FLOWAGE EASEMENTS

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WHAT IS THE DEFINITION OF FLOWAGE EASEMENT?

A flowage easement is the right of the government to use another's land.[1] Any easement is a right or privilege by one to use the land of another for a specific purpose. In the case of a flowage easement, this usually consists of the perpetual right, power, privilege and easement to overflow, flood and submerge the lands affected; reserving, however, to the fee owner of the lands all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights granted in the flowage easement.[2]

WHY SHOULD GOVERNMENT ACQUIRE A FLOWAGE EASEMENT?

An owner of land is entitled to "just compensation" whenever the waters of a stream or lake are altered or impounded so as to inundate, saturate, or erode his land. This applies to lands not previously affected by natural flooding, **AS WELL AS TO THOSE WHICH HAVE BEEN SUBJECT TO NATURAL FLOODING, WHERE WATER LEVEL ALTERATION OR ARTIFICIAL IMPOUNDMENT AGGRAVATES THIS NATURAL FLOODING CONDITION**. Such alteration constitutes a "taking" of the land involved, and the taker must either purchase the affected land in fee or acquire a flowage easement.[3]

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[1] Appraisal of Flowage Easements--Another Look, By Joseph Strain pg. 581

[2] Appraisal of a Flowage Easement, By Lloyd Boettcher, (1957) pg. 374

[3] Appraisal of Flowage Easements, By Lloyd Boettcher, Corps of Engineers, pg. 742 (1968)

WHAT ARE THE TYPES OF FLOWAGE EASEMENTS?

The Right To Overflow Permanently.

The right to overflow permanently may be acquired in low-lying lands which will be subject to constant inundation, **such as those situated below the normal pool level of a reservoir.**[4] This method would probably not be used in the Skagit County because although any of the property in the floodplain is subject to floods at any time of the year, the property is not "permanently inundated" and the property can be used in some manner most of the year.

The Right To Overflow Occasionally.

The right to occasionally overflow is taken on all affected lands within a reservoir area and includes all of the land subject to **BACKWATER EFFECT** produced by floods or increased stream flow.[5] Lands...subject to such frequent and unpredictable flooding that most of their utility is lost, are generally acquired in fee, that is, purchased outright.[6]

Valuation of Land Not Permanently Inundated

Acquisition of land for reservoir purposes by use of the flowage easement is not a new policy in the Northwest, since much of the land in the pool of Bonneville Dam was acquired by this means. The flowage easement method of acquisition can be used in all cases where the only right needed is the right to overflow the land. ... In most cases, a substantial amount of agricultural utility remains in the easement ... so that this method of acquisition is much less painful to the landowner. Further, this method meets with the favor of state and county governments since the affected lands aren't removed from the tax rolls.[7]

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[4]Ibid., pg. 741
[5] Appraisal of a Flowage Easement, By Lloyd Boettcher, pg. 374(1957)
[6]Appraisal of Flowage Easements, Lloyd Boetcher, Corps of Engineers, pg. 742 (1968)

[7] Appraisal of a Flowage Easement, By Lloyd Boettcher, pg. 375(1957)

This includes land which will be subject to frequent flooding and occasional flooding. Based on hydrology data and flood frequency information provided, critical elevations will be determined. These elevations will be those which hydrology studies indicate may be reached by floods at 1-year, 2-year, 5-year, 10-year, and 50-year intervals.[8] In estimating value of a flowage easement on lands not permanently inundated, the appraiser must classify the land as to degrees of floodage, and determine the frequency of floodage, effect of floodings on the property, and the utility remaining in the land.[9]

ALTERNATIVES TO CONSIDER

Because of the maximum-use rule, a flowage easement may cost the same as, or just slightly less than, the full fee value of the property. Property encumbered by an easement is still subject to taxation. Although certain rights may be lost to the landowner, current uses may continue, the highest and best use may not change, and the landowner may seem unaffected. **BUT** the easement estate clouds the rights to the real estate and these rights extend to perpetuity. Fee acquisition by the government with landowner use on a permit, licensing, or lease-back basis may provide a suitable alternative.[10]

WHAT METHOD IS USED TO DETERMINE THE VALUE OF A FLOWAGE EASEMENT?

The difference between the value of the property before the easement and its value after the easement is the value of the flowage easement. This loss or reduction in value occasioned by the easement may be the result of **REDUCED PRODUCTIVE CAPACITY** and **INCREASED OPERATING COSTS**; **CHANGES IN HIGHEST AND BEST USE**; or **THE PSYCHOLOGICAL EFFECT OF THE PRESENCE OF THE EASEMENT IN THE**

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[8] Appraisal of Flowage Easements, By Lloyd D. Boettcher, COE, pg. 745 (1968)

[9] Appraisal of Flowage Easements, By Lloyd D. Boettcher, COE, pg. 751 (1968)

[10] Appraisal of Flowage Easements--Another Look, By Joseph Strain pg. 583 (1981)

MIND OF PROSPECTIVE PURCHASERS, lending agencies, and taxing authorities.[11] In one study conducted in Southern California [T]he transactions investigated and the analysis made disclosed that the flowage easements reduced the value of the land in the easement areas by 29.84% to 51.33% and that the average reduction was 39.38%.[12]

Market Value Before and After the Taking.

This method would determine the difference between the market value of the property before the easement and the market value after the easement. The difference would be the value of the easement[13] or put another way, the difference in value is the owner's "just compensation".[14] Compensation must correspond with the exact nature of the rights taken, and the estimate of just compensation is precisely the purpose of the appraisal.[15] However, this approach may not be available in estimating value "after" the easement, for sales of lands encumbered with a flowage easement are hard to find.[16]

The Income Approach

The income approach is usually the soundest approach for the "after" value. Due consideration must be given to the effect of the easement on the rental value and earning power of the property.[17] "...[I]ncome production must be given considerable weight in determining Fair Market Value.[18] The appraiser should be particularly alert for possible changes in the highest and best use of the affected lands. This is especially true in the case of agricultural lands. For instance, use of land for orchards, vineyards, or perennial

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[11] Flowage Easement--Market Analysis, By Albert L. Johnson, M.A.I., pg. 713

[12] *Ibid.*, pg. 717

[13] *Appraisal of Flowage Easements*, By Lloyd Boettcher, Corps of Engineers, pg. 744 (1968)

[14] *Appraisal of Flowage Easements--Another Look*, by Joseph A. Strain, pg. 580 (1981)

[15] Ibid., pg. 583

[16] *Appraisal of Flowage Easements*, By Lloyd D. Boettcher, COE, pg. 744 (1968)

[17] *Ibid.*, pg. 744

[18] *Flowage Easement Appraisals*, By Tom Vanderpool & Fred Hunt pg. 150 (1961)

crops may change to annual crops; the raising of legumes on hayland or pasture may change to that of water resistant grasses.[19] What this means is that it must be determined what the rental value is of property within the area subject to induced flooding and the rental value of ag land on the other side of the levees. This would also include an analysis of what types of crops can be grown within the inundated community and what types are prohibited because of the flooding situation (i.e. grass pasture and field corn vs. raspberries, strawberries and seed crops). "...[T]he most understandable approach to damages caused by flowage easements is the income approach."[20]

The Cost Approach

The appraiser must measure the loss in value of agricultural land due to the imposition of the easement estate. One such measure is the cost-to-cure, which is based on the principle of substitution and which maintains that a prudent purchaser will pay no more for land than the cost of acquiring an equally desirable substitute with the same utility.[21]

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[19] *Appraisal of a Flowage Easement*, By Lloyd Boettcher, pg. 376 (1957)
[20] *Flowage Easement Appraisals*, By Tom Vanderpool & Fred Hunt pg. 152 (1961)
[21] *Appraisal of Flowage Easements--Another Look*, By Joseph Strain pg. 585 (1981)