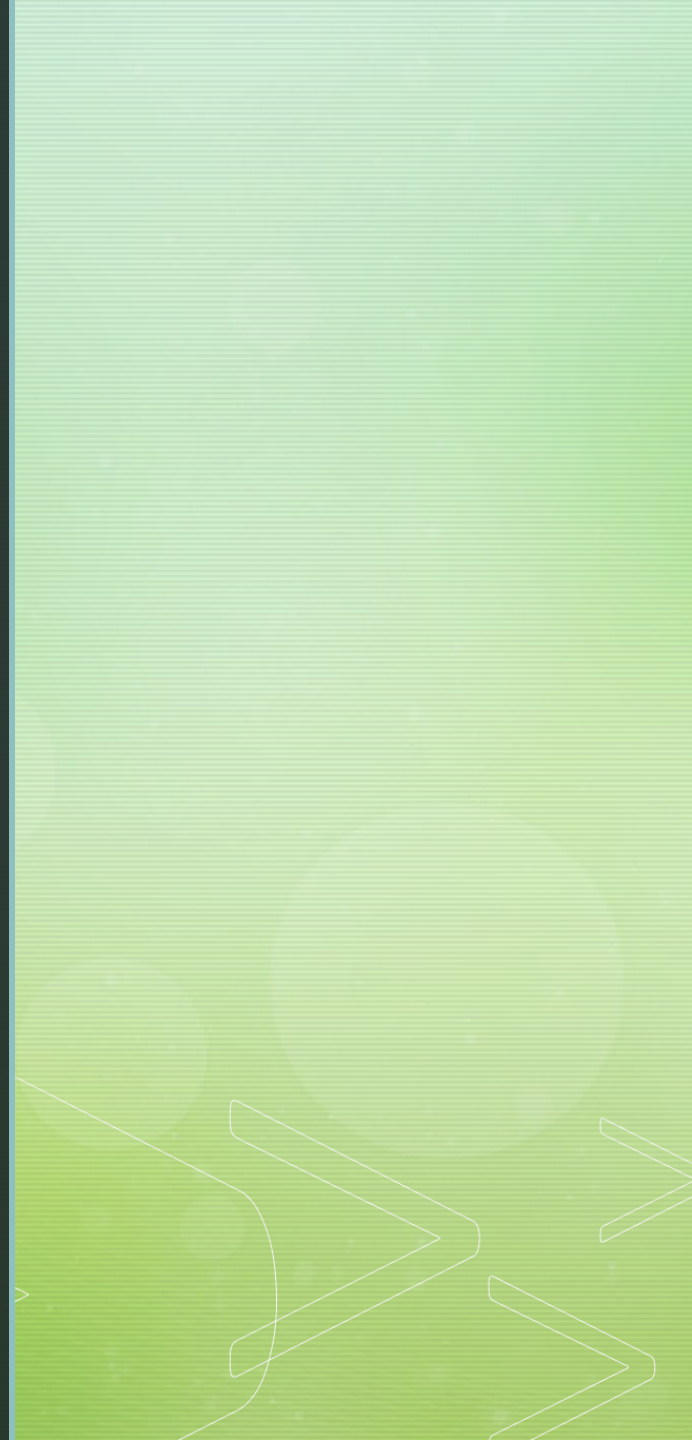


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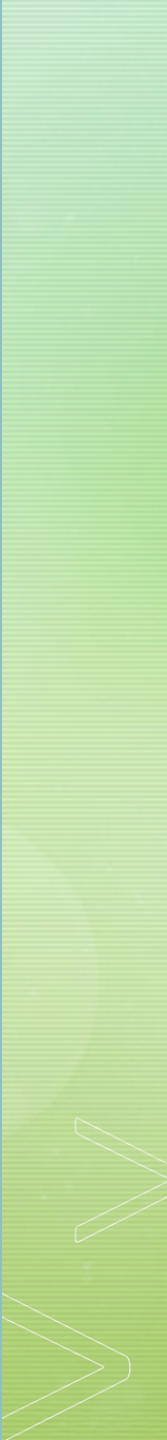


Easements





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Easement: Part of a bundle of sticks

An easement is the right to use the **land of another** for a specific purpose that is not inconsistent with the general use of the property by the owner.

Hodgins v. Sales, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003)

Easements: Encumber the land

- One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement.

Akers v. D.L. White Const., Inc., 142 Idaho 293, 301, 127 P.3d 196, 204 (2005)

TWO TYPES OF EASEMENTS

- There are two general types of easements:
- (1) easements appurtenant and (2) easements in gross.

Hodgins v. Sales, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003)

EASEMENT APPURTENANT

- An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate.
- An easement appurtenant serves the owner of the dominant estate in a way that cannot be separated from his rights in the land.
- When an appurtenant easement is created, it becomes fixed as an appurtenance to the real property

Hodgins v. Sales, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003)

EASEMENT IN GROSS

- An easement in gross benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel of land.

King v. Lang, 136 Idaho 905, 909, 42 P.3d 698, 702 (2002).

- Easements in gross do not attach to property.

King v. Lang, 136 Idaho 905, 909, 42 P.3d 698, 702 (2002).

- In cases of doubt, Idaho courts presume the easement is appurtenant.

Nelson v. Johnson, 106 Idaho 385, 387–388, 679 P.2d 662, 664–665 (1984).

Easement Appurtenant v. In Gross

- An appurtenant easement has a dominant estate to which the easement is attached and must “bear some relation to the use of the dominant estate.”
- An appurtenant easement is incapable of existence or separation from that dominant estate, and any attempt at severance must fail.
- An appurtenant easement generally passes with the possession of the dominant estate.
- An easement in gross is “merely a personal interest in land of another.” This right is not assignable or attached to the land; rather, the easement in gross only benefits a particular person (or persons).

Lorenzen , Tr. of Phyllis E. Lorenzen Revocable Tr. v. Pearson, 167 Idaho 385, 393, 470 P.3d 1194, 1202 (2020), reh'g denied (Aug. 24, 2020)

How do you get an easement?

- Express grant
- Necessity
- Prescription
- Implied from Prior Use
- Recorded document- deed or written easement
- Necessity, prescription, and implication all require a court to find the easement exists as a matter of law
- Because “it is no trivial thing to take another’s land without compensation,” easements by prescription are not favored by the law.

Hughes v. Fisher, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006)

Easement by Grant or Reservation

- An express easement may be by way of reservation or by exception.
- An express easement by reservation reserves to the grantor some new right in the property being conveyed; an express easement by exception operates by withholding title to a portion of the conveyed property.

Akers v. D.L. White Const., Inc., 142 Idaho 293, 301, 127 P.3d 196, 204 (2005)

Easement by Prescription

- To establish an easement by prescription, the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period.

Hodgins v. Sales, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003)

Easement by Prescription (Adverse Possession)

- What is open and notorious?
- A use must be sufficiently open and notorious so that a reasonable person would have discovered its occurrence.
- The purpose of the requirement that prescriptive use be open and notorious is to give the owner of the servient tenement knowledge and opportunity to assert his rights.
- The use must rise to a level that would provide notice to “a servient landowner maintaining a reasonable degree of supervision over his premises.”

Backman v. Lawrence, 147 Idaho 390, 396, 210 P.3d 75, 81 (2009)

Easement by Prescription (Adverse Possession)

- What is continuous and uninterrupted use?
- It is generally accepted that the “continuous and uninterrupted” element does not require daily use or even monthly use.
- The acquisition of a prescriptive easement requires continuous use according to the nature of the use and the needs of the claimant.

Latvala v. Green Enterprises, Inc., 168 Idaho 686, 697, 485 P.3d 1129, 1140 (2021)

Easement by Prescription (Adverse Possession)

- **What does it mean for use to be adverse and under a claim of right?**
- Adverse use has been characterized as an actual invasion or infringement made without permission of the owner. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.

Akers v. D.L. White Const., Inc., 142 Idaho 293, 303, 127 P.3d 196, 206 (2005)

- Under a claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement.
- The nature of the use is characterized as hostile in that it runs contrary to the servient owner's claims to the property. However, the state of mind of the claimant is not controlling; the focus is upon the nature of the claimant's use.

Hodgins v. Sales, 139 Idaho 225, 231, 76 P.3d 969, 975-976 (2003)

Easement by Prescription (Adverse Possession)

- *What does it mean for the use to be with the actual or imputed knowledge of the owner of the servient tenement?*
- Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right.
- Proof of all of these elements shifts the burden to the owner of the servient estate, who must demonstrate that the claimant's use was permissive

Cook v. Van Orden, 170 Idaho 46, 507 P.3d 119, 126 (2022)

Easement by Prescription (Adverse Possession)

- *What is the statutory period for a prescriptive easement in Idaho?*

The prescriptive period in Idaho is 20 years. Idaho Code § 5–203 (2006).

How do you dispute adverse possession?

- Permissive Use: A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner.

Hughes v. Fisher, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006)

- Where the easement alleged is over wild and unenclosed lands, there is a rebuttable presumption that use of such lands is permissive, and the burden is on the party asserting the easement to establish adversity.
- *Marshall v. Blair*, 130 Idaho at 680, 946 P.2d at 980.
- Proof of independent, decisive acts, such as maintenance of the way, tearing down barriers, and other indications of separate and exclusive use is sufficient to rebut a presumption of permissive use.

Hodgins v. Sales, 139 Idaho 225, 232, 76 P.3d 969, 976 (2003)

▶ Easement from implication from prior use

- A party seeking to establish an implied easement from prior use “must demonstrate three essential elements: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Akers v. D.L. White Const., Inc., 142 Idaho 293, 301, 127 P.3d 196, 204 (2005)

Easement by Necessity

- One who claims an easement by necessity across another's land must prove:
 - (1) unity of title and subsequent separation of the dominant and servient estates;
 - (2) necessity of the easement at the time of severance; and
 - (3) great present necessity for the easement.

Backman v. Lawrence, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009)



Easement by Grant

- What could go wrong?

Shared Driveway Easements

- One cannot have an easement in one's own lands

Fitzpatrick Trustees of Fitzpatrick Revocable Tr. v. Kent Trustees of Alan & Sherry Kent Living Tr. Dated 11/07/2003, 166 Idaho 365, 369, 458 P.3d 943, 947 (2020)

Solution: Declaration of Easement – Springing Easement

- **Reservation of Easement Over Burdened Parcel.** Upon the conveyance of the Burdened Parcel to a third-party, an easement is immediately and automatically reserved burdening the Burdened Parcel that was conveyed and benefitting the Benefitted Parcels.
- **Grant of Easement Over Burdened Parcel.** Upon the conveyance of any of the Benefitted Parcels to a third-party, an easement is immediately and automatically granted burdening the Burdened Parcel owned by Declarant and benefitting the Benefitted Parcel conveyed. If more than one Benefitted Parcel is conveyed at one time, easements for each Benefitted Parcel shall immediately and automatically be granted.

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Questions?

