

## Memorandum 84-63

Subject: Study H-406 - Marketable Title (Abandoned Easements--  
staff draft)

In the past the Commission has been interested in developing a statute to enable clearing title to real property of abandoned easements. The Commission suspended work on this study while Professor French was completing a project to consolidate the law of servitudes. It now appears that any practical results of Professor French's work will not be immediate. It is therefore appropriate for the Commission to proceed on this matter.

Most improved land and much unimproved land is either benefitted or burdened by easements. Easements tend to make the land and improvements more usable or beneficial. Thus the mere existence of the burden of an easement may not indicate that the title is unmarketable; it may only mean that when an easement becomes obsolete, it constitutes an unreasonable encumbrance.

Unlike the possibility of reverter and the right of entry, which impair marketability upon creation, the easement may never detract from marketability unless conditions materially change. In recent years there has been a trend among the states to limit reversionary interests by legislation but little tendency to limit easements. The major statutory limitations on easements appear in the various Marketable Title Acts.

In California an easement may be abandoned by nonuse accompanied by an intent to abandon. An abandoned easement may be removed of record if necessary, but this requires a judicial proceeding because there is no maximum duration for easements as there is for such property interests as leases and because abandonment does not (except in rare instances) appear of record. In addition, proof of intent to abandon may be difficult--nonuse alone is not enough to show abandonment.

The difficulty in this area is to develop a satisfactory means of clearing the record of abandoned easements that will not impose an undue burden on holders of viable easements. The only feasible approach the staff can see is a combination of requirements that will adequately

protect the easement holder, in a scheme similar to the one just enacted for dormant mineral rights. The easement would be abandoned if unused for 20 years, but the easement holder could preserve the easement by recording a notice of intent to preserve the easement. This will enable clearing of obsolete easements while still permitting the easement holder to preserve an easement in perpetuity by a simple act. Treating easements the same way mineral rights are treated also makes theoretical sense since mineral rights are simply a special form of easement--a profit a prendre or right to remove material from land as opposed to a general servitude on land.

Attached to this memorandum is a staff draft of a statute to implement this scheme. Publicly-held easements are excepted from the statute, as are "conservation easements" that may be made perpetual under certain circumstances pursuant to statute. See existing Civil Code § 880.240 (not reproduced here). The staff draft also does not cover negative easements (such as for light and air), which require the servient tenement owner to refrain from using the land in a certain way. A scheme based on nonuse would be inappropriate for negative easements, which we will deal with later in conjunction with equitable servitudes.

Even with these protections, it is likely public utilities and other institutional easement holders would oppose this statute--the burden of recording to preserve thousands of parcels would be tremendous. See Exhibit 1. Rather than except public utilities altogether, the staff has added to the draft a provision developed in connection with the dormant mineral right legislation that enables an easement holder to make a single recording good for all easements in a county.

If the Commission approves this draft, we will distribute it as a tentative recommendation for comment.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

## EXHIBIT 1

*Southern California Edison Company*

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File No.  
7007-2

California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

Attention: Nathaniel Sterling  
Assistant Executive Secretary

Dear Mr. Sterling:

Southern California Edison Company supports your Study H-405 - Marketable Title (Reverter Act), as it would eliminate obsolete possibilities of reverter, more technically called powers of termination, since it would eliminate title defects and would more readily permit us to certify to the Trustees of our bond indenture that no material defects exist in properties which we acquire. Such properties would be more readily available as security for bonds to be issued by the Edison Company.

On the other hand, the Edison Company would not support your Study H-406 - Marketable Title (abandoned Easements), recommendation unless it contained language which your staff recommends, namely, "The staff suggests the Commission consider making an exception for public utility easements -- the burden of rerecording for thousands of parcels would be tremendous...."

Sincerely,

*Marvin D. Homer*  
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Attorney at Law

MDH:jm

cc: P. Walsh  
T. P. Gilfoy

STAFF DRAFT

## TENTATIVE RECOMMENDATION

relating to

## ABANDONED EASEMENTS

Almost all improved land and much unimproved land is either benefited or burdened by easements.<sup>1</sup> Easements tend to make the land and the improvements thereon more usable or beneficial. Thus the mere existence of the burden of an easement may not indicate that the title is unmarketable; it may only mean that when these interests become obsolete, they constitute an unreasonable encumbrance.<sup>2</sup>

If an easement acquired by prescription becomes obsolete, it can be extinguished through nonuse.<sup>3</sup> If an easement acquired by grant becomes obsolete, nonuse alone is not sufficient to extinguish the easement;<sup>4</sup> the intent to abandon the easement must also be shown.<sup>5</sup>

Clearing record title of an easement created by grant that is obsolete thus requires a judicial proceeding and a difficult proof question--intent to abandon. The fact that an easement has not been used for a long period of time is not itself sufficient to infer an abandonment.<sup>6</sup> Similarly, the mere fact that the holder of an easement fails to maintain and repair it, or selects an alternative route, is insufficient to infer an abandonment.<sup>7</sup>

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1. 1 A. Bowman, *Ogden's Revised California Real Property Law* § 13.1 (1974).
  2. L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 223 (1960).
  3. Civil Code § 811(4).
  4. See discussion in 3 B. Witkin, *Summary of California Law Real Property* § 374, at \_\_\_\_\_ (8th ed. 1973); 1 A. Bowman, *Ogden's Revised California Real Property Law* § 13.50 (1974); 2 H. Miller & M. Starr, *Current Law of California Real Estate* § 18:64 (rev. 1977).
  5. See discussion in 3 B. Witkin, *Summary of California Law Real Property* § 376, at \_\_\_\_\_ (8th ed. 1973); 1 A. Bowman, *Ogden's Revised California Real Property Law* § 13.49 (1974); 3 H. Miller & M. Starr, *Current Law of California Real Estate* § 18:66 (rev. 1977).
  6. See, e.g., *Vallejo v. Scally*, 192 Cal. 175, 219 P. 63 (1923).
  7. See discussion in 3 H. Miller & M. Starr, *Current Law of California Real Estate* § 18:64 (rev. 1977).

The difficulty of clearing the record of an abandoned easement impairs the value and marketability of property even though the easement is obsolete. As a general rule, if an easement is relatively old and has been unused for a period of time, the easement should be subject to extinguishment without a showing of actual intent to abandon.<sup>8</sup>

The Law Revision Commission recommends that an easement be deemed abandoned if it has been unused for at least 20 years continuously, without payment of taxes or any other record transaction relating to the easement.<sup>9</sup> To accommodate cases where the easement holder's nonuse is merely temporary or where the easement is held for future use, the Commission further recommends that the easement holder be permitted to extend the duration of the easement for a period of 20 years at a time by recording a notice of intent to preserve the easement.<sup>10</sup> This will provide a relatively simple but effective means of ensuring preservation of the easement through periods of nonuse.

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The Commission's recommendation would be effectuated by enactment of the following measure.

An act to add Chapter 7 (commencing with Section 887.010) to Title 5 of Part 2 of Division 2 of the Civil Code, relating to easements.

The people of the State of California do enact as follows:

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8. Negative easements, such as for light and air, are excepted from this rule since the fact of nonuse is difficult to ascertain.
  9. This rule should not apply to "conservation easements" that are perpetual in duration pursuant to Civil Code Section 815.2.
  10. Recordation of a notice of intent to preserve for 20 years would not affect the ability of the servient tenement owner to show an actual abandonment should it occur before expiration of the 20-year period.

SECTION 1. Chapter 7 (commencing with Section 887.010) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

Chapter 7. Abandoned Easements

§ 887.010. "Easement" defined

887.010. As used in this chapter, "easement" means a burden or servitude upon land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts upon the land.

Comment. Section 887.010 provides a special definition of an easement for the purposes of this chapter. This chapter applies to affirmative easements, whether appurtenant or in gross. Contrast Sections 801 and 803 ("easement" is an appurtenant servitude). Negative easements are not governed by this chapter.

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§ 887.020. Common law of abandonment not affected

887.020. This chapter supplements and does not limit or otherwise affect the common law governing abandonment of an easement or any other procedure provided by statute for clearing an abandoned easement from title to real property.

Comment. Section 887.020 makes clear that although this chapter prescribes a standard for determining that an easement has been abandoned, it is not intended to limit the common law of abandonment of easements. See discussion in 3 B. Witkin, Summary of California Law Real Property §§ 374-376 (1973); 1 A. Bowman, Ogen's Revised California Property Law §§ 13.49-13.50 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate §§ 18:64-66 (rev. 1977).

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§ 887.030. Action authorized

887.030. (a) the owner of real property subject to an easement may bring an action to establish the abandonment of the easement and to clear record title of the easement.

(b) The action shall be brought in the superior court of the county in which the real property subject to the easement is located.

(c) The action shall be brought in the same manner and shall be subject to the same procedure as an action to quiet title pursuant to Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure, to the extent applicable.

Comment. Subdivision (a) of Section 887.030 authorizes an action to establish abandonment of an easement, subject to the limitations and conditions in this chapter. This is consistent with public policy to enable and encourage full use and development of real property. Section 880.020 (declaration of policy and purposes). This is also consistent with the common law rule that easements are subject to abandonment. See Section 887.020 and Comment thereto (common law of abandonment not affected). This chapter supplements common law principles of abandonment by providing a separate and independent basis for determining abandonment of an easement.

Subdivisions (b) and (c) incorporate, insofar as applicable, the general quiet title procedures for an action pursuant to this chapter. See Code Civ. Proc. §§ 760.010-764.070.

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§ 887.040. Abandonment

887.040. (a) For the purpose of this chapter, an easement is abandoned if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the action to establish the abandonment of the easement.

(1) The easement is not used at any time.

(2) No separate property tax assessment is made of the easement or, if made, no taxes are paid on the assessment.

(3) No instrument creating, reserving, transferring, or otherwise evidencing the easement is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the easement or in another recorded document unless the instrument or other document provides an earlier expiration date.

(c) For purposes of this section, an instrument does not create, reserve, transfer, or otherwise evidence an easement unless the instrument makes specific reference to the easement.

Comment. Section 887.040 provides for expiration of an unused easement after 20 years, notwithstanding a longer or an indefinite period provided in the instrument creating the easement. This reverses prior law that an easement obtained by grant cannot be lost by mere nonuse. See, e.g., discussion in 3 B. Witkin, Summary of California Law Real Property § 376 (1973); 1 A. Bowman, Ogden's Revised California Property Law § 13.49 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:66 (rev. 1977).

The expiration period can be extended for up to 20 years at a time by recordation of a notice of intent to preserve the easement before the easement expires. See Section 887.050 (preservation of easement). Recordation of a notice of intent to preserve the easement does not

necessarily preclude abandonment of the easement pursuant to general principles governing abandonment for nonuse upon a showing of intent to abandon. See Section 880.310 (notice of intent to preserve interest); see also discussion in 3 B. Witkin, Summary of California Law Real Property § 374, at \_\_\_\_ (8th ed. 1973); 1 A. Bowman, Ogden's revised California Property Law § 13.50 (1974); and 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:64 (rev. 1977).

Subdivision (c) makes clear that in the case of an appurtenant easement, a transfer of the dominant tenement without reference to the easement does not start the twenty-year period running anew, even though such a transfer may be effective to convey the easement. Sections 1084, 1104.

Easements held by public entities and conservation easements are not subject to expiration pursuant to this section. See Section 880.240 (interests excepted from title).

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§ 887.050. Preservation of easement

887.050. (a) The owner of an easement may at any time record a notice of intent to preserve the easement.

(b) In lieu of the statement of the character of the interest claimed and the record location of the documents creating or evidencing the easement claimed as otherwise required by paragraph (2) of subdivision (b) of Section 880.330 and in lieu of the legal description of the real property in which the interest is claimed as otherwise required by paragraph (3) of subdivision (b) of Section 880.330 and notwithstanding the provisions of Section 880.340 or any other provision in this title, a notice of intent to preserve an easement may refer generally and without specificity to any or all easements claimed by claimant in any real property situated in the county.

(c) An easement is not abandoned for the purpose of this chapter if:

(1) A notice of intent to preserve the easement is recorded within 20 years immediately preceding commencement of the action to establish the abandonment of the easement.

(2) A notice of intent to preserve the easement is recorded pursuant to Section 887.060 after commencement of the action to establish the abandonment of the easement.



Comment. Section 883.230 makes recording a notice of intent to preserve an easement conclusive evidence of non-abandonment for purposes of this chapter. Recording a notice of intent to preserve also creates a presumption affecting the burden of proof that the claimant has not abandoned the easement for purposes of a determination of abandonment pursuant to common law. Section 880.310 (notice of intent to preserve interest).

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§ 887.060. Late recordation

887.060. In an action to establish the abandonment of an easement pursuant to this chapter, the court shall permit the owner of the easement to record a late notice of intent to preserve the easement as a condition of dismissal of the action, upon payment into court for the benefit of the owner of the real property the litigation expenses attributable to the easement or portion thereof as to which the notice is recorded. As used in this section, the term "litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including a reasonable attorney's fee.

Comment. Section 883.250 enables the owner of an easement to preserve the easement, after commencement of an action to establish its abandonment and clear title, by filing a late notice of intent to preserve the interest. This authority is conditioned upon payment of the property owner's litigation expenses. Litigation expenses include disbursements made for title reports and other disbursements made in preparation for the litigation as well as court costs and attorneys fees incurred in connection with the litigation.

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§ 887.070. Effect of establishing abandonment

887.070. An abandoned easement is unenforceable and is deemed to have expired. A court order establishing abandonment of an easement pursuant to this chapter is equivalent for all purposes to a conveyance of the easement to the owner of the real property.

Comment. Section 887.070 makes clear that establishment of abandonment of an easement has the effect of a reconveyance to the owner of the land. See also Section 887.030 (action authorized) and Code Civ. Proc. §§ 764.010-764.070 (effect of quiet title judgment).

§ 887.080. Transitional provision

887.080. Subject to Section 880.370 (grace period for recording notice), this chapter applies to all easements, whether executed or recorded before, on, or after January 1, 1986.

Comment. Section 887.080 makes clear the legislative intent to apply this chapter to easements existing on the date this chapter becomes operative (January 1, 1986). Section 880.370 provides a five-year grace period for recording a notice of intent to preserve an easement that would be subject to termination pursuant to this chapter before, on, or within five years after the operative date of this chapter. See Sections 887.050 (preservation of easement) and 880.370 (grace period for recording notice) and Comments thereto.