandoned federal military site, long after all of the relevant land had passed into the hands of private parties. In 1959 the US fenced an access easement, along with the federal property which it served, after obtaining both the land and the easement through a condemnation judgment, which described the easement connecting the federal site to a public highway as being exclusive in character. Wilkoske eventually acquired the former federal site in fee, and the easement as well, and he left the fence in place, but Warren removed part of the fence after acquiring the land which was crossed by the access road, because that fencing split his tract into 2 parts, leading Wilkoske to file an action seeking to have Warren judicially compelled to replace the fence. The WYSC declined Wilkoske's request however, on the grounds that the easement at issue could not be deemed to be exclusive, despite the use of the term "exclusive" when it was acquired, in the absence of evidence that the condemnation payment made by the US in 1959 had adequately compensated the servient estate holder for the creation of a federal interest in his land which bestowed rights tantamount to fee title upon the easement holder. But the WYSC is not the only court which has elected not to trust that the term "exclusive" was properly

understood, either by those who decided to make use of it, or by those who subsequently had occasion to try to ascertain its meaning in existing documentation.

See also United States v 269 Acres (2019 US Dist Lexis 56203) for a more recent ruling which demonstrates the vast scope of certain federal easement acquisitions made for military purposes, illustrating that federal courts are prepared to uphold even the most rigorously intensive negative easements, if the supporting documentation defining the easement does so with genuine thoroughness and complete clarity.

2) In the 2011 case of Knight v Nyara (248 P3d 36), the ORSC was again confronted with an exclusive easement, and thus had occasion to provide a reminder that when used in the easement context the term "exclusive" will not always be judicially viewed as being directed at the creation of any right of total control over the easement area. Knight subdivided land which he owned, and in 2005 he sold one of the parcels he had created to Nyara, but in so doing he created an access easement, thereby providing for legal access to the remainder of his land, across the Nyara parcel, and in so doing Knight plainly identified this easement as being "exclusive". Nyara however, insisted that he could not be excluded from the easement area and refused to cease his use of that area, leading Knight to file an action, seeking a judicial decree that Nyara had acquired no right to use the easement area in any way. A lower court deemed the easement to be genuinely and totally exclusive, agreeing that Knight had the right to bar Nyara from entering the easement area for any purpose, but the ORSC reversed that ruling, informing the parties and the trial judge that the legal meaning and effect of the word "exclusive" must be ascertained on a case by case basis, depending on the context in which it is used. In this instance, the ORSC ruled, consistent with the 1977 George case, that the word "exclusive" constituted a limitation upon the scope of use of the easement by the dominant estate, and not a limitation upon use of the easement area by the servient estate, holding that Knight could use the easement he had created only for access. Despite the fact that he had plainly labeled the easement as being exclusive in character, Knight had retained no right to prevent his grantee Nyara from engaging in use of the easement area, the ORSC determined, instead Knight's reference to exclusivity operated to narrow the scope of his own capacity to utilize the easement area, preventing him from successfully asserting that he had retained a right of complete control over that area.

In contrast, the 1906 Minnesota case of Thompson v Germania (106 NW 102) demonstrates that a right to exert full control over an easement, including the right to exclude others from making any use of it, can arise even in the absence of any direct reference to exclusivity in the documentation through which the easement was created. In that case, Thompson created an access easement to serve a particular group of platted lots which he owned, and he identified it as a "private alleyway", to be used "in common", logically describing its course as following the boundary of an adjoining platted lot. After Thompson later sold the lot which he had thus burdened with the easement, the next owner of that lot proceeded to convey a right to use that same easement to Germania, who owned another adjoining lot, that shared the same platted boundary line along which the easement ran. Thompson then filed an action, seeking a judicial decree that Germania had no right to use the easement, but the trial judge held that the easement was not exclusive in nature and that Thompson therefore had no right to exert any control over its use by any other platted lot owners such as Germania. The Supreme Court of Minnesota (MNSC) reversed that ruling however, agreeing with Thompson that he had in fact

retained a right to exert full control over all use of the easement, despite the fact that he had not characterized it as exclusive easement. In so ruling, the MNSC clarified that use of an easement can be limited solely to the dominant estate, comprised of the particular land which the easement serves, if the language used to create the easement is indicative of such an intention, and that a servient estate owner cannot expand the scope of an easement by allowing unauthorized parties to make use of it, nor can an easement which adjoins a property boundary be used by the owner of the adjoining land merely because the easement extends to the boundary of his property, if the easement was not created to serve his estate.

On that same theme, in 1988 the Court of Appeals of Minnesota (MCOA) was confronted with a comparable controversy, centered upon control over use of an easement, between occupants of a platted block, in Bauer v Flatgard (1988 WL 6223). Bauer and Flatgard owned lots in the same platted block, and Bauer wanted to build a garage on the rear portion of his lot, facing rearward, so he could access it from the rear, but in order to do so he needed to make use of a 15 foot wide platted easement which ran along the rear line of all the lots in that block, including Flatgard's lot. The easement in question was created by the subdivider when the relevant lots were platted in 1962, and the easement's purpose was identified on the plat in the typical manner, by a note which stated that it was for "ingress and egress, and for placement of utilities". Shortly thereafter however, utility poles had been installed in that easement, running down the center of the 15 foot strip, so no alley had ever been built, and that strip had never been used for any kind of vehicular access to any of the platted lots. Bauer insisted that the easement was clearly intended to be used both for vehicular access and utilities, but Flatgard did not want an alley to be constructed within that strip and did not want Bauer to drive upon the rear 15 feet of the Flatgard lot, as Bauer proposed to do, so Bauer was forced to file an action, seeking judicial confirmation of his right to demand that the utility poles must be relocated to one edge of that strip, in order to enable him to make use of the easement as a driveway, leading to his new garage. Bauer was unable to prevail however, as the MCOA upheld a lower court ruling, in which the platted easement in question was deemed to have been intended exclusively for utilities, and not for vehicular access. Given the fact that the easement had been used solely for utility purposes for a quarter of a century, the MCOA explained, the lower court was justified in concluding, on the basis of that extrinsic evidence, that the words "ingress" and "egress" upon the subdivision plat, were meant to refer only to travel within the easement strip by utility providers, to maintain or repair the utility lines, and not to vehicular travel by lot owners, demonstrating that the actual use to which an easement is put can operate as the primary evidence of its intended purpose, potentially allowing servient parties to successfully resist any expansion of its use.

3) The South Dakota case of Picardi v Zimmiond (689 NW2d 886 - 2004 & 693 NW2d 656 - 2005) provides an informative counterpoint to the Macpherson case, illustrating the consequences of failure on the part of an easement grantee to obtain a clearly defined right of exclusion. In 1998 Picardi acquired a wooded and landlocked 320 acre tract, with the intention of building a house on it, and eventually logging the land as well. He also acquired an easement at that time, from the owner of the land lying between his tract and a public highway, thereby obtaining legal access to his tract. However, the concluding sentence of his easement deed stated "This easement shall allow access to the Picardi property only and to no other property.". Picardi thought those words meant that he had been granted a right of total control over the full width of the easement, which was verbally agreed to be 44 feet, although the existing roadway

was only 18 feet wide, and he planned to widen the road to accommodate logging trucks. In 2001, Zimmiond acquired the tract bearing the Picardi easement, and he built several structures near the roadway, within the 44 foot wide strip comprising Picardi's easement, leading Picardi to file an action seeking judicial confirmation of his right to make sole use of the whole 44 foot strip. After confirming the width of Picardi's easement on the basis of extrinsic evidence however, in 2004 the Supreme Court of South Dakota (SDSC) upheld a lower court ruling that his easement was not exclusive, informing Picardi that the last sentence of his easement deed operated as a restriction upon his own use of the easement, rather than vesting any exclusionary rights in him, as he had mistakenly supposed, leaving him with no right to prevent Zimmiond from using either the roadway itself or part of the easement area. When the case returned to the SDSC in 2005, the central issue was Picardi's desire to widen the road in anticipation of using it for logging purposes, which the SDSC rejected on that occasion, because Picardi's easement deed also stipulated that his easement was created to serve "one single family residence", which in the view of the SDSC made his proposed use of the road to log his land an unacceptable expansion of the easement's documented scope. Because the easement language relied upon by Picardi was wisely and clearly composed by his grantor for the benefit of his own servient estate, rather than Picardi's dominant estate, and did not plainly vest any exclusionary right in him, as the easement grantee, Picardi's assertion of a right to convert the existing residential route into a commercial logging highway was judicially denied, preventing him from overburdening the servient Zimmiond tract by putting the full width of his easement to use for that unauthorized purpose. Although Picardi had succeeded by extrinsically proving that his easement was in fact 44 feet in width, his litigational efforts were ultimately fruitless, because he was legally barred from taking control over the easement's full width, due to the incompatibility of his logging plan with his acquired access rights.

4) Along with the Pasadena case and the George case, which we have previously reviewed, in addressing the Latham-Garner scenario, the ISC cited the Utah case of Weggeland v Ujifusa (384 P2d 590 - 1963) among others, as support for the judicial inclination to interpret or construe documented exclusionary rights in a restrictive manner. Weggeland and Ujifusa owned typical adjoining urban lots in Salt Lake City, and Weggeland's deed included an exclusive easement, allowing him to make use of the 15 foot wide area on Ujifusa's side of their mutual lot line, while Ujifusa's deed also made reference to that same 15 foot strip as an exclusive easement, so both parties had distinct notice that an exclusive easement existed in the relevant location. That 15 foot strip was occupied by an alleyway, long used by both parties, but the building on the Ujifusa lot was just 15 feet from the lot line, so the concrete steps to Ujifusa's doorway were within the easement area. Weggeland filed an action, demanding removal by Ujifusa of all obstacles within the easement area, on the basis that his easement was clearly exclusive in nature, and therefore allowed him to bar Ujifusa from using any portion of the easement area for any purpose. The Supreme Court of Utah (UTSC) was unprepared to accept the concept of exclusionary rights associated with an easement however, and flatly rejected the validity of Weggeland's assertions. In deeming Weggeland's position to be legally "unsound", the UTSC informed him that "the usual nature of a right-of-way" is distinct from a conveyance of fee simple title, concluding that any easement must "burden the servient estate only to the degree necessary to satisfy the purpose.". Despite the clear presence of an exclusionary right encumbering the Ujifusa lot, in favor of the Weggeland lot, the UTSC confirmed that Ujifusa, as the servient party, could not be barred from using the 15 foot strip, holding that the reference to exclusivity in the relevant deeds meant only that the right to use that area was bestowed solely

upon Weggeland, as the dominant lot owner, and was not to be shared by him with any others. As this ruling indicates, use of the term "exclusive" in an easement document typically creates no unilateral right of exclusion, vested in either the dominant estate or the servient estate, against the other estate, but does stipulate that neither party retains any right to convey a substantially identical easement or right of usage to any third party. Thus this UTSC ruling exemplifies the powerful proposition, embraced 20 years later by the ISC majority, that an easement of any kind, even when defined as being exclusive in relevant documentation, cannot be allowed to masquerade as a fee conveyance to the detriment of the servient estate, because an easement, being a non-possessory interest by definition, can never take on the attributes of a possessory interest in land.

5) Just 3 years later, the WCOA once again upheld the proposition that words relating to exclusivity in an easement deed may hold no meaning or value, if that document fails to satisfactorily clarify the meaning or applicability of such words, since the term "exclusive" is ambiguous when left undefined, and also again the WCOA served notice that the meaning and intent of easement language of any variety must be reconciled and judicially resolved through the use of extrinsic evidence, revealing exactly what that language meant to its author and the other relevant parties at the moment of its creation, in Gabriel v Mascarinas (2001 WL 1407638). Gabriel owned commercial property in King County with no public road frontage, and he was also the holder of an access easement and a parking easement, both of which burdened the adjoining Mascarinas property. After these easements proved to be dysfunctional, due to persistent interference by Mascarinas, Gabriel filed an action insisting that both easements were actually meant to be exclusive in nature, and were intended to allow him to exert complete control over both easement areas, even though the access easement was expressly defined as being non-exclusive, and the parking easement contained no reference to exclusivity at all. Not surprisingly, the trial judge dismissed Gabriel's case without consideration, pursuant to the premise that no right of exclusion can be found to exist where easements have been documented without any specification of exclusivity. Citing the Pasadena, Latham, Macpherson and Wilkoske cases however, the WCOA reversed that ruling, ordering the lower court to allow Gabriel's litigation to proceed to trial. While acknowledging that "an exclusive easement will be recognized only where clearly intended", the WCOA nonetheless adopted the position that even a documented non-exclusive easement can be extrinsically proven to have been intended to be exclusive in nature in some respect, if it can be shown that use of the phrase "non-exclusive easement" was in fact a mistake, which failed to fully capture the true intentions of the relevant parties. Thus once again, just as in the Harris case, the WCOA had occasion here to point out that the presence of ambiguity, resulting from the inherent uncertainty surrounding the use of the term "exclusive" in the realm of easement law, had unjustifiably been judicially discounted at the trial court level, where knowledge of easement law is notoriously incomplete, necessitating further adjudication encompassing vital extrinsic evidence relating to intent.

Although only a relatively small number of cases focusing upon exclusive easements or purportedly exclusive easements in the purely private context have been adjudicated in the federal court system, and the exclusive easement topic has never been squarely addressed by the Supreme Court of the United States, most federal courts not surprisingly appear to take a narrower view of the role of extrinsic evidence in the resolution of issues involving exclusive control over easements. A long running and multi-faceted bankruptcy action involving a complex set of private property rights connected with the Los Angeles International Airport

(LAX) judicially identified on varying occasions by various names, including In re RadLAX Gateway Hotel (466 BR 453 - 2012) exemplifies the prevailing disinclination of federal courts to engage in extrinsic evidence analysis. In that case, apparent bungling on the part of those who prepared certain easement documentation resulted in the presence of self-contradictory terminology within the same set of relevant documents, defining certain access and parking easements as being both exclusive and non-exclusive at the same time. After reviewing the disparity of judicial opinion on the specific topic of exclusive easements and the general topic of easement control, the federal bankruptcy court handling the matter took the position that no easement which is described in conflicting terms, as being both exclusive and non-exclusive, can be deemed exclusive, because a genuinely exclusive easement cannot be judicially supported unless a clear intention to inject a right of exclusion into the easement appears in the relevant documentation, quite logically following the mandate set forth in the Pasadena case, since California was the site of the RadLAX controversy. Thus the ambiguity emerging from the complex and convoluted easement documentation in question proved to be fatal to the purported exclusionary rights, which of course had an impact upon the valuation of the property rights at issue. Rather ironically, in so holding the federal judge expressly noted that the Pasadena case has long been widely judicially respected, and represents the foundation for the modern judicial "exclusivity test" applied by all courts, even though the easements which were contested in the Pasadena case were never expressly defined as being either exclusive or non-exclusive, as we have previously observed.

Both the evidentiary power introduced by the presence of ambiguity in documentation and the value of extrinsic evidence were nonetheless once again fully evident just 3 years later, in the Minnesota case of Apitz v Hopkins (863 NW2d 437 - 2015). The litigants in that case owned presumably typical adjoining platted lots, but Hopkins was also the holder of an easement allowing him to make use of a portion of the Apitz property. The easement in question, which was in existence and was recorded well before Apitz acquired Lot 2, was described in highly typical fashion, as "an exclusive easement for ingress, egress and utility purposes, over, under and across the East 33 feet of Lot 2 ... for the benefit of Lot 3.". As the owner of Lot 3, Hopkins undoubtedly felt completely secure in his belief that this language bestowed full control over the easement area upon him, as long as his use of the designated area did not exceed the plainly specified scope of his easement, to the complete exclusion of the owner of the servient lot and all others. Apitz was unconvinced however, so he elected to file an action challenging the legal force and effect of the Hopkins easement, but his assertion that no exclusionary rights were either adequately defined or clearly communicated in the easement deed held by Hopkins was met with judicial rejection, as the trial judge awarded summary judgment to Hopkins, on the same premise which carried Harris to his initial victory, deeming the relevant language to be sufficient to create a clear right of exclusion, vested in Hopkins. Adopting the same view which had been embraced by the WCOA in the Harris case however, the MCOA reversed that lower court judgment, informing the litigants and the trial judge that summary judgment is never appropriate when an exclusive easement is contested, because all exclusive easements contain some degree of ambiguity, which requires consideration of extrinsic evidence, either supporting or contradicting the presence of genuine exclusivity, before any ruling which deprives a servient fee title holder of all use of some portion of his estate can be decreed. Pointing to the Latham ruling, and noting that no precise or specific legal meaning had ever been assigned to the phrase "exclusive easement" in Minnesota, either statutorily or judicially, the MCOA reminded the parties and the lower court judge that "extrinsic evidence may be used to aid in the

interpretation of an easement grant", whenever any legally ambiguous terminology appears in the easement documentation, before sending the matter back to the trial court level for fuller adjudication and definitive resolution.

6) Another Michigan case decided 12 years after the Proto-Cam ruling (Penrose v McCullough - 862 NW2d 674 - 2014) focuses on the multi-faceted nature of the exclusivity concept, providing a poignant reminder that the element of exclusivity can deprive a servient party of not only any right to use land which he owns in fee, but also of the right to grant any right of usage within the encumbered area to others, thereby completely nullifying an otherwise legitimate subsequently created easement. McCullough and Gleeson were neighbors in South Haven, and in 2007 McCullough granted Gleeson an exclusive easement burdening one of McCullough's platted lots, which listed access, parking, utilities and storage as the authorized uses of the easement area. Then in 2008 McCullough sold one of his lots to Sanford, and along with fee title to that lot he also conveyed an easement to Sanford, covering the same area that had been described as comprising the Gleeson easement just a year earlier. Apparently Gleeson was unaware of the details of that 2008 transaction, and thus did not know that Sanford had acquired an easement which was identical in terms of location to his own easement, and likewise Sanford seems to have been unaware that Gleeson already had an easement covering the same location as the one granted to him, although both easements were duly recorded. Evidently little if any use was made of the easement area by either Gleeson or Sanford, so no controversy arose, until Gleeson sold his property to Penrose, who then proceeded to inform both McCullough and Sanford that neither of them had any right to use the portion of the McCullough lot bearing the easement which had been created in 2007. Sanford insisted that his easement was just as valid as the one held by Penrose however, forcing Penrose to file an action seeking judicial verification of the exclusive nature of his easement. Penrose prevailed, but McCullough and Sanford elevated the matter to the MCOA, protesting that neither of them had fully understood the meaning of the term "exclusive" in the easement context, therefore Sanford was an innocent purchaser, without notice of the right of exclusion held by Penrose, and maintaining that the easement held by Sanford was legally valid on that basis. Because the exclusive easement was recorded however, the MCOA pointed out to the defendants, both of them did in fact have legally sufficient notice of the 2007 easement's existence, and the fact that they had no clue about the legal ramifications of an exclusive easement was immaterial, confirming the lower court ruling that Sanford's easement was a worthless legal nullity. In so holding, the MCOA again cited the Latham case, highlighting the fact that genuinely exclusive easements have the capacity to operate as a restraint upon the servient party's right of alienation, and it was McCullough's failure to comprehend that fact which produced this controversy.

Not every exclusive easement survives judicial scrutiny however, and another Michigan case decided less than 2 years later (Torres v Ten Eyck - 2016 WL 520029) demonstrates that in certain states highly comparable exclusive easements have been both judicially accepted and judicially rejected. Sullivan owned a tract of substantial size, and after subdividing it into an unspecified number of parcels of unspecified size and shape, he conveyed one of those newly created parcels to Ten Eyck. Since the Ten Eyck parcel had no public road frontage, Sullivan also granted Ten Eyck an access and utility easement, which traversed an existing gravel driveway upon the Sullivan tract. The language employed by Sullivan in so doing described "an exclusive 66 foot wide private ingress and egress and public/private utility easement for sole and exclusive use", and Sullivan raised no objection when Ten Eyck asserted full control over that driveway by

installing a gate at its entrance. Evidently no one other than Ten Eyck had any need to use the driveway in question however, so no controversy arose, until 2013 when Torres acquired the parcel that was crossed by the driveway, lying between the Ten Eyck parcel and the public road to which the driveway connected. When Torres began using the driveway Ten Eyck protested, informing him that Ten Eyck held the sole right to make use of the driveway, and Ten Eyck then proceeded to lock the gate, but Torres responded by filing an action challenging the exclusivity of the Ten Eyck access and utility easement. A trial judge declined to agree with Ten Eyck that his easement was genuinely exclusive, taking the position that the language of the contested easement gave Ten Eyck no right to prevent Torres from using the driveway, but cognizant of the rulings in the Proto-Cam and Penrose cases, Ten Eyck placed the matter before the MCOA, confident that his duly acquired exclusionary rights would be upheld at the appellate level. Torres and his legal team proved to be worthy adversaries however, who were up to the task they had taken on, and they wisely carved out a path to victory over Ten Eyck by utilizing Sullivan as a witness. Based on Sullivan's testimony that he never intended to grant Ten Eyck any right of exclusion, the MCOA fully upheld the lower court ruling in favor of Torres, reminding Ten Eyck in so doing that every exclusive easement is ambiguous, facilitating the use of extrinsic evidence, such as direct testimony from an easement grantor regarding his true intent, which has the capacity to clarify the meaning that the language he chose to employ held in his own mind, when he created the easement.

7) The 2019 case of Stark v Ortiz (2019 WL 289654) also decided by the CCOA, exemplifies recent judicial support for the concept of easement exclusivity, while clarifying that it can legally serve as a surrogate for fee boundary adjustment. Kehoe owned 2 adjoining 40 acre parcels in Humboldt County, and in 2004 he deeded one of them to Stark, shortly after deeding the other one to Ortiz. Along with her acquisition however, Ortiz had acquired an easement from Kehoe, burdening a substantial portion of the Stark parcel, "for the purpose of maintaining, cultivating and improving the garden area", and that easement was described in the relevant recorded documentation as being exclusive in nature. In 2009, Ortiz proceeded to build a greenhouse on the Stark parcel, within the easement area, and she then installed an irrigation system including a well within that area, and she fenced the easement area, to prevent unwanted intrusion into that area by Stark. Cognizant that he could not deny the duly documented existence of the Ortiz easement, Stark responded in 2011 by filing an action in which he charged that the construction undertaken by Ortiz exceeded the scope of her easement, and he attacked that easement's validity, asserting that it stood in violation of the California Map Act (CMA) and therefore constituted an illegal subdivision of the Kehoe estate. Citing the Gray case among others however, the CCOA flatly rejected all of Stark's assertions, and fully upheld a lower court ruling in which the right of Ortiz to erect the aforementioned permanent improvements upon her easement had been judicially approved. In so doing, after reminding Stark that the easement creation process has no destructive impact upon the legal status of any fee title, and disposing of his allegation that Ortiz was guilty of an unauthorized intrusion into or upon his 40 acre parcel, the CCOA explained to Stark that proper creation of an exclusive easement does not constitute an illegal evasion of the CMA. Thus the CCOA clarified that the CMA controls only the alteration of fee boundaries, and does not outlaw the creation of easements of any variety or any configuration, leaving property owners such as Kehoe free to place easement burdens of any kind upon their own fee property, for any purpose that can be accommodated by the creation of an easement, thereby avoiding the greater level of expense which is incurred by land owners who select the boundary adjustment option to address their needs.

Legal questions raised by construction of permanent structures and substantial improvements, like those erected by Gray and Ortiz as typical private dominant estate holders, upon their easements, without the approval or against the wishes of the servient party, have generated countless controversies over many decades, with widely varying results. Courts have typically deemed permanent construction within an easement by a private easement holder, based upon any form of non-exclusive easement rights, to represent an excessive and unjustified burden upon the servient estate, to the extent that such construction effectively initiates a fundamentally exclusionary right, preventing any use whatsoever of the land which has been built upon by the holder of fee title to that land, bringing the empty fee principle into play. Numerous exceptions to that principle have been judicially carved out however, such as the one illustrated by the widely respected Minnesota case of Farnes v Lane (161 NW2d 297 - 1968). Lane owned a tract situated near a certain lake, and he was also the holder of a typical non-exclusive easement, allowing access from his tract to the lake, across the land of Farnes, who owned the lakefront property which intervened between the Lane tract and the waterfront. When Lane proceeded to install a dock upon the lakeshore at the end of his easement, Farnes objected, asserting that the dock comprised an excessive and unjustified imposition, and a trial judge agreed with him, ordering Lane to remove the dock. Upon appeal by Lane, the MNSC was thus confronted with the question of the acceptability of dock construction by a holder of a plain generic access easement in the riparian context, which question the MNSC framed as "Does a private easement appurtenant, for a right-of-way to a lake, include by implication the right to install a dock?". After citing the 1906 Thompson case (see FN 2) for the proposition that the scope of an easement cannot legally be expanded in any unauthorized manner, and noting that ownership of an easement does not equate to ownership of land itself, while verifying that Lane's riparian access easement did not convert him into a riparian property owner, the MNSC nonetheless reversed the lower court ruling against him, rejecting the suggestion that Farnes had a right to insist upon removal of Lane's structure simply because the easement made no reference to any such structure. In so ruling, the MNSC emphasized that because the documentation of the easement at issue failed to address dock construction in any manner, the easement language was inherently ambiguous, making judicial reference to extrinsic evidence necessary, to ascertain the true intent with which the easement was created, before concluding by instructing the trial court to thoroughly evaluate all relevant historical evidence prior to making any determination regarding the legitimacy of the dock. Thus the MNSC directed the attention of the litigants and the trial judge to the important principle that any party seeking to impose any specific limitation upon an existing easement bears the burden of proving that the purportedly unauthorized use, which has been either proposed or made of the easement, is in fact excessive or otherwise illegitimate.

8) The third easement borne by the road crossing the Aikman parcel, which was held by a Tangipahoa Parish Drainage District, was never a source of contention, and during the litigation reviewed herein it was clarified that the old road was plainly a private road, rather than a public thoroughfare, despite the fact that it bore an access easement which was held by a public entity. In addition, the existence of those very minimally intrusive publicly held rights was known to Aikman and Seilham at all times, and represented no source of concern to them, since the access right held by the public upon their land, unlike the rights asserted by the descendants of the senior Arnolds, was revealed to them by their title report, in which the documentation supporting that public easement's existence was duly noted.

9) Article 741 of the Louisiana Civil Code represents statutory recognition of the validity and applicability of the concept which is widely known as "easement by implication", but in Louisiana the phrase "easement by destination" has alternatively been legislatively utilized to denominate the easement rights which come into existence when a transfer of real property necessitates the formation of access rights upon an apparent route of existing travel, in order to prevent the unintentional creation of a legally landlocked lot, parcel or tract. That statutory measure thus represents wise legislative acknowledgement not only that land which is legally inaccessible is problematic and contrary to the interests of the public, but also that grantors, such as the senior Arnolds in this instance, have historically been negligent in addressing access rights when deeding real property, and therefore operates to prevent the consequences of such negligence from beleaguering their successors. As can readily be seen, under Louisiana law, the mere existence of the old road at the time of the earliest conveyances made by the Arnolds gave rise to an access easement upon that road on the occasion of each conveyance made by them, leaving their failure to fully document their intentions regarding access powerless to prevent the formation of easement rights upon that road. Or to put it in the most blunt terms, recognizing the ignorance of folks like the senior Arnolds with respect to land rights documentation procedures, by enacting Article 741 the Louisiana Legislature made their incompetence, demonstrated by their inability to convert an existing driveway or roadway into a properly defined access easement through the use of appropriate language, legally moot.

10) For another western case which stands in high contrast to the Naramore ruling, and demonstrates that even clear intent on the part of a grantor, acting as a subdivider of land, to create an access easement, can be legally negated, by the judicial eradication of the intended easement, if the intended purpose of that easement was inadequately communicated in the relevant documentation, see the 2008 case of Blazer v Wall (183 P3d 84) which holds special interest for land surveyors, since the easement that was rejected by the Supreme Court of Montana on the basis of inadequate specificity in that case was depicted and labeled on a plat, by a land surveyor, in accord with the client's wishes.

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