

RIGHT-OF-WAY STATUTES & THEIR CHARACTERISTICS

| | 1866 ACT | 1891 ACT | FLPMA (1976) | DITCH BILL (1986) |
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| Type of grant & general considerations | Easement. A congressional recognition of a pre-existing right to construct, operate, and maintain water systems on federal lands. A true property right subject to constitutional protection. Perhaps the most desirable easement. | Easement. A congressional grant of an easement to construct, operate, and maintain water systems on federal lands. A true property right subject to constitutional protection. Again, a very desirable easement. | Mix between an easement and a license. Questionable whether a Federal Lands Policy Management Act ("FLPMA") "easement" is a property right subject to constitutional protection. As a general matter, this firm encourages water users to attempt to verify/confirm an easement under a statute other than FLPMA. | Mix between an easement and a license. Questionable whether a Ditch Bill "easement" is a property right subject to constitutional protection. Alleged purpose of the Ditch Bill was to provide an easement for water systems built prior to 1976 under a Forest Service Special Use Permit. A Ditch Bill easement probably is more desirable than a plain FLPMA easement, but this firm encourages water users to attempt to acquire easements under a statute other than the Ditch Bill. |
| Term | Perpetual. | Perpetual. | Specified number of years. | "Permanent," but subject to revocation for a number of reasons. |
| Subject to termination, revocation, or forfeiture? (Each of the listed easements can be voluntarily relinquished.) | Yes but only for failure to comply with requisites of 1866 Act. Also subject to loss because of abandonment. | Yes but only for failure to comply with requisites of 1891 Act. Also subject to loss because of abandonment. | Yes failure to comply with FLPMA or terms and conditions of easement document. Also subject to loss because of abandonment. | Yes failure to comply with Ditch Bill, the FLPMA or terms and conditions of easement document. Also subject to loss because of abandonment. |
| Method of termination | Judicial proceedings. | Judicial proceedings. | Administrative proceedings. | Administrative proceedings. |
| Rental fees | Free. | Free. | Rental fee based on per acre rental value. Fee can be reduced or waived at agency discretion (usually only waived if applicant agrees to provide some public benefit (bypass flow, minimum reservoir pool, etc.). | Free. |
| Extent of regulation | Subject to reasonable regulations that are consistent with 1866 Act. (Usually very limited.) Not subject to future rules and regulations, unless those regulations are consistent with 1866 Act. For all practical purposes, not subject to much regulation because in most cases no formal documentation for the easement exists. | Subject to reasonable regulations that are consistent with 1891 Act. (Usually very limited.) Not subject to future rules and regulations, unless those regulations are consistent with 1891 Act. For all practical purposes, these easements are subject only to the specific stipulations that the agency attached to the easement when it was first granted. | Subject to regulations that are consistent with the FLPMA. Also note that most FLPMA easement documents make the easement subject to future rules and regulations (presumably even if those rules or regulations are not consistent with the FLPMA). | Subject to regulations that are consistent with the Ditch Bill and the FLPMA. Also note that most Ditch Bill easement documents make the easement subject to future rules and regulations (presumably even if those rules or regulations are not consistent with the Ditch Bill or the FLPMA). |

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| Discretion of agency officer to administer and impose additional requirements not spelled out in easement document | Very little discretionary power. | Very little discretionary power. | Very broad discretionary power. | Broad discretionary power. |
| Transferability | Freely transferable. | Normally freely transferable, unless the easement specifies otherwise. | Not transferable without assent of agency. | Not transferable without assent of agency. |
| Liability for damages to National Forest lands | Liability defined by state law. | Liability defined by state law. | Defined by federal law and regulation; usually strict liability applies. | Defined by federal law and regulations; usually strict liability applies. |
| Scope of easement | Defined by the physical extent of the on-the-ground easement, plus adjacent lands. The extent of adjacent lands included in the easement is a question of state law. In many states, a "reasonable and necessary" standard applies. | Defined by the physical extent of the on-the-ground system, plus fifty feet from the marginal limit thereof. Also, upon a satisfactory showing by the water company, the easement can include those adjacent lands deemed necessary for the proper operation and maintenance of the system. These standards come from the 1891 statute, although there is some authority for looking to customs under state easement law. | Defined by the specific legal description of the system in the easement document. | Defined by the specific legal description of the system in the easement document. |
| Can modifications be authorized under the original easement (are deviations allowed)? | Yes. Again a question of state law as to whether the deviation is within the scope of the original easement. | Yes. If the deviation is non-substantial and conforms with the general purposes and scope of the original easement. | Yes, but only upon a specific determination from the agency that the change falls within scope of original easement. Recent agency practice is to treat any deviation as "outside the scope" of original easement. This requires a new authorization. | No. The Ditch Bill statutory language plainly states that "any future extension or enlargement of facilities" will require a separate authorization (under FLPMA). |
| Relevant date as to definition of the easement (in relation to systems on National Forest lands) | The date of creation of the National Forest. | October 21, 1976. (Facilities must have been in place prior to October 21, 1976. | Applies to all easements issued after October 21, 1976. Forest Service has attempted to apply to systems built prior to 1976, if no formal agency documentation of an easement exists. | A Ditch Bill easement can be acquired only for those physical water conveyance and storage facilities in place as of October 21, 1976. Any extensions or enlargements built after 1976 must be authorized by a FLPMA easement. |
| Ability of agency to require bypass flows | For all practical purposes bypass flows are precluded because there is no formal agency documentation of the easement. Bypass flows would also be inconsistent with plain language of the 1866 Act. | Precluded by statutory language, old Dept. of the Interior regulations, and Dept. of the Interior administrative decisions. | Questionable. Forest Service has imposed bypass flows under FLPMA. Forest Service argues that FLPMA gives it the discretion to impose bypass flows. Environmental groups have argued that FLPMA <u>requires</u> the Forest Service to impose bypass flows (Trout Unlimited litigation). | Same as FLPMA. Many persons have the mistaken belief that the Ditch Bill precludes bypass flows. The Ditch Bill plainly states that it does not increase or <u>decrease</u> the power of the Forest Service to regulate water rights. |

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| How is the easement acquired? | Actual completion of construction of the water system (and use) before the lands were set aside as a National Forest. No formal agency documentation is necessary. Must have proof of state water rights. | Acquired through formal application OR through actual construction and use before October 21, 1976. Note that Forest Service argues that the only way to acquire an easement was by pre-construction application or post-construction formal approval by federal government. (This position is contrary to plain language of the 1891 Act, as noted recently by the federal district court in Colorado.) | Pre-construction application and approval. | Application. Deadline to submit application was 12/31/96. |
| Miscellaneous | Forest Service is actively attempting to extinguish 1866 Act easements. Note that until 1986, the Dept. of the Interior had the sole jurisdiction to issue and administer 1866 Act easements. | Forest Service is actively attempting to extinguish 1891 Act easements. Note that until 1986, the Dept. of the Interior had the sole jurisdiction to issue and administer 1891 Act easements. | Most FLPMA easements are issued subject to valid existing rights. Thus, even if a water company has acquired a FLPMA easement, it might still possess an easement under another statute. The statute of limitations issues comes into play, however, for water companies that have acquired FLPMA easements. | To acquire a Ditch Bill easement, water users are required to relinquish any easements that they have or might have under other federal statutes. (Must sign away all prior rights.) |