Chapter 15

Understanding Unconventional Easements and Rights of Entry

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Synopsis

§ 15.01. Easements Generally; Easements Appurtenant vs. Easements in Gross ................................................................. 512
§ 15.02. Easements Created By Express Grant or Reservation ..................................................................................... 514
§ 15.03. Easements Arising By Operation of Law ............................................................................................................. 515
  [1] — Implied Easements ........................................................................................................................................ 515
    [a] — Quasi-Easements ................................................................................................................................. 516
    [b] — Easements of Necessity ......................................................................................................................... 519
  [2] — Easement By Estoppel ................................................................................................................................ 524
  [3] — Prescriptive Easements ............................................................................................................................ 527
§ 15.04. Statutory Easements and Rights of Entry ........................................................................................................ 530
  [1] — Statutory Right of Entry for Reclamation .................................................................................................. 530
  [2] — Public Roadways ..................................................................................................................................... 532
§ 15.05. Conclusion .................................................................................................................................................. 535

A typical mineral operation involves multiple stakeholders, including mineral owners, surface owners and mine operators. Each has unique goals and concerns, and each has different (and often overlapping) rights to use the real property overlying the minerals. As a result, there is significant potential for confusion and disagreement regarding the existence, nature and scope of those rights, particularly where the mineral estate was severed from the surface estate long ago, the properties have changed hands repeatedly since severance, or the property has not been mined in many years. Often, any opportunity to clearly specify the various rights of the original parties has long since passed, and their successors may need to rely on the law of easements as a “last resort” to obtain or clarify their respective rights.1

1 See O. Judson Scheaf, “Easement Basics: A Primer on Easements in Oil and Gas Exploration and Production,” 16 E. Min. L. Inst. 3.05 (1993) [hereinafter Scheaf, Easement Basics] (describing the easement by prescription as a “last resort.”).
This chapter provides an overview of easements, describes the more unconventional easements that arise by operation of law or statute, and discusses how these easements arise and operate in a mineral law context.

§ 15.01. Easements Generally; Easements Appurtenant vs. Easements in Gross.

At its most basic, an easement is a non-possessory right to enter and use land in the possession of another.2 The right of use granted by an easement is the right to use the land for a specific purpose.3 Although it is a property right, an easement is an “incorporeal” right, meaning, as one Kentucky court has explained, that it is “a privilege or an interest in land, but it is not an estate in land nor is it ‘land’ itself.”4

Easements are either appurtenant or in gross. An easement appurtenant is created for the benefit of a particular parcel of real property, which becomes the “dominant” estate. The real property subject to the easement is said to be burdened by the easement or servient to the dominant estate, and is thus referred to as the “burdened estate” or “servient estate.” An easement appurtenant does not exist separately from the dominant estate to which it belongs. It is a covenant running with the land, binding future owners of both the dominant and servient estates.5 If the dominant estate is conveyed, the easement is conveyed with it. Similarly, if the servient estate is conveyed, it is conveyed subject to the burden of the easement.

The most obvious example of an easement appurtenant in the mineral context arises where the minerals have been severed from the surface. The dominance of the mineral estate over the severed surface estate is well-established law in mineral-producing jurisdictions. In most instances, mineral owners enjoy the benefits of an easement that burdens the severed surface

2 Restatement (Third) of Property (Servitudes) § 1.2 (2000).
3 E.g., O’Dell v. Stegall, 703 S.E.2d 561, 576 (W. Va. 2010) (“An easement is a right that one person has to use the land of another, for a specific purpose.”) (quoting Cobb v. Daugherty, 693 S.E.2d 800, 806 (W. Va. 2010))).
4 Henry Bickel Co. v. Texas Gas Transmission Corp., 336 S.W.2d 345, 347 (Ky. 1960) (internal citations omitted).
estate and grants to the mineral owner the right of reasonable surface use for the extraction of minerals.\(^6\) If the minerals are transferred, the easement is transferred along with them, and the easement can only be enjoyed by the mineral owner\(^7\) or its lessee.\(^8\) The typical “easement rights” mineral owners hold with respect to the immediately overlying surface are perhaps always the best source of surface use rights, and in any case, the rights afforded under a severance deed should be closely examined before resorting to any of the other easements or rights of entry discussed in this chapter.\(^9\)

Unlike the easement appurtenant, the easement in gross is personal to the holder and is not connected to a particular dominant estate. The holder of the easement in gross possesses the right to use the servient estate without regard to any property the easement holder may own.\(^{10}\) Thus, when an easement in

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\(^6\) E.g., Wiser Oil Co. v. Conley, 346 S.W.2d 718, 721 (Ky. 1960) (“Numerous authorities could be cited to the effect that, unless the conveyance itself repels the construction, one who owns the mineral rights in a tract of land by implication of law acquires the right to use as much of the surface as may be reasonably necessary for the beneficial and profitable operation of his mines.” (citing Gen. Refractories Co. v. Swetman, 197 S.W.2d 769, 770 (Ky. 1946))).

\(^7\) Scheaf, *Easement Basics*, supra note 1, at nn. 5-6 and accompanying text.

\(^8\) Phelps v. Fitch, 255 S.W.2d 660, 662 (Ky. 1953) (“[W]e find it to be generally recognized that a lessee of a dominant estate is entitled to the use of easements legally appurtenant to the demised premises and reasonably necessary to their enjoyment.”).


\(^{10}\) See Meade v. Ginn, 159 S.W.3d 314, 320 (Ky. 2004) (“An easement in gross is a mere personal interest in or right to use the land of another. It is attached to[,] and vested in, the person to whom it is granted. In fact, the principal distinction between an easement in gross and an easement appurtenant is that in the first there is not, and in the second there is, a dominant tenement to which it is attached.” (quoting 25 *Am. Jur. 2d “Easements and Licenses in Real Property”* § 11 (1996))); see also Inter-Cnty. Rural Elec. Co-op Corp. v. Reeves, 171 S.W.2d 978, 983-84 (Ky. 1943) (noting that the easement in gross at issue was “personal to the [grantee] and does not subsist as an appurtenance to any interest in land owned by the [grantee] corporation”).
gross exists, there is only a servient estate — not a dominant estate. Examples of easements in gross include utility line or pipeline rights of way.

Courts tend to disfavor easements in gross. In Kentucky, the rule is that “an easement will never be presumed to be a mere personal right when it can fairly be construed to be appurtenant to some other estate.”\(^{11}\) Easements in gross have been found to be non-assignable and non-inheritable.\(^{12}\) On the other hand, certain commercial easements in gross, such as utility or pipeline easements, are alienable.\(^{13}\) An easement in gross created by contract also can be made assignable by the terms of the contract.\(^{14}\)

§ 15.02. Easements Created By Express Grant or Reservation.

Easements may be expressly created in writing by an affirmative grant or by reservation in a deed or other document. Because an easement is an interest in land, it is subject to the statute of frauds.\(^{15}\) Further, the document in which the easement is created should be prepared with the requisite formalities,\(^{16}\) as should any subsequent amendment or modification to the easement.

Express creation of an easement is preferable because it allows the parties to specifically describe the location, purpose, scope and duration of the easement and the respective rights and obligations of the dominant and servient estates’ owners. In a perfect world, mineral owners, surface owners, and mine operators would anticipate all reasonable future uses of

\(^{11}\) Meade, 159 S.W.3d at 320-321.
\(^{13}\) Scheaf, Easement Basics, supra note 1, at n.9 and accompanying text.
\(^{14}\) Meade, 159 S.W.3d at 320.
\(^{16}\) Loid v. Kell, 844 S.W.2d 428, 429-430 (Ky. Ct. App. 1992) (“A written grant consistent with the formalities of a deed is necessary to create an express easement.”).
the real property at issue and would set out the rights of the various interest holders in clear and unambiguous agreements before a mining operation commences. Of course, the real world is not perfect, and this rarely happens. A mine operator’s easement rights often do not become an issue until years after mining commences; the severed estates may have been conveyed or leased multiple times in the interim, increasing the potential for conflict and confusion. As a result, the parties may be forced to evaluate more unconventional easements, such as those that arise under statute or by operation of law.

§ 15.03. Easements Arising By Operation of Law.

Certain easements arise by operation of law, which can be useful for the party who lacks an express grant or reservation of an easement to support its right of entry onto, or use of, the real property in question. These easements do not always fit neatly into distinct categories, a fact complicated by terminology that varies by jurisdiction and is used inconsistently by both attorneys and the courts. Generally, however, there are three common types of easements arising by operation of law: (1) implied easements, which for purposes of this chapter are deemed to include both “quasi-easements” and easements of necessity, (2) easements by estoppel and (3) prescriptive easements.


In some instances, the law implies an easement based on the presumed intent of the parties to a conveyance (quasi-easement) or public policy considerations (easement of necessity). Courts may determine that the parties to a conveyance intended to grant or reserve an easement, but failed to document this manifest intent. In such cases, the law of quasi-easements is invoked to judicially imply an easement. In other cases, the courts

17 See Scheaf, Easement Basics, supra note 1, at 3.01 (“If anything should be derived from the sections that follow, it is that a mineral owner’s reasonable anticipation of the scope of needed uses of the surface estate for recovery activity ought to be thought out, agreed to, and reduced to writing as part of the initial severance of the mineral estate from the surface estate.”).

18 As described by a Texas court, “[t]he basis of the doctrine is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration.” Mitchell v. Castellaw, 246 S.W.2d 163, 167 (Tex. 1952).
determine that public policy favoring the beneficial use of land requires
the creation of an easement, regardless of intent. In these cases, the law of
easements by necessity is invoked.19 In either situation, the law of implied
easements requires examination of facts outside the four corners of the
document to determine what presumed intent or public policy requires.20

[a] — Quasi-Easements.

One class of implied easements is known (perhaps, more appropriately)
as quasi-easements.21 A quasi-easement arises when an owner of a tract
of land intends, as evidenced by his use of it, to burden one portion of his
property with an easement (or a “quasi-easement,” since one cannot have
an easement across his own property) benefiting the other portion, and
subsequently conveys the portion benefited by the quasi-easement. The
portion benefited is sometimes called the “quasi-dominant” estate.22 The
most familiar example is the farmer who uses a road constructed upon his
property for many years in order to reach the back portion of the property.
If he subsequently conveys the back portion of the farm, which has been
benefited by the use of the road, an easement for the use of the road will be
implied in favor of the grantee. Because the quasi-easement is based on the

(noting that the easement of necessity “is created as a result of a strong public policy that
no land may be made inaccessible or useless”).
20  On the other hand, as commenters have pointed out, because the implication of
easements not found in a written document runs afoul of other public policies embodied in the
recording acts and statutes of frauds, they are disfavored by law. See The Law of Easements
& Licenses in Land § 4:15 at nn.16-17 (compiling cases demonstrating the restrictive view
of some courts toward implied easements).
21  Other commentators have noted that the most accurate title is the “easement implied
from quasi-easements” rather than implied easements or easements by implication, because
easements (such as easements by necessity) are “implied” in other cases that do not involve
22  Carroll v. Meredith, 59 S.W.3d 484, 490 (Ky. Ct. App. 2001). See also Swinney v.
Haynes, 236 S.W.2d 705, 707 (Ky. 1951) (“It is the settled rule of law of this state that, on
the conveyance of one of several parcels of land belonging to the same owner, there is an
implied grant or reservation, as the case may be, of all apparent and continuous easements
which may have been created or used by him during the unity of possession . . . .”).

516
presumed intention of a grantor, it requires evidence that both the benefited (dominant) and burdened (servient) estates were once held in common and that the use now claimed by the party seeking to imply an easement was in existence at the time of common ownership.23

Although the specifics vary by jurisdiction, a party seeking to establish a quasi-easement must generally show that: (1) a separation of title from common ownership occurred; (2) use of the property prior to the separation of title was so long continued and obvious that it must have been intended to be permanent; and (3) use of the claimed easement was highly convenient and beneficial to the land conveyed.24

In keeping with the general principle that creation of the quasi-easement was within the presumed intent of the grantor, courts focus on the date the unity of ownership ceases in order to determine whether an easement has been imposed.25 Relevant factors include whether the party claiming the easement is the grantor or grantee, the terms of the conveyance, the consideration given for the conveyance, whether the claim of an easement is made against a simultaneous grantee, the extent of necessity of the easement to the party claiming it, whether reciprocal benefits accrue to the grantor and the grantee, the manner in which the land was used prior to its conveyance and the extent to which the manner of prior use was or might have been known to the parties.26

Courts will typically imply an easement more readily in favor of a grantee than a grantor on the theory that the grantor was in the best position to limit the scope of the grant to preclude the implication of an easement.27 This is

23 See, e.g., Charles C. Marvel, Annotation, “What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity,” 94 A.L.R.3d 502 § 3a (1979) (noting that use must have been in existence at time of unity of title).
26 Restatement (First) of Property § 476 (1944).
27 Carroll, 59 S.W.3d at 490 (citing Restatement (First) of Property § 476 cmt. c (1944)).
both consistent with the general rule that conveyances are construed in favor of the grantee, and with an extension of this rule to cover not only the express terms of the conveyance, but also the implications that may arise from the circumstances surrounding the grant.\(^{28}\) Consideration is important in that courts are more reluctant to find an implied easement when the property transfer was gratuitous.\(^{29}\)

The key factor for a quasi-easement, however, is whether the implication of an easement is “necessary.” The use must be “reasonably necessary,” which means “more than merely convenient to the dominant owner, but less than a total inability to enjoy the property absent the use.”\(^{30}\) Courts have recognized that the “necessity” analysis for quasi-easements differs from the analysis for easements by necessity (discussed below). This difference, though slight, is important. As one West Virginia court recently explained, “necessary” in the context of a quasi-easement means “that another [access] cannot be substituted at a reasonable expense.”\(^{31}\) Thus, a quasi-easement can be demonstrated where it would be unreasonably expensive to obtain another right of entry, even if some other access were physically or technically possible.

In determining whether use of an easement was “reasonably necessary” under a quasi-easement analysis, the focus generally is on the necessity at the time the property was divided — not at the time the easement was claimed. Thus, the party seeking to establish the existence of a quasi-easement must present some proof that the easement was in use prior to the division of the property and that this easement was necessary at that time.\(^ {32}\) As with many of the easements and rights of entry discussed in this chapter, this requirement

\(^{28}\) Restatement (First) of Property § 476 cmt. c (1944) (“What is true in construing the language of the conveyance is likewise true in drawing inferences from the circumstances under which the conveyance was made. Accordingly, circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor.”).

\(^{29}\) Id. at cmt. e.

\(^{30}\) Cole, 59 S.W.3d at 477. See also Carroll, 59 S.W.3d at 491 (noting that a quasi-easement requires only “reasonable” necessity, as opposed to the “strict necessity” traditionally required for easements of necessity).

\(^{31}\) Cobb v. Daugherty, 693 S.E.2d 800, 813 (W. Va. 2010).

\(^{32}\) Id.
can result in difficult issues of proof with respect to past use of property, particularly since in many implied easement cases, the party claiming the easement must support its case with clear and convincing evidence.33

A final important factor courts will consider in determining whether to imply a quasi-easement is whether the use of the easement was “apparent” at the time of severance.34 The requirement that the prior use of the easement be “apparent” or “manifest” often hinders the ability to claim a quasi-easement. For example, in Consolidation Coal Co. v. Bluestone Coal Corp.,35 a mining company was prevented from using a drainage tunnel constructed below its underground mining operations under an implied easement theory, despite the fact that the tunnel was constructed decades earlier to serve a larger mining operation that was subsequently divided between two companies. The court held that the “alleged easement was not apparent when the severance of ownership occurred”36 because it was not in use at that time, but was only drilled into some five years later. For this same reason, the court held, there was no continuity or necessity of use sufficient to support an implied easement.

[b] — Easements of Necessity.

The easement of necessity is similar to the quasi-easement in many important respects.37 As a result, the case law regarding easements of necessity and quasi-easements is often confusing, and the basis for the distinctions can be difficult to discern.38 This confusion results primarily

33 See, e.g., Carroll, 59 S.W.3d at 491-92 (Ky. Ct. App. 2001); United Food and Commercial Workers Int’l Union Local 400 v. NLRB, 222 F.3d 1030 (D.C. Cir. 2000) (applying Virginia law).
34 See Cole, 59 S.W.3d at 476 (requiring easement’s use prior to severance to have been “so long continued, obvious and manifest that it must have been intended to be permanent”). See also Cobb, 693 S.E.2d at 812.
36 Id. at *3.
37 See 11 Am.Jur. Proof of Facts 3d, “Easements-Existence of Way of Necessity” § 3 (1991) (“The elements of ways of necessity and the elements of implied easements from a prior use are often confused by both litigants and courts. The primary reason why these two types of implied easements are confused is that their elements are nearly identical.”).
38 The confusion between these two types of easements, and their distinctions, have been discussed in numerous articles, including: Note, “Implied Easement of Necessity Contrasted
from the common elements shared by both types of easements. A party seeking to establish an easement of necessity, like the party seeking to establish a quasi-easement, must prove that the title to both the dominant and servient estates were once held by a common owner, that the unity of title was then severed and that the easement was necessary at the time of this severance.39

Given these similarities, and the tendency of the courts to confuse the two easements, a party seeking to prove the existence of an easement by necessity should, at least at the outset, try to establish a quasi-easement as well.40 Nonetheless, there are significant differences in the theories upon which these easements are based and in how the elements required to support them are interpreted. While the quasi-easement is based exclusively on the original grantor’s presumed intent with respect to the property, the easement by necessity is based primarily on public policy favoring the beneficial use of property for some economic purpose.41 In other words, the law will imply an easement to prevent land from being rendered unusable.42 Subject to a


40 As one commentator points out, the first Restatement of Property did not even distinguish between easements of necessity and other implied easements, but viewed them “as different means to the same result.” See Jeffrey R. Sang, 11 Am. Jur. Proof of Facts 3d 601 n.25 (1991). Under this initial Restatement view, both types of easements were located on different ends of a continuum: “On the one end is a case where a landlocked property could not be used if a way were not implied, thus, in such a case the showing of necessity would be strong and a showing of prior use would be unnecessary. On the other end is a case where the showing of necessity is not strong, and yet there is a strong showing of a prior use. In both cases an easement would be implied.” Id.
41 Cobb v. Daugherty, 693 S.E.2d 800, 808 (W. Va. 2010) (“The driving force behind an easement by necessity is purely economic.”).
42 Id. at 809 (“The way of necessity arises when the strong public policy against shutting off a tract of land and thus rendering it unusable gives rise to a fictional intent defeating any such restraint.” (citing Wolf v. Owens, 172 P.3d 124, 128 (Mont. 2007))). Regarding the creation of such a “fictional intent” on the part of the grantor to allow the continued use of the easement, some courts justify the easement by necessity primarily in terms of presumed intent in much the same manner as they would justify the finding of a quasi-easement. See, e.g., Middleton v. Johnston, 273 S.E.2d 800, 802 (Va. 1981) (“The [easement by necessity] is
variety of limitations and exceptions, Kentucky has extended this policy to residential real property by statute.43

As for the elements, the most distinctive difference is that the “necessity” required to support an easement by necessity is generally interpreted to mean strict necessity, as opposed to the “reasonable” necessity that is usually sufficient to support a quasi-easement.

The concept of strict necessity is not only the defining element of the easement by necessity, but also the most difficult element of proof. Numerous courts have wrestled with the issue of just how to define “necessity” in the context of these easements. Owners of the purported “servient” tenement can nearly always point to some means of access to the outside world that renders use of their property unnecessary to avoid landlocking the other tract. Nevertheless, most courts hold that a showing of strict or absolute necessity is required to demonstrate an easement by necessity.44 There are cases holding that a reasonable or practical necessity is all that must be demonstrated, such that necessity may be found to exist when there is alternative access to the outside world, but that access is inadequate, inconvenient or costly.45 Counsel relying on these cases should use caution, however, because many of them appear to confuse the easement by necessity with the quasi-easement discussed above.

Most eastern coal mining jurisdictions adhere to the requirement that strict or absolute necessity, such as where a property is “landlocked,” must be established in order to imply an easement by necessity. Kentucky courts hold that “a way of necessity generally will not be implied if the claimant

based upon the idea that whenever one conveys property, he conveys that which is necessary for the beneficial use of the land and retains that which is necessary for the beneficial use of the property he still possesses.”). For a discussion of numerous authorities on the theory underlying easements by necessity, see James W. Ely, Jr.and Jon W. Bruce, The Law of Easements and Licenses in Land § 4:5 and the authorities cited therein.


45 Id. at § 4.
has another means of access to a public road from his land however inconvenient.”46 Likewise, Illinois appears to adopt a strict rule that there must be “no alternative means of access” to the property.47 Indiana courts have rejected the argument that the convenience of alternative access must be considered, holding that any access, regardless of convenience, will defeat an easement by necessity.48 Ohio,49 Pennsylvania,50 and West Virginia51 also adhere to a strict necessity requirement. Alabama, on the other hand, appears to entertain at least some consideration of the cost of the alternative access in determining whether necessity exists. That state’s courts have recognized that an easement by necessity may exist if all other means of access “would require unreasonable expense disproportionate to the value of the property.”52 Similarly, at least one Virginia court has noted that necessity need not mean a “physical or an absolute necessity but a reasonable and practicable necessity.”53

Assuming that a party can establish that there is a strict or absolute necessity, the scope of the easement of necessity can become an issue. Specifically, a crucial matter is whether to consider the past use of the claimed easement in determining its scope. In the context of a quasi-easement, where the grantor’s intent is based on his use of the property prior to conveyance, a strong argument can be made that the scope of the easement is essentially established prior to severance of title. With easements by necessity, however,

46  Carroll v. Meredith, 59 S.W.3d 484, 491 (Ky. Ct. App. 2001) (emphasis added); see also Gosney v. Glenn, 163 S.W.3d 894, 901 (Ky. Ct. App. 2005) (holding that there was no necessity where a public road could be accessed, even if it could only be accessed by tractor or four-wheeler); Standard Elkhorn Coal Co. v. Moore, 289 S.W. 261 (Ky. 1926) (“If the grantee has an outlet over his own land, although less convenient, he cannot claim a right over the land of the grantor.”).
many courts find that the *present* use of the property governs the scope of the easement.

The scope of an implied easement has enormous importance in the mining context, which often involves the use of previously unused or lightly used property on one hand, and very intrusive surface use on the other. For example, the owner of a mineral lease on a tract landlocked from any public road claims an easement by necessity to haul coal across a tract once held by a common grantor. This past unity of title meets the first element of the easement by necessity. There is absolutely no other access to the public road, so the requirement of strict necessity would appear to be met in most states. But the mineral property was divided in the 19th century, before any widespread mining took place in the area. The party attempting to defeat the easement will argue that there was no necessity in the 19th century, because there was no coal mining in the area at the time, or at a minimum, that the scope of the easement (and correspondingly of the necessity) was not so great as to accommodate a coal haulage road. The opponent could also attempt to argue that if the owner of the landlocked mineral tract can have ingress and egress over a narrow road, or perhaps by use of a stream, then there can be no easement of necessity.

At least one court has held, however, that the scope of the easement by necessity is not strictly controlled by the extent of the necessity in existence at the time unity of title ceased. In *Keen v. Paragon Jewel Coal Company*, the Supreme Court of Virginia found that an easement by necessity existed to allow coal haulage from a landlocked tract.\(^{54}\) In *Keen*, a large tract of property was divided in 1895. The property was located in a remote, mountainous and heavily wooded area of the state. From the record, it does not appear that any mining was taking place at the time title was severed. Years later, the owner of the minerals under one of the landlocked parcels of this original tract sought to haul coal across one of the other parcels, claiming that it held an easement by necessity. The owner of the purported servient estate objected on the basis that at the time of the initial severance of title, there was no apparent necessity for, or actual use of, an easement to haul coal. Rejecting this argument, the court held that the scope of the easement by necessity was

not limited to the use which may have been necessary at the time title was severed, but instead “may increase to meet the increased necessities of the property.”55 Because the “use of the right of way over Keen’s land did not go beyond what was reasonably necessary for the transportation and marketing of the natural resources from defendant’s land,” an easement was implied.56

Keen remains good law in Virginia, and has been cited in a handful of cases in other jurisdictions. Courts in other easement by necessity cases outside of the mineral context appear to have adopted the basic rationale that the scope of the easement by necessity is determined based on the present use of the dominant tenement.57 Thus, in the mineral context, a party seeking to prove the existence of the easement may in fact prefer to hold an easement by necessity, rather than a quasi-easement, as it conceivably grants an easement of a greater scope. Of course, the value of obtaining an easement by necessity is mitigated to some extent by the difficulty in establishing the element of absolute necessity required to support it.


The easement by estoppel is unique within the field of implied easements in that it focuses primarily on the actions of the owner of the servient estate, rather than the party claiming the easement. “Estoppel is based upon the principle that one who failed to act when he should have acted should not reap a profit to the detriment of his adversary.” 58 In its most basic form, estoppel involves “(1) misrepresentation or fraudulent failure to speak and

55 Id. at 546.
56 Id. at 548.
57 See, e.g., Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 264 P.3d 1065, 1083 (Mont. 2011) (“A developed way of access to the landlocked parcel need not actually exist at the time of severance. Indeed, this is the fundamental distinction between an easement by necessity and an easement by existing use. The location and dimensions of a way of necessity are dictated by the necessity on which the easement is based and what is reasonable under the circumstances.”) (internal citations omitted). See also Schumacher v. Dep’t of Natural Res., 663 N.W.2d 921, 924 (Mich. App. 2003) (scope of easement of necessity changes along with advances in technology); Beck v. Mangels, 640 A.2d 236, 250 (Md. App. 1994) (“the scope of ingress/egress ways of necessity may reasonably increase with the dominant estate’s necessary and reasonable needs as those needs exist, present and future.”).
58 Sizemore v. Bennett, 408 S.W.2d 449, 451 (Ky. 1966)
(2) reasonable detrimental reliance” on the misrepresentation or failure to speak.59 An easement by estoppel, then, is the application of this equitable principle to the use of real property.

The two situations where an easement by estoppel is most likely to arise are (1) where a landowner represents that an easement exists, where it in fact does not, and (2) where a landowner allows another party to use property in the mistaken belief that the party holds an easement.60 It is not difficult to imagine how these situations might play out in the context of a mining operation. Consider the following scenario: Landowner leases Parcel A to Mining Company. In the course of mining Parcel A, Mining Company uses a particular location to load trucks and place overburden. Landowner, happy to receive the regular royalty checks from the mining of Parcel A, knows that Mining Company is using this property for these purposes, even though it really is part of the adjacent Parcel B. The relationship between Landowner and Mining Company later sours, the royalty checks stop and Landowner erects a gate to prevent Mining Company from using Parcel B. Assuming that Mining Company cannot establish a quasi-easement or easement of necessity, can Mining Company regain the use of Parcel B via an easement by estoppel? As with most unconventional easements, the answer depends on the facts.

In Kentucky, the elements necessary to establish an easement by estoppel have been expressed as follows: (1) the party denying the easement made a false representation to the party asserting the easement; (2) the party denying the easement intended, or at least expected, that the party asserting the easement would rely on the representation; and (3) the party asserting the easement did in fact rely on the representation to his detriment.61 The

60 Id. at nn. 7.
61 Roe Creek Dev., Inc. v. Arnett, 2010-CA-001149-MR, 2011 WL 5865431 at *3 (Ky. Ct. App. Nov. 23, 2011) (unpublished) (describing the elements to include: that the party denying the easement knew the material facts which had been concealed or about which the party had made a false representation to the party asserting the easement (citing Jones v. Sparks, 297 S.W.3d 73, 77 (Ky. Ct. App. 2009)).
analysis is similar in other jurisdictions. These can be difficult elements to establish in any jurisdiction, particularly if the alleged “false representation” is construed merely as an oral promise within the relevant statute of frauds. This may partially explain the relatively small amount of case law regarding easements by estoppel.

In the example above, Mining Company would need to establish that Landowner engaged in some more affirmative conduct other than mere acquiescence in Mining Company’s use of Parcel B, perhaps by affirmatively misrepresenting that the portion of Parcel B used by Mining Company was in fact part of Parcel A. Mining Company would also need to establish that Landowner knew or expected that Mining Company would rely on that false representation and that Mining Company suffered some detriment as a result, perhaps by not pursuing the purchase of the now-unavailable Parcel C.

Even if the party asserting an easement by estoppel has the “good facts” necessary to satisfy the elements, this type of easement can be of limited use. In Kentucky, at least, easements by estoppel do not run with the land. Kentucky courts have held that easement by estoppel is an equitable principal invoked against a particular person based on particular conduct and can only bind a subsequent grantee of that party if there are similar equitable principles involved; otherwise, the easement is extinguished. In our example, even if Mining Company could prove the elements necessary to establish an

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62 See, e.g., Shrewsbury v. Humphrey, 395 S.E.2d 535, 538 (W. Va. 1990) (“[T]here must be a showing that a representation was made and that the party relied upon that representation before an easement by estoppel can be established.”), partially overruled on other grounds by O’Dell v. Stegall, 703 S.E.2d 561 (W. Va. 2010); Prymas v. Kassai, 858 N.E.2d 1209, 1213 (Ohio Ct. App. 2006) (“The party seeking to establish an equitable easement must show (1) a misrepresentation or fraudulent failure to speak, and (2) reasonable detrimental reliance.”).
63 Cottrell v. Nurnberger, 47 S.E.2d 454, 461 (W. Va. 1948) (finding that a developer’s oral representations that a lot would be reserved for certain uses were merely oral promises and not representations sufficient to support an easement by estoppel).
64 Bennett v. Charles Corp., 226 S.E.2d 559, 563 (W. Va. 1976) (noting the “limited instances in which an easement has been held to ‘arise from estoppel’”).
65 See Roe Creek, 2011 WL 5865431 at *3 (“[S]imply failing to object is not enough.”).
66 See, e.g., Sparks, 297 S.W.3d at 77.
easement by estoppel with respect to Parcel B, it would be useless if by then Landowner had sold Parcel B to a third party.


The third type of easement arising by operation of law is the prescriptive easement, which is based on the law of adverse possession. Even within a single jurisdiction, the courts do not always consistently describe the elements necessary to establish adverse possession in either a fee simple or easement context.68 These differences are largely variations on a theme, however, and the party claiming a prescriptive easement generally must establish that the use in question was (1) actual, (2) hostile, (3) open and notorious, (4) exclusive and (5) continuous for the time period required under the law of the jurisdiction.69 The required time period derives from statute and, subject to any applicable statutory exceptions, is 10 years in West Virginia,70 15 years in Kentucky71 and 15 years in Virginia.72

The elements necessary to establish adverse possession are well known, and any in-depth analysis of their application depends heavily on the facts of each case. Indeed, one court noted that “the physical nature of the thing possessed must determine the character of the acts necessary to impart notice that the right to use or possess is asserted and exercised without consent, continuously, and in open hostility to anyone’s right to interfere.”73 Therefore, it may be more helpful to discuss how certain of these elements have been interpreted and applied in the context of prescriptive easements asserted in connection with mineral operations.

Drew v. Whittington,74 for example, addressed the exclusivity element required under Illinois law to establish a prescriptive easement. The case has

73 Riley v. Jones, 174 S.W.2d 530, 532 (Ky. 1943).
important implications for any operator who uses haul roads constructed by another operator. The *Drew* claimant asserted a prescriptive easement over a roadway that had been constructed on adjacent property by that owner’s oil company tenant in order to service oil and gas wells located on both properties. The claimant subsequently began using the roadway to access a portion of his property. The court began by noting that “it is well settled [in Illinois] that exclusive use does not mean that no one . . . use[s] the way in question [other than the claimant]." Rather, it means that the claimant’s right to use the way does not depend upon a like right in others." Here, the claimant did not construct or maintain the roadway and only began using it after the oil company did. Therefore, the court found it reasonable to conclude, as the lower court had, that the claimant’s use of the roadway depended on the oil company’s use of the roadway; in other words, a like right in another. Therefore, the claimant failed to demonstrate the exclusivity needed to support a prescriptive easement in the roadway.

With respect to the element of continuous use, the court in *Walley v. Iraca* upheld the lower court’s determination that a mineral owner asserting the right to haul coal over a dirt road on his neighbor’s property had failed to establish the elements necessary to support a prescriptive easement. The opinion does not contain an in-depth discussion of the trial court’s interpretation of these elements, but it remains notable for its analysis of the continuous use requirement. During the trial, the neighbor contended that the mineral owner had at one point asked for permission to use the road to haul coal. Because the alleged request occurred after the statutory period had run, the lower court had not considered it in the context of a defense to the mineral owner’s asserted prescriptive claim but instead as bearing on the mineral owner’s claim that his use of the road had been continuous as required. The *Walley* court noted that establishing continuity of use need not require “constant, day-to-day use,” but could be established “if the evidence

75 *Id.* at 932.
76 *Id.*
77 *Id.*
79 *Id.* at 890.
shows ‘a settled course of conduct indicating an attitude of mind on the part of the user’” that his use is the exercise of a property right.\textsuperscript{80}

While prescriptive easements can be useful, they have limitations. The general rule is that the use of an easement established by express grant or reservation is not restricted to the types or modes of use in existence when the easement was established unless the language provides otherwise.\textsuperscript{81} With a prescriptive easement, however, the courts are largely unwilling to permit a use that is significantly broader or more burdensome than the use upon which the prescriptive easement was based.\textsuperscript{82} In the mineral context, this arises frequently with respect to haul roads. For example, in Luther\textsuperscript{83} v. Jeffers, a mine operator sought to establish a prescriptive easement in order to use a road over Ms. Jeffers’ property for purposes of moving mining equipment and hauling coal. The evidence that the operator’s predecessors had used the road for private domestic purposes, a small farming operation and the occasional hauling of small amounts of coal for at least 20 years was sufficient to satisfy the requirements of open, visible, notorious and adverse use of the roadway, thereby giving the operator a prescriptive easement over it. The court, applying Virginia law, held that the scope of the prescriptive easement was limited to “normal rural transportation” and could not be enlarged to encompass the operator’s contemplated use of the roadway for its “extensive coal mining operations,”\textsuperscript{84} which would have included moving large pieces of machinery and hauling significant amounts of coal over the

\textsuperscript{80} Id. (quoting Keefer v. Jones, 359 A.2d 735, 737 (Pa. 1976)).

\textsuperscript{81} See, e.g., Cameron v. Barton, 272 S.W.2d 40, 41 (Ky. Ct. App. 1954) (“As the passage of time creates new needs and the uses of property change, a normal change in the manner of using a passway does not constitute a deviation from the original grant, and modern transportation uses are not restricted to the ancient modes of travel.”). See also Beattyville Co. v. Tyrone Coal Co., 265 S.W. 616, 618 (Ky. 1924) (noting that express right of way granted to coal mining operator in severance deed “necessarily” authorized the operator “to use modern methods of transporting”).

\textsuperscript{82} Williams v. Slate, 415 S.W.2d 616, 617-18 (Ky. 1966) (“An easement by prescription is limited by the purpose for which it is acquired and the use to which it is put for the statutory period.”). See also Brown v. Fleagane, 1976 WL 188536 at * 2 (Ohio Ct. App. 1976) (finding that prescriptive easement over roadway was limited to the agricultural use that established it and would not permit commercial use by coal trucks).


\textsuperscript{84} Id. at 183.
road. The court noted that a prescriptive easement acquired based on use of a certain nature or character, such as ingress and egress for domestic and other ‘light’ transportation purposes, cannot be enlarged to allow other uses that are significantly different or impose a “substantial or material increase of burden on the servient estate.”85 Similarly, a Kentucky court held that even though the general public had acquired a prescriptive easement over an old farm road for “normal rural transportation purposes,” the use of the roadway could not be enlarged to function as “a haul-road for heavy coal trucks[,] which] was an entirely new and heavily burdensome use unrelated to that which had theretofore existed.”86

§ 15.04. Statutory Easements and Rights of Entry.

In certain limited circumstances, statutes may also provide a right of entry or easement that could be of use to the mineral operator. Because these easements arise either in a very specific set of circumstances, or can be used only for limited purposes, they are only briefly analyzed here.


Where a company is required by state or federal law, such as SMCRA,87 to perform reclamation operations or remediate reclamation violations, a right of entry exists in many states to enter upon the land of another to carry out these obligations. In some states, the “right of entry” is merely a prohibition from interfering with reclamation operations. West Virginia’s statute, W. Va. Code Section 22-3-11(e), is one example, and provides: “It is unlawful for the

85 Id. at 183-84. See also Brown v. Fleagane, 1976 WL 188536 at *2 (describing proposed use of prescriptive easement for commercial coal trucks as an “imposition of a heavier burden upon the proposed servient estate” where prescriptive easement was established based on “normal domestic” use).
86 Williams v. Slate, 415 S.W.2d 616, 618 (Ky. 1966).
87 Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. SMCRA is the primary statute governing reclamation obligations applicable to surface mining and the surface effects of underground mining. Most eastern coal mining states (with the notable exception of Tennessee) are “primacy” states under SMCRA, meaning they have been delegated primary enforcement and oversight responsibility with respect to surface mining and the surface effects of underground mining within their borders. As such, state statutes and regulations should always be consulted when determining the available options for obtaining right of entry to perform reclamation.
owner of surface or mineral rights to interfere with the present operator in the discharge of the operator’s obligations to the state for the reclamation of lands disturbed by the operator.”

Virginia has adopted a similar statute.

Although these statutes can be beneficial for a company dealing with a recalcitrant landowner, they are primarily designed to protect the government’s ability to compel the completion of reclamation work. The federal government has held that the inability to obtain right of entry does not relieve a mine operator from its obligations to conduct reclamation necessary to abate violations. Thus, the utility of this right of entry is naturally limited to only necessary reclamation work. However, these statutes do provide an option for obtaining a right of entry that otherwise would not exist.

Kentucky has adopted a more complex procedure for obtaining right of entry to abate violations of reclamation or environmental statutes. Under Ky. Rev. Stat. 350.280, where an operator is denied access, it must provide a statement to the property owner (or lawful occupant) stating that access has been denied, that an appraiser will be hired to value the property, and that the operator will diligently work to abate the violation. The operator must also provide the regulatory authority and the property owner with a copy of a reclamation plan regarding work on the property. At that point, an easement by necessity is created to enter the property and perform the work. During and after the time the work is carried out, however, the operator must also hire an appraiser, and begin negotiations with the property owner as to damages. The property owner has the opportunity to dispute the operator’s appraisal, and to bring an action in court seeking to establish the proper amount owed for the right of entry. Finally, the statute specifically states that nothing in

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88 See W. Va. Code § 22-3-11(e).
89 See Va. Code Ann. § 45.1-188 (2012) (“It shall be unlawful for any owner or owners of surface rights or the owner or owners of mineral rights to interfere with the operator in the discharge of his obligations to the Commonwealth for the reclamation of lands disturbed by him.”).
90 See 66 Fed. Reg. 33020 (June 20, 2001) (discussing Office of Surface Mining administrative decisions holding that inability to obtain right of entry does not relieve permittee of burden of abating violations).
91 Kentucky actually has another statute creating a right of entry to perform reclamation. See Ky. Rev. Stat. Ann. § 350.105. This statute is too narrow in scope, however, to be of general applicability.
the section prohibits the property owner from bringing any other appropriate civil action for relief related to the incident.

Kentucky’s more complex procedure was apparently designed to overturn an unpublished court of appeals decision in *McCoy Elkhorn Coal Corporation v. Greene*, 96-CA-2644. In that decision, the court of appeals held that a coal company had no right to enter a property owner’s surface estate to reclaim and repair subsidence cracks that had developed, and that the state’s regulators could not compel the property owners to allow the coal company to enter their property. Thus, the procedure in Ky. Rev. Stat. 350.280 was designed to allow the company to immediately obtain access after making the promise of a future appraisal and payment of damages – in other words, it forces the surface owner to the bargaining table.

It should be noted that the state statutes that merely prohibit interference with reclamation by a third party do not absolve a mine operator from civil liability toward a third party affected by mining operations which must be reclaimed. Thus, while these statutes provide for right of entry, they do not necessarily shield the mine operator from other damage claims resulting from whatever activity occasioned the need for the right of entry.


Statutes creating public roadways due to continuous public use are also a source of easement rights. In some instances a right may exist on behalf of the general public, not just the mine operator, to use a particular right of way if certain statutory requirements are met. The creation of a public roadway by continued public use is akin to the prescriptive easement in many respects, although it may involve different issues of proof. Although the specific requirements vary by jurisdiction, the Kentucky Court of Appeals provided a generally applicable statement of the rule in *Cole v. Gilvin*:

It is settled in this state that a general and long-continued use of a passway by the public as a right will create the right to continue

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the use and the owner of the land traversed by the passway who allows the public to use it as a highway for a long period of years under a claim of right will be estopped from denying a dedication to the public.\textsuperscript{93}

Under this formulation, a party seeking to prove the existence of a public road must prove public use for a statutorily defined period, and a number of years of maintenance or control of the road by the government.\textsuperscript{94}

Although these are the two elements required to be demonstrated, they are loaded with additional factors that courts consider in determining whether a particular roadway is actually a “public” one. Perhaps the most commonly recurring issue with respect to the public roadway easement is whether the road has been used by the general “public.” To determine whether use is “public” as required to prove the existence of this easement, courts turn to a variety of factors, including: whether residents live along the roadway and use it to access homes; whether businesses are located on the roadway; whether customers use the roadway to access those businesses; the history of repairs or regarding of the roadway by the government; and the use of the roadway for mail service.\textsuperscript{95}

None of the above factors is necessarily dispositive. Courts simply evaluate all of the facts surrounding the use of the road to determine, as one court put it, whether the road “lead[s] to any place . . . the general public would have an interest in going.”\textsuperscript{96} The case law demonstrates that a road does not

\textsuperscript{93} 59 S.W.3d 468, 473 (Ky. Ct. App. 2001) (quoting Freeman v. Dugger, 286 S.W.2d 894 (Ky. 1956)).
\textsuperscript{94} See, e.g., Watson v. Crittenden Cnty. Fiscal Court, 771 S.W.2d 47, 48 (Ky. Ct. App. 1989) (“a public road may be acquired by prescription only upon (1) fifteen years public use and (2) a like number of years of control and maintenance by the government.” (citing Sarver v. Allen Cnty. Fiscal Court, 582 S.W.2d 40, 43 (Ky. 1979))). The presence of these two elements creates a presumption that the road is a public one. See Ky. Rev. Stat. Ann. § 178.025(1) (“Any road, street, highway or parcel of ground, dedicated and laid off as a public way and used without restrictions on a continuous basis by the general public for fifteen (15) consecutive years, shall conclusively be presumed to be a public road.”).
\textsuperscript{95} See generally Whilden v. Compton, 555 S.W.2d 272 (Ky. App. 1977).
become “public” – even if widely used – if it is used only by a particular segment of the public, or only for a particular, limited purpose. Thus, a road that is used exclusively to access hunting or fishing property is unlikely to be deemed a public roadway, even if it is used by many individuals for this limited purpose.\(^97\) Similarly, a road that it used only by neighbors or as a hideout for illicit activity will generally not be considered a public road.\(^98\)

Another issue arising in the public roadway context is abandonment. Because a public roadway is established by continuous public use and maintenance, it follows that a period of nonuse by the public and neglect by the government can result in the roadway reverting to the owner of the otherwise burdened estate.\(^99\) Generally, the period of nonuse necessary to demonstrate abandonment of a public road is the same time period required to show abandonment of a prescriptive easement, which is typically set by statute, as discussed above.\(^100\) The abandonment issue is further complicated by statutes governing the formal dedication of roads into a state or county system. Where a government entity has taken some formal action to claim a roadway as part of the public system, a longer period of nonuse may be required to show abandonment.\(^101\)

Clearly, showing the existence of a public road involves difficult issues of proof. Each of the two key factors – continued public use and continued government maintenance or oversight – may require resort to witnesses or documents that are quite old, or worse, non-existent. On the other hand, because meeting the statutory requirements for the existence of a public

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97 See Allen, 209 S.W.3d 475, 482 (Even though 118 witnesses were prepared to testify that they used the road at issue for hunting and fishing purposes, court held that due to lack of any other purpose for the road and other factors, the road could not be considered public).
98 See Cummins, 477 S.W.2d 163 (use of roadway for “drinking and lollygagging” was not sufficient to establish public roadway).
99 See Sarver v. Allen County Fiscal Court, 582 S.W.2d 40, 42 (Ky. 1979) (“when the public has acquired the free use of a roadway by user . . . it may abandon that right by a long period of nonuse.”).
100 Id. at 43 (holding that 15 years of nonuse was required to abandon public road as this is the statutory time period in the state to show abandonment of a prescriptive easement).
101 See, e.g., Sarver, 582 S.W.2d at 41 (recognizing that if a road has been “dedicated” into the county road system, the period of nonuse or neglect of maintenance to prove abandonment is 33 years, rather than 15, per a state statute).
roadway creates a presumption in favor of its existence, the public roadway requires proof of fewer elements than some of the easements discussed herein.

Determining whether a particular road or passageway has been dedicated to public use (or abandoned by nonuse) generally requires an evaluation of state statutes related to the dedication of public roads. Often, these statutes contain different requirements for the formal dedication of state, county or city roads into the public system, and different requirements for the establishment of public roadways by long periods of continuous use. Thus, before attempting to prove the existence of a public road, state laws and municipal ordinances should be consulted.

15.05. Conclusion.

The easements and rights of entry discussed in this chapter are not the first, and almost never the best, option for obtaining surface use rights in the mining context. In many cases, however, they may be the only choice. Proving each of these easements or rights of entry may be difficult, but it is not always impossible. Careful examination of the facts presented in a particular case, and the law of a particular jurisdiction may well prove the existence of one or more of these easements “of last resort” and grant the right of use necessary to continue operations.