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THE RIGHT IN RIGHT-OF-WAY:
 AN IN-DEPTH LOOK AT PUBLIC ROAD AND UTILITY RIGHTS-OF-WAY
 TEST SURVEYORS' INSTITUTE
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PUBLIC ROAD RIGHT-OF-WAY

- Eminent Domain (generally)
- State acquisitions: Wis. Stat. s. 84.09
 - State typically acquires a fee interest
- Laid out by town order: Wis. Stat. ch. 82, subch. II
 - May be initiated by residents or town board
- Wis. Stat. s. 83.07: acquisition for county highways
- Wis. Stat. s. 62.23: City planning and Official Maps
- Dedication – common law or statutory
- Prescription/use

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EMINENT DOMAIN


- Wis. Stat. s. 32.02 (who may condemn; purpose):
 - (1) Any county, town, village, city...
 - (4) Any Wisconsin telegraph or telecommunications corp. ...
 - (6) Any Wisconsin corp. furnishing gas, electric light or power to the public...
 - (8) Any Wisconsin corp. organized to furnish water or light to any city, village or town...
 - (9) Any Wisconsin corp. transmitting gas, oil or related products in pipelines...
 - (10) Any rural electric cooperative association...
- Sec. 32.03 – condemnation requires a certificate of public convenience and necessity from the Public Service Commission for:
 - High voltage transmission lines (100kV or greater)
 - Large electric generating facilities
- Beware of other limitations and specific requirements for certain condemnations.
- Wis. Stat. s 32.16 – easements for public use are not readily subject to abandonment.

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WIS. STAT. § 82.31 VALIDATION OF HIGHWAYS.

(1) RECORDED HIGHWAYS. Any recorded highway that has been laid out under this chapter is a legal highway only to the extent that it has been opened and worked for 3 years. Any laid out highway that has not been fully and sufficiently described or recorded or for which the records have been lost or destroyed is presumed to be 66 feet wide.

(2) UNRECORDED HIGHWAYS. (a) Except as provided in pars. (b) and (c), any unrecorded highway that has been worked as a public highway for 10 years or more is a public highway and is presumed to be 66 feet wide.



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AFFELT V. GREEN LAKE COUNTY, 2011 WI 56

- 1st Question: Is the highway “a recorded highway that has been laid out?”
 - Answered by looking to law in place at the time the highway was purportedly laid out.
 - Burden of proof on the municipality.
- 2nd Question: If the highway was laid out, was it not fully or sufficiently described/recorded? Or were the records lost or destroyed?
 - If so, presumption of 66-foot width.
 - Presumption has existed since 1885.
 - Presumption may be rebutted by property owner.
- 3rd Question: If not laid out – was the highway “worked” as a public highway for 10 years?
 - If so, presumption of 66-foot width.
 - Presumption has existed since 1951.


Affelt Case:

- No question that road was a public highway, dispute regarding width
- 1939 law applied: no evidence that multiple statutory requirements were met.
- Surveyor testified that highway of this type (major road in 1800s) would have been four rods wide.
- Affelts presented evidence of fences, trees and a machine shed in the 4-rod width – determined to be enough to rebut the presumption of 66-foot width.

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UNRECORDED “WORKED” HIGHWAYS


- **“Worked” as a public highway for 10 years**
 - Permissive use ≠ public right
 - Does the work demonstrate the public’s ownership of the road so that the public’s use of the road is not merely permissive? *County of Langland v. Kaster*, 202 Wis. 2d 448 (Ct. App. 1996).
 - Use of a way through wild/wooded land is presumed to be permissive
 - Sporadic plowing is not enough
- **Presumed width of 66-feet**
 - May be rebutted by landowner
 - Fences, trees and other improvements along the road may rebut presumption



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HIGHWAY BY PUBLIC USER

- Highway may exist even if not worked by a town/county.
- Requires 20 years of adverse public use.
 - Permissive use does not count.
 - Per Wis. Stat. s. 893.28(3) use of a way through wild/unimproved land is deemed permissive.
- Width determined by limits of the use.
 - Width includes such portion of the land adjoining the travelled area as goes with the travelled area for purposes of the highway (i.e., some form of shoulder or possibly ditches).




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DEDICATION


- **Dedication in accordance with Statute:**
 - Depends on statutes in effect at time of possible dedication.
 - Wis. Stat. § 236.20(4): "... (b) All lands dedicated to public use shall be clearly marked 'Dedicated to the Public.' (c) All roads or streets shown on the plat which are not dedicated to public use shall be clearly marked 'Private Road' or 'Private Street' or 'Private Way'."
 - Sec. 236.29(1): acceptance of plat is acceptance of dedication and vests fee simple interest.
 - Sec. 236.34(1m)(e): streets and other public areas may be dedicated by CSM. Acceptance occurs when the CSM is approved and recorded.



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DEDICATION, CNTD.


- **Common Law Dedication** (see Cohn v. Town of Randall, 2001 WI App 176):
 - Explicit or implicit offer to dedicate
 - Intent to dedicate to the public use
 - Acceptance by the municipality OR by the public
 - No time limit on acceptance of dedication by municipality
- **Mushel v. Town of Moltor, 123 Wis. 2d 136 (Cl. App. 1985).**
 - Dispute regarding road leading to lake.
 - Town argued that 1938 release of damage granted public road ROW.
 - Court held for property owner:
 - No presumption that a road leading to navigable water is public.
 - No common law dedication because public did not use road within 4 years of 1938 release.



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WIS. STAT. S. 82.27 – LANDLOCKED PROPERTIES


- Applies to property without access
 - No easement or public highway, OR
 - existing access is inadequate
- Landlocked property owner may apply to town board
- Requires inability to purchase easement
- Town Board:
 - Discretionary decision to lay out road
 - Can be over any neighboring property
 - 66-feet required unless impracticable
- Applicant responsible for costs including damages to owner of burdened property



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PUBLIC ROADS, EASEMENT V. OWNERSHIP

- **Berger v. Town of New Denmark, 2012 WI App 26**
 - Presumption of grant of easement absent express language to the contrary
 - No right to take fee title prior to 1951
 - "Right-of-way" strongly suggests easement
- **Dedicated public interests**
 - Current statute describes a fee interest
 - Older dedications may have only conveyed easement interests
 - See - *Marino v. City of Madison*, 2008AP1141 (Unpublished)
- **Beware of errors in conveyances**
 - Land under road often omitted
 - Surveys may create or perpetuate errors
 - Safety net: *Spence v. Frantz*, 195 Wis. 69 (Wis. 1928)
 - Title to center of highway
 - Conveyance transfers title even if highway is named as the boundary

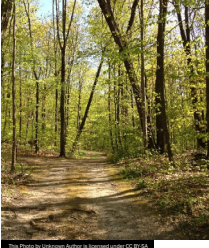


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DISCONTINUANCE OF PUBLIC ROAD



- Sec. 82.10-12, Town roads
 - Application can be made by 6+ town residents
 - For having road laid out, altered or discontinued
 - Can be initiated by Town Board
 - Applies to both recorded and unrecorded highways
- Sec. 66.1003, "public ways" in cities (other than 1st class), villages or towns
 - Applies to counties per s. 236.445
 - Discontinuance may be by petition of abutting and nearby owners
 - Discontinuance may be by resolution in public interest

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DISCONTINUANCE, CNTD

- **Limitations:**
 - Public access to navigable lake or stream cannot be discontinued without DNR consent (see s. 66.1006)
 - Sec. 82.14(3) allows damages for property owners where property abutting highway is damaged by a discontinuance
 - Cannot landlock/deprive owner of access to highway
- **Vacation of platted public road:** See Wis. Stat. s. 236.43
 - Court decision
 - Plat must be 40 years old+
 - No improvement of dedicated streets/roads
 - Will not landlock property
 - Municipality and property owners agree


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SEC. 82.19 DISCONTINUANCE

(2) (a) Every highway shall cease to be a public highway 4 years from the date on which it was laid out, except the parts of the highway that have been opened, traveled, or worked within that time. ...

2. Any highway that has been entirely abandoned as a route of vehicular travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.


- **Carroll v. Town of Balsam Lake, 206 Wis. 2d 529 (Wis. Ct. App. 1996)**
 - Statute codifies the common law of reversion.
 - Statute does not mean what it says...
 - No application until the highway is required for public use and then not opened.
 - "No abandonment will be found absent a manifest abuse of discretion by the public authority in charge in refusing to open the property."
- **Town of Schoepke v. Rustick, 2006 WI App 222.**
 - Very difficult to establish abandonment.
 - Higher burden of proof applies.



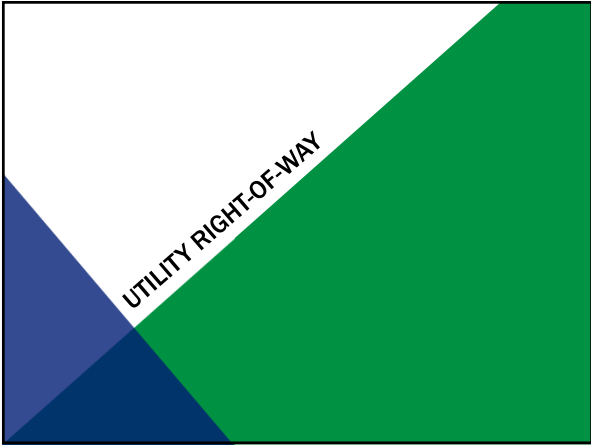
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S. 66.1005 REVERSION OF TITLE

- Upon discontinuance the land underlying the highway reverts to "the lots to which it originally belonged if that can be ascertained."
- If uncertain – land is equally divided between the adjoining lots.
- Caution – do not assume the dividing line should run down the center of the discontinued highway.
- Utility easements survive unless:
 - Easement holder consents.
 - Easement is not used for 4 years from vacation/discontinuance.
 - Damages are paid.



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UTILITIES UNDER WI LAW

- Type of entity:
 - Investor Owned Utilities
 - Municipal Owned Utilities } "public utilities"
 - Cooperative Associations
- Type of service: electric, natural gas, telephone, water & sewer
- Function: Generation, transmission and distribution

Know what you're dealing with!

- Pay attention to defined terms
- Different laws and regulations may apply depending on the utility



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EXPRESS EASEMENT AGREEMENTS

- Most utility easements are by written agreement
 - Many are very old and date back to electrification
- New easements are executed when:
 - New development/subdivision
 - New need for utility service
 - New transmission line
- Non-standard documents may create an easement:
 - *Gallagher v. Grant-Lafayette Electric Cooperative*, 2001 WI App 276 – electric cooperative membership application conveyed an easement
 - Is it a valid conveyance under the law: 1) signed, 2) Describes parties, 3) Describes land, 4) Identifies interest conveyed, 5) Delivered

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PLATS AND SURVEYS

- Wis. Stat. § 236.29(1) grant of easement by notation on the face of a plat. These easements can be in favor of public or private parties.
- Wis. Stat. s. 236.34(1m)(e) – A certified survey map may be used to grant easements “to the public or any person” noted on the map.
- Wis. Stat. s. 236.293 – Land restricted for use by public utility vests right in the public utility.



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PRESCRIPTIVE UTILITY EASEMENTS

- Wis. Stat. s. 893.28(2) (compared to (1)):
 - Continuous
 - ~~Adverse~~ Use of rights in real estate of another
 - For at least ~~10~~ 20 years
 - by [most utilities]



- *Williams v. ATC*, 2007 WI App 246, 306 Wis. 2d 181, 742 N.W.2d 882: Use by a utility need not be “adverse” to result in a prescriptive easement.

- Pursuant to permission
- Underground



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STATUTORY UTILITY EASEMENT RIGHTS

- Wis. Stat. s. 86.16(1) "Any person... may, ... with the written consent of the department with respect to state trunk highways, and with the written consent of local authorities with respect to highways under their jurisdiction, including connecting highways, construct and operate telegraph, telephone, or electric lines, or pipes or pipelines, for the purpose of transmitting messages, water, liquid manure, heat, light, or power along, across, or within the limits of the highway."
- Wis. Stat. s. 182.017(1r) "Any company may, subject to ...reasonable regulations made by any municipality through which its transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge or any stream or body of water, or upon any lands of any owner consenting thereto, and for such purpose may acquire lands or the necessary easements..."



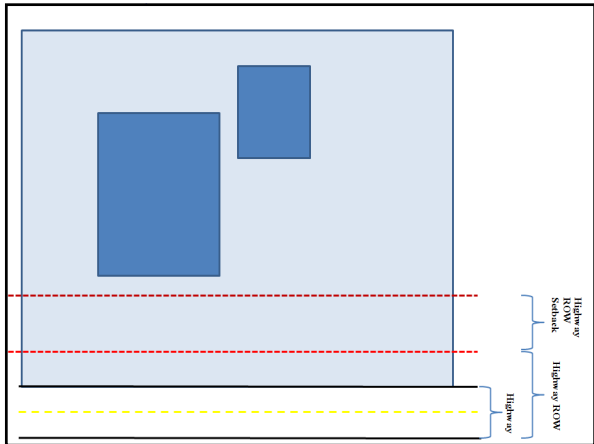
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HIGHWAY RIGHT-OF-WAY & SETBACKS

- Separate easement might not be required if utility facilities are placed pursuant to ss. 86.16 and/or 182.017.
- Utilities must relocate from highway ROW at their cost when necessitated by public improvements.
- **BEWARE OF Local setback ordinances:**
 - Highway setbacks are often set by county and/or town ordinances beyond the highway ROW.
 - May impose setback of 30-50 ft. beyond ROW line.
 - Ordinances allow utilities in setback but may require the utility to move improvements at their own expense and without compensation when demanded by the highway authority.




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HIGH VOLTAGE TRANSMISSION LINES


- HVTL ≥ 100 kV
- Wis. Stat. s. 182.017(7): HVTL easement must describe:
 - Length and width of ROW
 - Number, type and maximum height of all structures
 - Minimum height of lines above the ground
 - Number of lines
 - Maximum voltage of lines
- Wis. Stat. s. 182.017(7) also imposes construction requirements and bans the use of herbicides without written consent of the owner. Note that some of the requirements can be waived by the property owner.
- Statute applies to easements obtained after 1975.



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POLE PLACEMENT

- Terms of easement and reasonable interpretation control.
- Wis. Stat. s. 86.16 – poles placed within road row (without private easement) cannot interfere with use of land.
- Wis. Stat. s. 182.017(4): "In case of dispute as to the location of poles, pipes or conduits, the commissioners appointed in condemnation proceedings under ch. 32 may determine the location. In no case, except where the owner consents, shall poles be set in front of or upon any residence property, or in front of a building occupied for business purposes, unless the commissioners find that the same is necessary and the court may review the finding."



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RELOCATION AND ADDITIONAL LINES

- **Depends on terms of easement.**
- *Pahl v. ATC, 2011* (unpublished): 1964 easement allowed for construction of a second transmission line within the right-of-way. Agreement stated: "the construction of the second line may occur some years after the first line."
 - Right to build second line not abandoned.
 - No adverse possession of easement/right.
- *AKG Real Estate, LLC v. Kosterman, WI 2006 106*: Servient estate owner cannot unilaterally terminate or relocate an express utility easement.
- *Enbridge Energy v. Engelking, 2013* (unpublished): Pipeline easement granted by blanket legal description clearly contemplated additional pipelines, but the easement location was a question of fact for the court to determine.

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IS THE PROPERTY BURDENED BY A UTILITY EASEMENT?

Visible Search

- Good Starting Point
- May be underground
- May not be in use
- Where are the easement boundaries?

Title Search

- May not reveal many utility easements
- Easements older than standard search
- Unrecorded easements
- No written easement
- Utility within road ROW only

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OLD UTILITY EASEMENTS

- Many easements will not show-up in a 40-60 year title search.
- Marketable Title Statutes (ss. 893.33 and 706.09) do not apply to most utility interests.
 - 893.33(5): "... This section does not apply to any real estate or interest in real estate while the record title to the real estate or interest in real estate remains in... a public service corporation as defined in s. 201.01, an electric cooperative organized and operating on a nonprofit basis under ch. 185, a natural gas company, as defined in 15 USC 717a (6)..."
- Not abandoned:
 - Wis. Stat. s. 32.16: "an easement for public use acquired by gift or purchase or by condemnation shall not be deemed abandoned on the grounds of nonuser thereof for any period less than that prescribed [in an SOL]."
 - *Spencir v. Kosir*, 2007 WI App 135: Easement granted 70-years prior, not abandoned due to non-development.

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UNRECORDED UTILITY EASEMENTS

- Many old utility easements were not recorded.
- Unrecorded utility easements are still valid easements if they meet the formal requisites under Wis. Stat. s. 706.02
- Wis. Stat. s. 706.09 (innocent purchaser defense) does not apply to most utility easements.
- Wis. Stat. s. 706.08 (the race notice statute) also does not apply to most utility easements.




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LOCATING THE RIGHT-OF-WAY

- Prescriptive Easements: area used for at least 10 years
- ROW Strip Easements
 - Defined centerline
 - Defined corridor
- Blanket Easements
 - Prior to installation a "reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land." Court decides if parties cannot agree.
 - Location is fixed following installation and cannot be changed by utility or property owner.

NOTE: Requirement of full legal description for recording under s. 706.05(2m)(b) does not apply to most utility easements.




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Blanket Easements		ROW Strip Easements	
Easy legal description	Ambiguous scope post installation	Clear expectations and legal description	Added costs
Flexibility in construction	Often disliked by property owners	Preferred by property owners	Reconstruction / relocation limited to described area
Reduced costs	May limit relocation rights	Relocation rights within strip	Need to separately address access and needs outside of strip

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SCOPE OF USE

- General Easement Law:
 - Right of reasonable enjoyment - may include modernization.
 - Right to do whatever is reasonable necessary for the full enjoyment of the easement itself.
- Express Easements: terms and purposes of grant control
- Prescriptive Easements: Rights are measured based on the extent of use within 10 years.



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Garza v. ATC, WI SC 2017

- 1969 easement language: "comprising wood pole structures"
- Decision:
 - Description not circumscription
 - Reasonable advances in technology allowed
 - Steel poles and use consistent with purpose of easement
- Prescriptive rights not addressed

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BARFIELD V. SHO-ME POWER COOPERATIVE

- Fiber optic cables installed alongside electric lines. Used for internal communications, but excess capacity was assigned to a broadband subsidiary.
- Over 2000 miles of easements at issue with varying descriptions generally for "electric transmission and distribution purposes".
- Landowners sued in class action for trespass and unjust enrichment.
- Jury awarded ~ \$80 million as the "fair market rental value"
- 8th Cir. (applying MO law):
 - The commercial uses exceeded the scope of the easements = trespass
 - Distinction between type of use and purpose
 - Unjust enrichment remedy not available
- Settlement reached for \$24 million

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TREE TRIMMING/CLEARING

- **Electric Utility right to clear:**
 - "Reasonable clearance" inherent easement right required for safety
 - No inherent deference to utility practices and judgment
- Without express language extent of right depends on what is "**Reasonably necessary**"
- If line was placed under Wis. Stat. s. 86.16 **consent of owner** required before cutting or trimming
- **Wis. Stat. s. 182.017(5)** "Any [utility] which shall in any manner destroy, trim or injure any shade or ornamental trees along any such lines or systems, or, in the course of tree trimming or removal, cause any damage to buildings, fences, crops, livestock or other property, except by the consent of the owner, or after the right to do so has been acquired, shall be liable to the person aggrieved in 3 times the actual damage sustained, besides costs."

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EASEMENT EXCERPTS

1. "...and the right to trim or remove such trees and brush as may now or hereafter interfere with or endanger said facilities."
2. "... and the right to cut down and, by continued cutting or by chemical treatment, to control the future growth of all trees and brush which may, in the judgment of the grantees, interfere with the exercise of the rights herein granted."
3. "... trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said Easement [and] treat the stumps of any trees or brush to prevent regrowth and apply herbicides in accordance with applicable laws, rules and regulations, for tree and brush control"
4. "... to cut, trim and control the growth by chemical means, machinery or otherwise of trees and shrubbery located within 20 feet of the center line of said line or system, or that may interfere with or threaten to endanger the operation and maintenance of said line or system."



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TREE TRIMMING/CLEARING CASES

- Herbicide case: *Gallagher v. Grant-Lafayette Elec. Coop.*, 249 Wis. 2d 115 (Ct. App. 2001).
 - Except as described in the agreement, ability to use herbicides depends on whether it is reasonably necessary to prevent interference with the wires.
 - Clearing all trees and vegetation within right-of-way by use of herbicide (or other means) may or may not be reasonably necessary.
- Hydro-axing case: *Sharkey v. Barron Elec. Coop.*, 183 Wis. 2d 435 (Ct. App. 1994) (unpublished).
 - Easement agreement provided right to "cut and trim trees and shrubbery to the extent necessary to keep them clear of the Cooperative's electric line or system installed on the land, and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling."
 - Hydro-axing was outside the rights granted to coop in easement agreement because there was no evidence that it was necessary.

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TREE TRIMMING/CLEARING CASES

- Right-of-way in north woods: *Tallard v. Norther States Power Co.*, 212 Wis. 2d 645 (Ct. App. 1997) (unpublished).
 - Agreement provided right "from time to time to cut, trim, destroy and remove from said lands any brush, trees, logs, stumps, branches, weeds or grass which by reason of their proximity may endanger or interfere with the said line or lines or the operation thereof... in so far as may be reasonably necessary..."
 - Clearing trees under and adjacent to line was reasonable and necessary to protect and maintain the line.
 - Emphasis on fact this was a rural area in the north woods.
- Clear cutting allowed: *Polk-Burnett Elec. Coop. v. Pavlicek*, 2003 WI App 111 (unpublished).
 - Agreement provided right "to place, construct, operate, repair, maintain, relocate and replace thereon... an electric transmission or distribution systems, and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling."
 - Clear-cutting was allowed as a matter of law: keeping trees "clear" of the system relates to both wire clearance and access. Important that clear-cutting not prohibited in easement agreement.
 - More clearance may be needed with modern machines.

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QUESTIONS?

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