



Preserving Property Access

—Victor P. Haley

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Every timberland owner understands the importance of maintaining reasonable access to his property while protecting the property from the unwanted access of others. Yet many timberland owners take their access for granted and do not fully consider the impact of access both on operations and the value and marketability of timberland properties.

Insurable Access

The clearest and most desirable type of property access is “insurable access,” which a title insurance company will insure. To be insurable, access must typically be via a publicly dedicated road, either directly or across a recorded easement. This option allows for easy access to the property to plant and harvest timber. Also, insurable access is most easily understood by a prospective purchaser, and a purchaser has the certainty that its title insurer will insure his access. As a result, a purchaser of property with this quality of access will typically pay a premium (or at least will not take any discount for poor access).

Public Road Access

An owner of property with insurable access can still do several things to enhance the marketability of his property. First, many roads located throughout rural timberlands may be considered public roads, but there may be no record that the applicable governmental authority ever accepted the road for dedication. In advance of a sale, a timberland owner should research the

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county records to determine the ownership of any road providing access to his property. If there is no evidence of county ownership, the owner should work with nearby landowners to have the road publicly dedicated. Second, if the property accesses a public road across a private easement, the owner should investigate the title to the property burdened by the easement to ensure there is no mortgage, option to purchase, or other right which might extinguish the easement.

Private Road Access

Timberland is frequently accessed via woods roads or private roads without any formal agreement with the owner of the road. While such practical access may be sufficient to perform timber management activities, this quality of access may give a prospective purchaser pause. Therefore, prior to a contemplated sale, a timberland owner should attempt to memorialize any informal access arrangement by recording a formal easement with the owner of the easement property. The party receiving the easement should again examine title to the easement property to ensure there

is no other party with rights who might “trump” the rights of the beneficiary of the easement. Since ideally the easement will be perpetual, the beneficiary should attempt to insure that the permissive use under the easement is broad enough to accommodate any possible future use of the benefited property. For example, at some future date the property may have a higher and better use for limited development. If so, an owner will want to insure that the right of access is not limited to timber management purposes only. By obtaining such an easement, the timberland owner converts uninsurable access into insurable access.

Impractical Access

Sometimes a timberland property will have no verifiable practical access. Either the owner accesses the property without permission from the neighbor whose property he crosses or the owner does not access the property at all. In this case, there are two possible ways to obtain access. Most states recognize the “easement of necessity” common law right. This doctrine generally provides that a property cannot lose its access by virtue of a sale of a portion of the property. Therefore, the remaining property will be entitled to an easement of necessity across the portion sold even if there is no formal easement agreement. This doctrine can be negated by the express intent of the parties. Many states also give a landlocked property owner the right to “break out”; that is, the right to acquire an easement across an adjacent landowner’s property. The statutes typi-



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cally require the party seeking an easement to file suit, and the claimant bears the burden of proving that he has no other reasonable means of access and that the easement being sought is reasonable in scope and location. The court will then assess the damages payable to the landowner forced to grant the easement.

Adjacent Property Access

Timberland owners often have others crossing over their property to access adjacent property. Owners providing this access should be diligent in policing the use of the access easement. If the owner does not dispute the existence of the easement, the owner should insist that the easement be evidenced by a written agreement, which will preferably limit the use of the easement area to access that is reasonably necessary to grow and harvest timber. Ideally the easement would also permit the grantor to relocate the easement area as necessary for the operation or development of his property.

The owner of the easement property should also insure that the public does not obtain rights in the easement. He can protect himself in this regard by gating the road and providing keys only to authorized parties. If gating the road is impractical, the owner should periodically close the road to cut off any prescriptive rights of others.

It is important for a timberland owner to consider the role access plays both in property operations and property value. An owner who has not taken steps to obtain and preserve adequate access to his property and to prevent unauthorized use of his property as access to other property may find that the marketability of his property has been impaired.

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Hear representatives from Sutherland Asbill & Brennan LLP speak at the 2006 Annual Forest Landowners Conference in San Antonio, Texas on Thursday, April 27. Haynes Roberts and Enrique Anderson will speak about emerging secondary markets. This discussion will provide an oversight of steadily growing and upcoming trends in forest management to produce alternative sources of income. See pages 3-15 for more conference information, including registration and hotel reservation forms.

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