

SUN STUDS, INC.

IBLA 76-180

Decided October 26, 1976

Appeal from decision of the Coos Bay District Office, Bureau of Land Management, denying a logging road right-of-way application.

Affirmed.

1. Administrative Authority: Generally -- Rights-of-Way: Act of January 21, 1895 -- Rights-of-Way: Applications

A decision by the Bureau of Land Management rejecting a logging road right-of-way application as not in the public interest will be affirmed in the absence of sufficient reasons to the contrary.

2. Conveyances: Interest Conveyed -- Patents of Public Lands: Generally -- Rights-of-Way: Generally

In the absence of legislation by Congress, a patent from the United States does not convey an implied easement by way of necessity across public land.

3. Rights-of-Way: Generally

In order to establish an easement by way of necessity, the requisite necessity must exist at the time of the conveyance. Moreover, if the necessity ceases to exist, the easement also ceases to exist. When other means of access are available, even though less convenient, a way of necessity will not be recognized or the implication becomes subject to control of other circumstances.

4. Administrative Procedure: Hearings -- Rules of Practice:  
Appeals: Hearings

It is within the discretion of the Board of Land Appeals to grant a request for a hearing on a question of fact. In order to warrant such a hearing, an appellant

must at least allege facts which, if proved, would entitle him to the relief sought.

APPEARANCES: Jerome S. Bischoff, Esq., Martin, Bischoff, Templeton & Biggs, Portland, Oregon, for appellant; Donald P. Lawton, Esq., Office of the Regional Solicitor, Portland, Oregon, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On April 24, 1973, Sun Studs, Inc., applied for a right-of-way to construct a road across lot 4, section 14, T. 22 S., R. 10 W., W.M., pursuant to the Act of January 21, 1895, as amended, 43 U.S.C. § 956 (1970). By decision dated July 31, 1975, the Coos Bay District Office, Bureau of Land Management (BLM), denied the application. Sun Studs appeals from that denial.

Appellant owns land in section 15 of the above township, which is bounded to the east by the BLM land. Both appellant's and the BLM land are bounded to the south by the Umpqua River. Appellant stated in its application that it desired to develop part of its land as a recreational area for its employees and to conduct logging operations on the remainder.

It asserted that it needed the right-of-way because there is no road access to its property. 1/

Following receipt of the application, BLM prepared an Environmental Analysis Record (EAR). The EAR begins with a description of the proposed road, alternatives to the road and the existing environment at the site. 2/ These descriptions are followed by analyses of the effect upon the environment of the proposed road and of each alternative. The EAR concludes with the recommendation that an Environmental Impact Statement be prepared before allowance of a right-of-way.

In its decision, the District Office stated that after a careful review of the EAR and the Congressional policies set forth in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. (1970), appellant's application for a right-of-way was denied "for environmental reasons." It then set forth some of the environmental objections and relevant provisions of NEPA. The decision was grounded on the discretionary authority granted to the Secretary of the Interior by 43 U.S.C. § 956 (1970) and set forth at 43 CFR 2812.6-1.

---

1/ The only road near appellant's property is Oregon State Highway #38; which is on the opposite bank of the Umpqua River. The proposed road would extend from appellant's property across the BLM land along the bank of the river, then across land owned by a third party until reaching an existing county road, a distance slightly over 1 mile.

2/ The original EAR was dated August 1973. Due to a change in Council on Environmental Quality guidelines, the EAR was revised in October 1974. This revision deleted some material but left intact the discussion of the impact of the road on the BLM land.

Appellant argues that the decision of the District Office is erroneous for two reasons. First, appellant disputes the conclusion that the proposed road will have an adverse environmental impact. In this regard, appellant alleges that the record does not support the findings of the District Office and that the District Office has misapplied the provisions of NEPA. Second, appellant argues that as successor in interest to the original patentees of the land, it is entitled to a common law easement by way of necessity for access to its land. Finally, appellant requests that a hearing be held.

In answer to appellant's arguments, BLM asserts that the decision of the District Office was "based upon a substantial record \* \* \* and is neither arbitrary or capricious." BLM argues further that ways of necessity are not applicable to land owned by the United States and that, in any event, appellant has not satisfied the necessity requirement of such an easement. We agree for the following reasons that appellant is not entitled to a right-of-way and therefore affirm the decision of the District Office.

[1] Under the Act of January 21, 1895, as amended, 43 U.S.C. § 956 (1970), the Secretary of the Interior is "authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands" for various purposes including the cutting of timber. The Secretary has issued regulations authorizing BLM to issue a right-of-way permit only "if

it is determined that the approval of the application will be in the public interest." 43 CFR 2812.6-1.

This Board will affirm a decision of BLM rejecting a right-of-way application made in due regard for the public interest in the absence of sufficient reasons to the contrary. Jack M. Vaughan, 25 IBLA 303 (1976); Hazel E. Kincaid, 25 IBLA 257 (1976).

Appellant's argument that the record does not support the findings of the District Office is, in effect, an argument against BLM policy as expressed by the District Office. There is some room for disagreement as to the precise effect of the proposed road upon the environment. At least some elements of the EAR and of appellant's environmental report support both positions. However, in the administration of public lands, BLM must make its decisions after considering all pertinent statutes and regulations and after weighing all the facts involved.

The BLM District Office determined, on the basis of a detailed record, that the overall impact of the proposed road would be adverse to the public interest. Appellant argues that the District Office failed to balance competing considerations properly as required by NEPA. This argument fails to overcome the fact that the balance could weigh against appellant, as in fact the District Office so determined. Appellant has not shown either that BLM failed to consider the record properly or that

it would be in the public interest to approve the application. Therefore, the decision rejecting appellant's application under 43 U.S.C. § 956 (1970) is affirmed. See Jack M. Vaughan, supra; Hazel E. Kincaid, supra. 3/

[2] Appellant also argues that it is entitled to the right-of-way as a common law easement by way of necessity. This easement is explained in 3 TIFFANY, REAL PROPERTY § 793 at 284-86 (3d ed. 1939):

\* \* \* Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's, land, or which is accessible only across either the grantor's land or the land of a stranger. In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but a limited use, if any, of the land conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction that, in the absence of indications of a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land. [Footnotes omitted.]

---

3/ In view of the holdings in this decision, we need not reach the question whether appellant's desire of access for recreational use of its land could fall within the uses specified by 43 U.S.C. § 956, especially as it has also alleged a use for timber management. Cf. Zolph S. Calder, 16 IBLA 27, 81 I.D. 339 (1974).

Accord, Rose v. Denn, 188 Or. 1, 212 P.2d 1077 (1949); Tucker v. Nuding, 92 Or. 319, 180 P. 903 (1919); see 2 THOMPSON ON REAL PROPERTY § 362 (1961).

The threshold issue of appellant's argument is the applicability of easements by way of necessity across public lands when the United States is the common grantor. Both appellant and BLM have filed briefs citing support for their respective positions and criticizing the support for the opposing view. The question is one which has not received a definitive answer in the courts. After briefly examining the authorities cited by the parties, we will explain our reasoning for holding that such implied easements are not applicable in this situation.

Appellant cites United States v. Dunn, 478 F.2d 443 (9th Cir. 1973), as the controlling authority applying ways of necessity to grants of the United States. In that decision, the court vacated a summary judgment for the Government and ordered a hearing on the factual question of whether the defendants were entitled to a way of necessity. The only discussion of the issue of applicability is contained in a footnote where the court stated that although the Government had not raised the point in its brief,

the court "did give it due consideration and concluded that it lacked merit." Id. at 444 n. 2. <sup>4/</sup>

In further support of its position, appellant also cites Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959); Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965); Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912); and Violet v. Martin, 62 Mont. 335, 205 P. 221 (1922). In Bydlon, the court allowed compensation to resort owners after the Government prohibited air travel over a national forest, based on an easement by necessity theory. There was no discussion of the issue involved in the present case. In Superior, the court found that no easement by way of necessity existed across an Indian reservation without reaching the issue of applicability to government grants. In the Montana cases, the court recognized the applicability of the easement when the United States was the common grantor, although the United States was not involved in either case.

As a final basis for arguing that this easement applies to government grants, appellant quotes from 3 POWELL, REAL PROPERTY P410 at 443-44 (Rohan ed. 1974), criticizing those decisions

---

<sup>4/</sup> In the recent decision of United States v. Clarke, 529 F.2d 984 (9th Cir. 1976), the court declined to hold that Dunn supports the principle that a patent may carry with it an implied right-of-way across public land; rather, the court merely accepted for purposes of discussion the appellant's premise that Dunn did support such a principle.

refusing to allow these easements under government grants. Appellant also cites in support of this criticism: Simonton, "Ways by Necessity," 25 Colum. L. Rev. 571, 579-80 (1925); and 2 TIFFANY, REAL PROPERTY § 363 at 1302 (1902).

BLM, in its brief, criticizes the use of the federal decisions as direct precedent for appellant's position. It cites several cases which hold that these easements do not apply to government grants. In United States v. Rindge, 208 F. 611 (S.D. Cal. 1913), the court stated that in its judgment, ways of necessity do not apply to government grants because they are not rights granted by act of Congress. The other cases cited by BLM are opinions of state courts, most of which accept without analysis the principle that ways of necessity do not apply when the Government, either state or federal, is the common grantor. E.g., Pearne v. Coal Creek Mining and Manufacturing Co., 90 Tenn. 619, 18 S.W. 402 (1891); Bully Hill Copper Mining & Smelting Co. v. Bruson, 4 Cal. App. 180, 87 P. 237 (1906); Guess v. Azar, 57 So.2d 443 (Fla. 1952). BLM also cites JONES, EASEMENTS § 301, as an example of a treatise writer accepting the principle that ways of necessity do not apply in situations such as appellant's.

In addition, BLM also urges that appellant's argument fails to consider Article IV, § 3 of the Constitution which gives Congress exclusive authority to regulate and control the use and disposal of public land. BLM argues that grants by Congress are

to be construed in favor of the grantor and that nothing passes by implication, citing several opinions of the Supreme Court. We agree that a grant of land by the United States does not give the grantee an easement by way of necessity over adjoining land still owned by the United States, and that a right to an easement over federal land may only be obtained in accordance with specific statutory authority.

Article IV, § 3 of the Constitution gives Congress unlimited power to control and dispose of public land. Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917); Texas Oil and Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 368 (W.D. Okla. 1967), aff'd, 406 F.2d 1303 (10 Cir.), cert. denied, 396 U.S. 829 (1969); United States v. Hatahley, 220 F.2d 666, 670-71 (10th Cir. 1955), rev'd on other grounds, 351 U.S. 173 (1956). While the states may exercise some jurisdiction over the public lands, "the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." Utah Power & Light Co. v. United States, supra at 404. (Emphasis added.) Accord, United States v. Oregon, 295 U.S. 1, 27-28 (1935).

It is established law that federal statutes granting property interests are construed in favor of the Government and that nothing

passes by implication. United States v. Union Pacific Railroad Co., 353 U.S. 112, 116 (1957); Burke v. Gulf, Mobile and Ohio Railroad Co., 465 F.2d 1206, 1209 (5th Cir. 1972); Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969). That vested property rights cannot be based upon implication rather than specific grant is arguably subject only to a possible exception where the United States has adopted and assented to state rules of construction as applicable in interpreting to what extent a United States patent of uplands conveys riparian rights, insofar as the state rules do not impair the efficacy of the grant or use and enjoyment of the property by the grantee. United States v. Oregon, *supra* at 28; Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922); Hardin v. Jordan, 140 U.S. 371, 382-84 (1891); Packer v. Bird, 137 U.S. 661 (1891). The reasons for such a rule regarding riparian rights after the United States has conveyed upland, however, do not apply to the rule advocated here. When the United States patents uplands, it conveys the riparian rights unless a contrary intent is manifested. Thus, it completely divests itself of the ownership and control over such rights. Here, however, the United States retains ownership and control over the land through which the right-of-way is sought.

Appellant argues that the United States, with regard to the public lands, is no different than any individual property owner. The above-cited opinions show that this is not the case. What the Supreme Court stated concerning the inapplicability of estoppel

or laches to acts of government agencies is equally relevant to other aspects of public land conveyances:

\* \* \* The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property \* \* \*.

United States v. California, 332 U.S. 19, 40 (1947).

As we noted above, there have been some criticisms of cases which have held that the doctrine of way of necessity cannot be imposed upon federal lands and advocacy for the opposite position. However, the critics have failed to show how the doctrine can or should be imposed against the Federal Government. For example, they have not explained the problem of distinguishing between state law and federal law. If a state statutory or common law is applied, they fail to show how this can be invoked to impose a grant over federal land. Similarly, they fail to show the existence of some federal common law which would require imposition of such an easement over federal lands. Nor have the critics indicated any intent of Congress which can be read into its grants of the public lands that the adjoining public lands should be imposed with such an easement in the absence of acquiring a right under a specific statute.

Congress has not ignored the problem of access to public lands. For example, it has provided for access to "actual settlers" within the boundaries of national forests. 43 U.S.C. § 478 (1970); see 42 Op. Atty. Gen. No. 7 (February 1, 1962). The right of access across public land to a mining claim has been recognized and a right of access across an unpatented mining claim has been reserved to the United States. 30 U.S.C. § 612(b) (1970); Alfred E. Koenig, 4 IBLA 18, 78 I.D. 305 (1971); Solicitor's Opinion, 66 I.D. 361 (1959); Solicitor's Opinion, 65 I.D. 200 (1958). The most general grant of access is for the construction of public highways across unreserved public lands. 43 U.S.C. § 932 (1970). Access for timber and certain other purposes may be authorized over certain public lands under 43 U.S.C. § 956 (1970). As discussed previously, rights-of-way under this statute are granted at the discretion of the Secretary of the Interior.

Congress has not enacted any statute which provides a general right of access across the public lands to all grantees, or their successors, of public land. The fact that Congress has enacted statutes for specific types of rights-of-way weighs against finding an easement by implication. We note that before enactment of the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970), and withdrawals of land affecting virtually all of the otherwise unreserved public land in the contiguous United States, there was no federal management or control over private grazing use of such lands. The

Supreme Court held that there was then an implied license to use such lands where they were open and unenclosed and where no act of the Government prohibited their use. Buford v. Houtz, 133 U.S. 320 (1890). Nevertheless, this use was deemed permissive only, creating no title or rights in the land, nor any grazing rights, that could not be terminated by withdrawal of the Government's consent thereto. Light v. United States, 220 U.S. 523, 535 (1911); Osborne v. United States, 145 F.2d 892, 894 (9th Cir. 1944). Thus, even if appellant's argument that there could be an implied right of access prior to an assertion of federal management and control is correct, such an implied license would not create a vested right in the absence of compliance with a specific statute authorizing the right-of-way.

The Department of the Interior can alienate interests in public land only within the limits authorized by law. Union Oil Co. of California v. Morton, 512 F.2d 743, 748 (9th Cir. 1975). We can find no law which grants or confirms such an implied easement across public land as alleged by appellant. Therefore, we do not recognize any vested right for an easement by way of necessity under the patents which appellant's predecessors in interest received from the United States.

[3] Even if we were to assume, arguendo, that an easement by way of necessity could be implied against the United States,

appellant has failed to demonstrate that it is entitled to one. The necessity required to establish the easement must exist at the time of the conveyance because it is the presumed intent of the parties to the conveyance that raises the implication. Rose v. Denn, supra; 3 TIFFANY, supra § 793 at 292, § 794 at 297. Moreover, if the necessity ceases to exist, the easement also ceases to exist. Tucker v. Nuding, supra, 180 P. at 905.

There is division of authority as to the degree of necessity required when the claimant's land adjoins navigable water. The trend in recent years has been away from denying the easement strictly for the reason that any access by water negates the necessity. Annot., 9 A.L.R. 3d 600, 602-03 (1966). The Oregon courts have followed the trend by holding that something less than "strict," or absolute, necessity will suffice to create the easement. State v. Deal, 191 Or. 661, 233 P.2d 242, 250 (1951).

Appellant has not suggested any necessity that might have existed at the time the land was patented which, according to BLM, was in 1896 and 1936. At present, appellant does have access to its land, although less convenient access than if the road were constructed. Public boat landings on the Umpqua River exist both upstream and downstream from appellant's land. Since filing the right-of-way application, appellant has clear-cut its land and ferried the timber by helicopter to the state highway immediately across the river, an alternative also discussed in the EAR. When

other means of access are available, even though less convenient, a way of necessity will either not be recognized or the implication becomes subject to control of other circumstances, such as the use of the land contemplated by the parties to the conveyance. Mackie v. United States, 194 F. Supp. 306 (D. Minn. 1961); Rose v. Denn, supra at 1086; Annot. 9 A.L.R. 3d 600 (1966); 3 TIFFANY, supra § 794 at 293-96. Moreover, construction of a road across the public land would not give appellant access to its land. It would then have to obtain a right-of-way across private land in order to link up with the only public highway on its side of the Umpqua River. Appellant has not shown how an easement by way of necessity would apply in these circumstances.

[4] Appellant has also requested a hearing. It is within the discretion of the Board to grant a request for a hearing on a question of fact. 43 CFR 4.415. In order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought. Rodney Rolfe, 25 IBLA 331, 340, 83 I.D. 269, 273 (1976). Here, appellant has not done so. It has challenged the conclusion drawn by BLM from the facts, but has not shown that BLM failed to consider any significant facts which would lead to an opposite conclusion. With regard to the easement by way of necessity, we have ruled as a matter of law that appellant is not entitled to one. Furthermore, appellant has not alleged sufficient facts to warrant a hearing on this issue even if our ruling

on the threshold legal issue were otherwise. Therefore, appellant's request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

---

Joan B. Thompson  
Administrative Judge

We concur:

---

Anne Poindexter Lewis  
Administrative Judge

---

Martin Ritvo  
Administrative Judge

