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State-road easements are not easy to live with
By Curtis Seltzer

I have nothing but respect and affection for state crews who maintain public roads, summer and winter. I don't feel the same toward certain road-department policies. Here are two examples.

Some years ago, I owned 400 acres on both sides of a state-maintained road in another state. The one-and-a-half-lane, paved road was at the top of a mountain and faced north. It was steep, narrow and curvy. It had been bench cut into the north-facing bank, which shielded it from winter sun. As a result, snow piled up and up, and melted slowly. I've seen snow there in May.

A week or so after I bought it, the county superintendent of the state road department appeared unannounced in my frontyard and offered me a roll of fence wire. I had no idea what he was talking about. It turned out that his crews routinely pushed the accumulated snow over the bank and into what was now "my fence." As a result, the fence was damaged beyond repair. They had no other place to put the snow. The roll of wire might have been worth $100. The damaged fence line was about 800 feet, maybe a $1,500 job to take down and build anew.

I wanted to build a new fence so that I could pasture cattle behind it. I needed to know the width of the state's easement, and I wanted to make some arrangement to let the road department remove snow without damaging a new fence.

The road department would not tell me the width of its easement. Nothing was recorded.

I was willing to sell the state a strip of land between my new fence and their easement that would give them space to pile snow. I was willing to have them condemn a strip by eminent domain and accept fair market value, the amount of which was, maybe, $1500. I was willing to install gates in the new fence so that they could dump on my land without pushing over the new fence. I was willing for them to repair damages at their expense each spring. I was willing to consider any solution that would work for both parties.

Having acknowledged state responsibility for damaging the old fence each winter, the county superintendent refused to do anything different. He said to me, "We can do whatever we want with all of your land." He said to me that I should "give the state the strip of land."

I was outraged at this taking—and this attitude.

I went to court. I wanted the state to stop damaging my property. I wanted to build a fence on my property. I wanted to know the width of the easement claimed by the state.

The highway department did not produce a single document showing a right-of-way easement, road design, survey or anything else. Nothing. They refused to tell the judge the width of their claimed easement.

First, they claimed they owned an easement of whatever dimension they wanted by adverse prescription or adverse possession. They backed off this argument when I asked whether stealing was official state policy. Then they claimed that the previous owner more than 60 years ago had given them permission to "use whatever land they needed for the new road." Fine, I said, permission is a license, which ends when the property is sold or the death of the person who granted it in the first place. Permission does not run with the land. Permission means that they cannot obtain the easement by adverse prescription or possession.

Their final argument was that the state had a right to do whatever it wanted in the public interest, including taking my entire 400 acres, and had no responsibility to compensate a private landowner for any damage they caused in keeping roadways open for the public. I could not stop the state from damaging my property year after year, nor could I get them to compensate me for the damage.

The judge said in a preliminary hearing that he would not allow me to introduce into evidence the fact that the superintendent had offered me a roll of wire or any of the statements that he had made to me. He refused to acknowledge that the settled law of permission -- the state's claim to the easement in the absence of any other -- ended with the sale of the property or the death of the party granting permission. It was clear that I would lose in this judge's court.

To have a chance at winning, I would have had to appeal to the state supreme court. I figured that the supreme court would see the interests of its state highway department as superior to those of a private out-of-state landowner, just as the local judge saw it. It would have cost me a lot of money to kick the case upstairs on principle for the purpose of losing the principle. So I dropped the suit, and eventually sold the land to a couple who didn't care about the fence or the principle.

My wife, herself a county attorney, told me at the beginning to not start with them. "You won't win," she said. "The facts and the law won't matter." A local lawyer who talked to the judge told me that they couldn't let me win this case owing to the precedent it would set. The precedent being—the state should pay for takings and damage. Imagine!

As you can see, I'm still enraged over this.

A couple of weeks ago, I noticed that the state road folks were spraying their easement to control vegetation and had consistently exceeded their width—by 20 feet in some cases. I don't object to spraying on their easement, nor do I object to controlling vegetation on their easement. I do object to having them kill trees that are not on their easement, that is, trees that are mine and have value.

Doing something with a state road department on this kind of matter is an expensive, time-eating, frustrating and quixotic exercise. I am less angry about the second incident than the first, because I didn't invest in fighting it.

I am a bad citizen, but a more pragmatic one.

Any property with state road frontage involves state maintenance. Buyers are vulnerable to surprises, and owners are vulnerable to arbitrary policies that cost too much for a landowner to correct.

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