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Easements of Necessity to Reach Public Lands

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The court, by its definition of a "lode" for mining purposes, indicates it is aware of the changes that must occur when dealing with a substance like uranium rather than the metallic minerals common at the time our present mining laws were enacted. Except when mineralized rock in place is physically produced, the requirements of what constitutes discovery of a vein or lode in Wyoming will remain in doubt, particularly as to new radioactive minerals, until there is a recognition, either by amendatory legislation or judicial decision, of what scientific information may be sufficient.

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EASEMENTS OF NECESSITY TO REACH PUBLIC LANDS

The United States Government in order to encourage settlement of the territories which have now become the western states made various grants to individuals[1] and to railroads.[2] By virtue of these grants, an uncontemplated problem arose. When the Government made these grants, it failed to expressly reserve to itself, its assigns, licensees, or other grantees, a right of way over the land granted. Thus, situations have arisen where there is public land that cannot be reached without crossing private lands. The problem is whether there is a way of necessity common to the United States Government, its assigns, licensees, or other grantees, across private lands to reach public land so situated. If such a way exists, there is no need for condemnation to establish a right that is already in existence.

Under the common law, the doctrine of easements of necessity (hereafter, easement of necessity and way of necessity may be used interchangeably) can be traced at least to the time of Edward I, for it was said, "Note that the law is that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist."[3] This maxim had application in a case in which a grantor conveyed land to his grantee which was entirely surrounded by land retained by the grantor. No provision was made in the grant for the grantee to have a way of ingress and of egress to his land. The court found that the grantee could have a way of necessity over other lands of the grantor, "for otherwise he could not have any profit of his land."[4] Soon, a consideration of the converse situation arose—the grantor conveyed the surrounding lands and retained the surrounded land reserving to himself no way of ingress or of egress across the land conveyed. It was held that the way should be allowed.[5] The doctrine of easements of necessity is based on the public policy that the general social interest favors the occupancy and utilization of land rather than that it should lie idle.

1. Act of December 29, 1916, c. 9, 39 Stat. 862, 43 U.S.C. § 291.
2. Act of July 1, 1862, c. CXX § 2, 12 Stat. 489.
3. Darcy (Lord) v. Askwith, Hobart 234 (1618).
4. Clark v. Cogge, Cro. Jac. 170 (1607).
5. Packer v. Welsted, 2 Sid. 39 (1658).

The courts have had much difficulty with the problem of finding an easement of necessity in favor of a grantee from the state or from the Federal Government because of the holding in an 1891 decision of the Supreme Court of Tennessee.[6] The court feared that to decide that there was a way of necessity would mean that every grantee of the state would have an implied right of way over all the surrounding and adjacent lands held under junior grants, even to the utmost limits of the state. The fear was unfounded because a way of necessity requires that there be a strict necessity[7] or at least a practical necessity.[8] If one established way existed that provided ingress and egress, the grantee could not have additional ways over any of the surrounding lands. The necessity of ingress and egress is fully met by the use of one way. Actually, even though the court said there was no such way in favor of the grantee, the denial of the right resulted because there was no strict necessity.[9]

Twenty years later, in *United States v. Rindge,*[10] a federal district court in California held that in the absence of a reservation in a grant of public land, there is no implied reservation of a right of way over the land granted in order to afford access by the public to other land belonging to the Government. But, as in the Tennessee case, there was no strict necessity. The Government's land could have been reached by building a road across a mountain range. The court held that when another way, although expensive and over a nearly impassable mountain range, could be established without crossing private lands, no necessity existed. Both parties to the action admitted the Government land was accessible from another approach. The complainant merely wanted to take gratuitous advantage of a pre-existing right of way.

These courts were concerned with protecting the private landowners in their exercise of absolute dominion and control over their property. But, in an 1848 decision in Missouri, the court did not recognize such an absolute right.[11] The court held that under principles of "natural law"

6. Pearne v. Coal Creek M. and M. Co., 90 Tenn. 619, 18 S.W. 402 (1891).
7. Burby, Real Property, 92 (2d ed. 1954).
8. Ibid.
9. The complainant owned coal six hundred feet below the surface of his land which was near the top of a mountain. In order to mine and remove the coal upon his own land, he would have to drill a perpendicular shaft to a depth of six hundred feet. Coal mined under these circumstances would be unprofitable. Therefore, the complainant insisted that he was entitled to a way of necessity over and through the adjacent lands of the defendant for the purposes of mining and of transportation. The defendant's land was lower on the side of the mountain so that it would be possible to reach the vein of coal by a shorter, non-perpendicular shaft. Thus, it can be realized that the complainant was merely seeking a more convenient and less expensive way to reach his coal.
10. 208 Fed. 611 (S.D. Cal. 1913).
11. Snyder v. Warford and Thomas, 11 Mo. 513 (1848). "The United States being the proprietor of a section of land, entirely surrounded by eight other sections, sells the section so surrounded; the purchaser acquires, by the common law, a right of way to the land he has bought, as a necessary incident of the grant. The case is not altered by the United States selling the surrounding land to different individuals. The purchasers take it subject to the burden imposed on it whilst it belonged to the government, the original proprietor. A way of necessity exists after unity of possession of the close, to which and the close over which the way exists, and after a subsequent severance."

a right of way should exist, although its existence would prevent the landowner from exercising absolute dominion and control over his property.

The public's assertion of a right of way principally arose in cases involving grants by the Congress of the United States to railroads.[12] These grants created a checkerboard pattern of ownership of land. The railroads obtained ownership of the alternate odd-numbered sections; the United States retained ownership of the alternate even-numbered sections. The railroads saw fit to sell their interests to cattle companies for use as pasturage. In one such instance,[13] a cattle company sought to enjoin parties threatening an invasion of its uninclosed lands for the purpose of crossing over to graze their sheep on the Government's land. The effect of the injunction would have been to prevent access to the Government's sections. The court held that there is, without charge, an implied license in the people who desire to use Government lands for pasturage. The injunction was denied on the ground that, if granted, it would be giving the cattle company the exclusive use of Government land.

In another case involving checkerboard ownership,[14] the purchaser from the railroad erected fences entirely upon his land in such a fashion that the fence extended along the boundary of his section to the section corner. The strand of fence ended at this point. The purchaser then left a six inch gap diagonally across the section corner, and began another strand of fence to the next section corner. This strand of fence was also on his land and directly opposite the Government sections. In such a manner, he had inclosed all of the land, his own and the Government's, by building a fence entirely upon his own land. The United States, by virtue of the Act of February 25, 1885,[15] the Fence Law, brought suit for removal of these fences. The court held that all inclosures of public lands, by whatever means, were unlawful.

In an early Wyoming case involving a related problem, the court in the form of dictum stated:

> If defendant had inclosed his own lands by fences, separating them from those of the government,—that is, each section by itself,—he would have effectually prevented the depasturing of the government lands by the public generally, except himself and the owners of land contiguous to the government sections thus inclosed, because the inclosure of each of his alternate sections would also enclose the government sections on either side of each section. It may be urged that he would have been bound to leave spaces at the angles of the sections touching the government sections, for

12. Act of July 1, 1862, c. CXX, § 2, 12 Stat. 489.
13. Buford v. Houtz, 133 U.S. 320, 10 S.Ct. 305,33 L.Ed. 618 (1890).
14. Camfield v. United States, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897).
15. Act of February 25, 1885, c. 149, 23 Stat. 321, 43 U.S.C. § 1061-1066 (1946 ed.). § 1063. "No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct the free passage or transit over or through the public lands. . . ."

> the passage of the public generally and of livestock, although in the grant to his predecessor in title, the Union Pacific Railroad Company, the government reserved no right of way, on the ground that the government, in its grant of all of the alternate and odd-numbered sections to such railroad company, impliedly reserved ways of easement and of necessity to its officers and agents, those desiring to enter the land by filing thereon, and to its licencees. . . .[16]

Such language clearly recognizes that a way of necessity was impliedly reserved across private land to gain access to public lands so situated.

In an attempt to avoid the effect of the Fence Law, a private landowner argued that only a part of the fence forming an inclosure belonged to him.[17] The court held that if by joining his fence to the fence constructed by others, he availed himself of the latter to make a complete inclosure, he could not avoid the penalty of the statute. Nor could he if he took advantage of a lake to make part of his inclosure, nor of a gap of three-fourths of a mile across an impassable canyon. In another attempt that failed,[18] the landowner owned a tract of land completely surrounding a tract of Government land. The landowner erected two fences, an outermost fence that inclosed all of the land, and an innermost fence which fenced out the inclosed tract of Government land. The innermost fence was erected to indicate that the private landowner did not intend to appropriate the public land to his exclusive use. The court held the fences were unlawfully inclosing public lands and that such an opening should be made in the general inclosure as would allow free ingress and egress to the public land.

The foregoing cases clearly indicate that once a person has reached the boundary between private and and public land, he has a right of ingress and egress onto and from the public land. However, they do not expressly hold that a person has a right of way to this point. But, in a Montana case, the court did not hedge on the problem.

> When it is impossible to gain access to the even-numbered sections belonging to the government except by going over some portion of the odd sections, it must follow that there is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections for any use to which it may wish to devote them, but also in favor of the private citizens who wish to go upon them for the purpose of making settlements thereon, or to cut timber when they may lawfully do so, or to explore them for mineral deposits, or finally, to use them for grazing purposes.[19]

Later, the Montana court reiterated this holding when it extended its

16. Hecht v. Harrison, 5 Wyo. 279, 284, 40 Pac. 306, 307 (1895).
17. Thomas v. United States, 136 Fed. 159 (9th Cir. 1905).
18. Homer v. United States, 185 Fed. 741 (8th Cir. 1911).
19. Herrin v. Siebin, 46 Mont. 226, 127 Pac. 323, 328 (1912). In a recent decision, Simonson v. McDonald, 131 Mont. 494, 311 P.2d 982, the court concluded that to the extent the Herrin case recognized implied easements or grants of a right of way by necessity where such easements or rights of way may be obtained in eminent domain proceedings, it is expressly overruled.

application to a hunter going upon public land to hunt. The court said, "If the hunter has no means of access except over private lands, the law provides for him a way of necessity under the doctrine of [the above quoted case.]"[20] Also, in an unofficial New Mexico case, *Elkins v. Sabre Pinion Uranimum Co.*,[21] the McKinley County District Court considered the very critical question of a mineral lessee's right of access to an isolated state section. The mineral lessee had leased for mining a state section which was entirely surrounded by patented land. The action was brought to establish access to this section. The District Court held that the mining lessee had a way of necessity over the patented land to provide him access to the state section. No appeal was taken from the District Court decision. Finally, in a concurring opinion of a New Mexico case,[22] and in an opinion of the Circuit Court of Appeals, Eighth Circuit,[23] the judges stated that the Fence Law has been construed to absolutely prohibit every method that works a practical denial of access to and passage over public lands.

The cases indicate two situations in which a way of necessity should exist. The first situation arises when the Government has granted to private landowners all of the land surrounding a tract of land retained by the Government. This is illustrated by the checkerboard pattern of ownership created in the railroad grants. A technical trespass is allowed because of the strict necessity.

The second situation involves the granting of all the land surrounding the retained tract except for an area over which transit is impossible because of an impassable barrier. This rule requires the difficult determination of what is an impassable barrier. A reconsideration of *United States v. Rindge*,[24] referred to previously, indicates that a range of mountains is not an impassable barrier. Evidence was introduced which indicated that a road could be built across the mountains. The road would be expensive and difficult to construct, but the court would settle for nothing less than a strict necessity, and a strict necessity did not exist.

It is urged that a more reasonable view would be to recognize a practical necessity as sufficient. The necessity must be actual, real, and reasonable, as distinguished from merely causing inconvenience, but it need not be absolute and irresistible.[25]

When these situations exist, and the Government has not expressly reserved a right of way to the retained tract, it is only reasonable that a way of necessity be recognized for the use of the Government, its permittees, lessees, and the public in general. A permittee may be a timberman

20. Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328, 333 (1925).
21. Elkins v. Sabre Pinion Uranium Co., No. 9138, McKinley County District Court, New Mexico. See American Bar Association Mineral Law Section, Report of Committee on Public Lands, 1958.
22. Jastro v. Francis, 24 N.M. 127, 172 Pac. 1139 (1918).
23. Mackay v. Uinta Development Co., 219 Fed. 116 (8th Cir. 1914).
24. 208 Fed. 611 (S.D. Cal. 1913). See text at note 10.
25. Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927).

who has received a forest permit to go upon public lands to cut timber. A lessee may be an oilman who has acquired an oil and gas lease to explore for oil and gas upon public lands. And the public in general has a right to use public land for hunting,[26] fishing, camping,[27] and prospecting.[28]

A Missouri court answered the question of when the easement arises.[29] It stated that, where the United States Government sells a section of land surrounded by other Government land, the grantee acquires a right of way to the land he has purchased over land retained by the Government; and if this land is afterwards sold to other individuals, they take it subject to the burden imposed upon it while it belonged to the Government.

The scope of an easement by necessity must be such as to enable those who possess a right to use the easement full enjoyment of their land for all lawful purposes, so long as the necessity exists.[30] In addition, the scope of a way of necessity enlarges to meet the uses made of the lands.[31]

Finally, members of the public in general, or the other lawful users as the case may be, who desire to exercise their rights should consult with the owner of land which must be crossed in order that they can mutually arrive at a designated way which would least interfere with the landowner's use of the land. If the landowner fails to designate a way, the members of the public in general may make a selection with the restriction that they cannot lawfully encroach upon the land further than circumstances require.[32]

It should be clearly noted that most courts will only recognize a strict necessity as reason to allow the right to be exercised, while some consider a practical necessity sufficient. Under either view, if there are other means of access, although less convenient, there is no way of necessity.

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AUTHORITY OF GAME WARDENS TO SEARCH AUTOMOBILES WITHOUT A WARRANT

The extent to which a game warden or his deputy may search an automobile is governed in part by the Wyoming Constitution, which protects the people from unreasonable searches and seizures;[1] and in part by the Wyoming Compiled Statutes, which designate the State of Wyoming as

26. Supra note 20. See also Act of June 28, 1934, c. 865, § 1, 48 Stat. 1269, as amended June 26, 1936, c. 842, Title I, § 1, 49 Stat. 1976; May 28, 1954, c. 243 § 2, 68 Stat. 151, 43 U.S.C. § 315 (1940 ed.).
27. Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).
28. Act of May 10, 1872, c. 152, § 1, 17 Stat. 91, 30 U.S.C. 22 (1940 ed.).
29. Snyder v. Warford and Thomas, 11 Mo. 513 (1848).
30. Jones, Easements (1898) § 323; Simonton, *Ways By Necessity,* 33 W.Va. L.Q. 64 (1926).
31. Myers v. Dunn, 49 Conn. 71 (1881); Whittier v. Winkley, 62 N.H. 338 (1882); Erie R.R. v. S. H. Kleinman Realty Co., 92 Ohio St. 96, 110 N.E. 527 (1915); Uhl v. Ohio River R.R., 47 W.Va. 59, 34 S.E. 934 (1899).
32. Mackay v. Uinta Development Co., 219 Fed. 116 (8th Cir. 1914).

1. Wyo. Const., Art. 1, § 4.