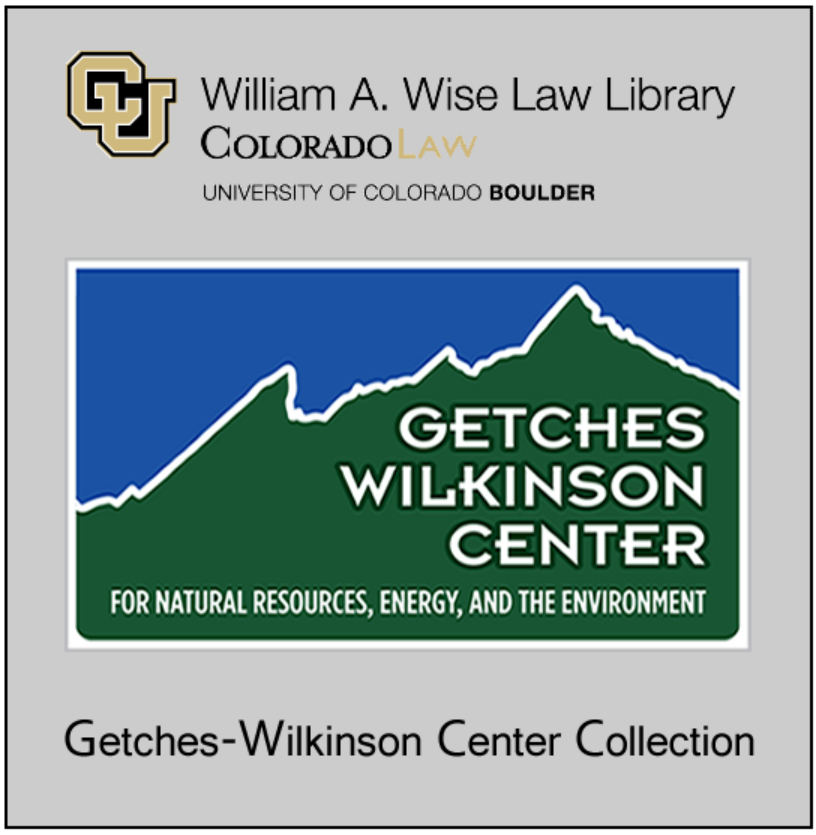
The Federal Land Policy and Management Act (Summer Conference, June 6-8) 1984

6-7-1984

Access to and Across Public Lands

Rebecca Love Kourlis



Rebecca Love Kourlis, *Access to and Across Public Lands*, *in* THE FEDERAL LAND POLICY AND MANAGEMENT ACT (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1984).

ACCESS TO AND ACROSS PUBLIC LANDS

Rebecca Love Kourlis
Attorney
Gibson, Dunn & Crutcher
Denver, Colorado

FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) CONFERENCE

a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 6-8, 1984

OUTLINE: FEDERAL LAND POLICY AND MANAGEMENT ACT CONFERENCE

June 6-8, 1984

A. INTRODUCTION

B. HISTORICAL PERSPECTIVE

C. ACCESS TO MINING CLAIMS: APPLICABILITY OF FLPMA

1. Department of Interior Authorization Unnecessary
2. FLPMA Applicability

D. TYPES OF FEDERAL SURFACE OWNERSHIP AND APPLICABLE LAWS

1. Federal Lands: General
2. Leasehold Surface Lease
3. Non-Leasehold Surface and Surface of Unleased Lands
4. Approved Federal Units

E. WITHDRAWN AND RESERVED LANDS

1. General
2. Wilderness Areas
3. Forest Lands
4. National Parks
5. Wildlife Refuges
6. Indian Lands
7. Alaska

F. FEDERAL LAND POLICY MANAGEMENT ACT OF 1976: PROCEDURES FOR OBTAINING RIGHTS OF WAY OVER MOST FEDERALLY-OWNED LANDS

1. Statute
2. Regulations: Rights of Way
3. Regulations: Pipelines
4. Energy Rights of Way

G. NON-FEDERAL SURFACE OWNERSHIP: APPLICABLE LAWS

1. State Lands

H. ACCESS FOR NON-MINING RELATED USE

1. Grazing
2. Recreation
3. Timber
4. Hunting

I. CURRENT PROBLEMS REGARDING FLPMA ACCESS - RELATED ISSUES

1. Environmental Analysis
2. Inconsistent Uses

ACCESS TO LEASEHOLD

A. INTRODUCTION

Principal Sources:

Mary Jane C. Due, Access Over Public Lands, 17 Rocky Mountain Mineral Law Foundation 171 (1971)

Clyde O. Martz, Rebecca Love, Charles Kaiser, Access to Mineral Interests by Rights, Permit Condemnation or Purchase, 28 Rocky Mountain Mineral Law Institute 1075 (1982)

Leonard J. Lewis, Access Problems and Remedies for Oil and Gas Operators, 26 Rocky Mountain Mineral Law Institute 811 (1980)

Rocky Mountain Mineral Law Foundation, Federal Law of Oil and Gas Leasing, Matthew Bender, New York

Statutes and Regulations appear at:

30 U.S.C. § 185 and 186 with related regulations at 43 C.F.R. Part 2800, §§ 2880.03-2887.03

43 U.S.C. 1761 et seq. and related regulations at 43 C.F.R. § 2800.0-2-2807.1-2

16 U.S.C. § 1134 (b) and related regulations at 36 C.F.R. § 293,12

36 C.F.R. § 9.32, 9.33 and 9.5

B. HISTORICAL PERSPECTIVE

1. The right to settle, explore and develop the public domain included the right of access across public domain for the purposes established in early mining laws.

2. Prior to the Mineral Leasing Act of 1920 rights of way for oil and gas operators were governed by:

   a. Mining Laws of 1866 and 1872 - included express and implied rights of ingress and egress.

   b. Tramroad Act of 1895 43 U.S.C. § 956: repealed by FLPMA insofar as it related to rights of way.

   c. Establishment of a public highway under 43 U.S.C § 932: repealed in its entirety by FLPMA.

3. Mineral Leasing Act of 1920, 30 U.S.C. § 181 et. seq.

   a. No express or implied rights of access for leasing act minerals.

   b. 30 U.S.C. § 186, Mineral Leasing Act, reserves to the Secretary the authority to grant easements or rights of way upon, through or in lands leased under the Act or lands subject to the Act. This is the only provision for access across federal lands adjacent to the leased tract.

   c. Current BLM policy is no guarantee of access for federal oil and gas lessees.

4. Mining Claims.

   a. Access is recognized for locations made pursuant to the General Mining Law: Mineral Location Law of 1872 30 U.S.C. § 22 (1976).

C. ACCESS TO MINING CLAIMS

1. Department of Interior authorization unnecessary.

   a. 1959 Solicitor's Opinion M-36584, 66 I.D. 361

   b. Alfred E. Koenig 4 IBLA 18 (1971)

2. Federal Land Policy Management Act, 43 U.S.C. § 1761 et seq.

   a. Did not materially alter access rights under the General Mining Laws

   b. Section 302(b): "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims made under that Act, including, but not limited to rights of ingress and egress."

   c. Section 302(b) provides for the authority to issue regulations necessary to protect unnecessary and undue degradation.

      1. 43 C.F.R. § 3809.1-3

      2. three-tier process

      3. effect of the regulations

D. TYPES OF FEDERAL SURFACE OWNERSHIP AND APPLICABLE LAWS

1. Federal Lands: General

a. FLPMA and the regulations promulgated thereunder at 43 C.F.R. § 2800.02-2807.1-2: Procedures for obtaining rights-of-way over federal lands: applicable to oil and gas lessees.

1. Great deal of agency discretion

2. FLPMA, § 302 states that any permit issued under FLPMA must provide for revocation or suspension upon a finding of a violation of a term of the instrument including those terms requiring compliance with Federal air and water quality standards. See, Columbia Basin Land Protection Assn. v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) holding tha § 505(a) of FLPMA's phrase "Compliance with state standards" means that an applicant for a right of way must meet state substantive standards, but not the state's procedures and all the requirements of the state's permitting system. Although this case involved an electrical right of way and related electrical permits, the argument can be made that this applies to state pollution standards and permitting unless other acts specifically require compliance.

3. See Shell Pipe Line Corp., 69 IBLA 103 (Nov. 30, 1982), holding that in granting a right of way pursuant to Title V of FLPMA, when the duration of the grant exceeds 20 years, BLM must condition the grant upon the power to review the grant after 20 years and regular intervals thereafter, not to exceed 10 years and to revise and modify its terms at that time as mandated by Departmental regulation, 43 C.F.R. § 2801.1-1.

4. Valuation of easement or right of way: See Donald R. Clark, 70 IBLA 39 (Jan. 10, 1983). The appraisal of value of a right of way for purposes of determining rental charges will be upheld if there is no error in the appraisal methods used by the BLM and the appellant fails to show convincing evidence that the charges are excessive. The "comparable lease method" of appraisal is preferred where sufficient data is available.

Paradise Oil, Water and Land Development Inc., 68 IBLA 268 (Nov. 17, 19820, where rental charges for a reservoir right of way are overturned and remanded for a new appraisal because they were besed on an appraisal report that did not comport with Department standards.

Meyring Livestock Co., 69 IBLA 110 (Nov. 30, 1983).

2. Leasehold Surface - Federally Owned

   a. The standard lease form, Form 3110-1 (Feb. 1982) provides

      SECTION 1. Rights of Lessee. The lessee is granted . . . the right to construct and maintain thereupon, all works, buildings, plants, waterways, road, . . . necessary to the full enjoyment thereof.

   b. This provision applies only to the leasehold surface.

   c. The Mineral Leasing Act gives the Department the authority to grant rights of way or easements under other Rights of Way acts, through leased lands if the use will not materially interfere with others rights. 30 U.S.C. § 186. The lease form also specifically reserves these rights to the lessor.

   d. The application process is set forth more fully infra: can be submitted simultaneously with Application for Permit to Drill.

3. Non-Leasehold Surface and Surface of Unleased Lands

   a. Federal Land Policy and Management Act of 1976 applies, along with the related regulations at 43 C.F.R. § 2800.

   b. Mineral Leasing Act § 29, 30 U.S.C. § 186 also applies. Floyd A. Wallis, 65 I.D. 417 (1958) held that § 29 implicitly grants to the Secretary the authority to exercise the right to grant easements or rights of way in all lands subject to the Act, not only after permit, lease or occupation has been allowed.

4. Access Implicit in Approved Federal Unit Agreement

a. 43 C.F.R. § 3105.4-4 - Regulations for pipeline right of way under unit agreement

b. The entire unitized area is considered to be one lease so rights-of-way are not required for operator owned roads and facilities within unit areas.

1. The unit area must be producing; drilling units are treated differently.

2. The road or facility must be for the benefit of the entire unit.

c. Rights of Way are required to a lease boundary for a drilling unit.

d. See BLM Instruction Memorandum No. WY-81-411 (Aug. 19, 1981)

E. WITHDRAWN AND RESERVED FEDERAL LANDS

1. General

a. Lands withdrawn for a public purpose are not open public domain to which rights of way laws aply.

b. Must look at each withdrawal order and determine what laws apply.

c. Access through National Forest Lands is governed by FLPMA and the regulations established pursuant to it which appear at 43 C.F.R. § 2800.0-2-2807.1-2, except with respect to mining activities, which are governed by 36 C.F.R. § 252.

2. Wilderness Areas - FLPMA § 603, 43 U.S.C. § 1782 (Supp. 1982) and 16 U.S.C. § 1134 (1982) and related regulations at 36 C.F.R. § 293.12.

a. Implied rights of access under the Mineral Leasing Act are not applicable but see: Mountain Legal Foundation v. Andrus, 655 F.2d 951 (9th Cir.) (1981) in which it was held that if a lease is issued in a Wilderness Area, the Department must grant reasonable accompanying rights to allow development of the lease.

b. Private or state lands enclosed by Wilderness Act lands are guaranteed adequate access.

c. Access to rights existing at the time of FLPMA's passage will not be unreasonably burdened.

3. Forest Service Withdrawals, FLPMA applies

   42 Op. Atty. Gen. 7 (1962) - Access across national forests, for persons other than actual settlers, is subject to reasonable regulation under 16 U.S.C. § 551 for protection for the national forest (Caveat: mining claims)

4. National Parks

   a. FLPMA applies

   b. Special regulations for protection of the National Parks appear at 36 C.F.R. § 9.32 and 9.50

5. Wildlife Refuges

   a. Regulations appear at 50 C.F.R. §§ 29.21.

   b. Administered by U. S. Fish and Wildlife Service

6. Indian Lands

   a. General mining laws and related access rights are not applicable to Indian lands

   b. Regulations appear at 25 C.F.R. § 169 (1982)

   c. The standard form Indian lease will expressly grant surface rights for access for the purpose for which the lease was granted.

7. Alaska

   a. Alaska Natives Claims Settlement Act of 1971, 43 U.S.C. 1601

      1. Related regulations appear at 43 C.F.R. § 2650

      2. See Northway Natives, Inc., Doyan Ltd., 69 IBLA 219, 89 I.D. (Dec. 17, 1982) in which the Board stated that the regulations contain safeguards to guarantee public access to public domain via easements across Native Selected lands so that other than present existing uses of the public domain may be enjoyed. At 43 C.F.R. § 2650.4-7(a)(3) it is provided that a public easement may be reserved absent a demonstration of present existing use if, among other things, there is no reasonable

alternative route available or if the public easement is for access to an isolated tract or publically owned land.

3. Doyan, Ltd., 70 IBLA 302 (Jan. 28, 1983), where easements have been recommended by the Joint Federal State Land Use Planning Commission for Alaska, their reservations in a BLM decision of intent to convey will generally be upheld.

b. Trans-Alaska Pipeline Act, 43 U.S.C. 1651, authorized and directed the Secretary of the Interior and other appropriate agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases and other authorizations to facilitate the development of the Alaska pipeline.

F. FLPMA: PROCEDURES FOR OBTAINING A RIGHT OF WAY

1. Statute: FLPMA grants the Secretary the authority to grant rights of way for "transportation systems or facilities which are in the public interest and which require rights of way."

2. Rights of Way granted pursuant to FLPMA

a. Regulations appear at 43 C.F.R. Subpart 2800

b. Right of Way may be granted for water storage or distribution systems, pipelines for other purposes than oil or natural gas, electric power transportations systems, communications systems, roads and highways and similar things under certain conditions.

c. Federal departments only may be granted rights of way for pipelines for oil and gas or fuels.

d. The United States retains all rights not expressly granted, most particularly the right to require common use of the right of way.

e. With certain well defined exceptions, the right of way does not give the holder the right to take any of the resources, such as timber or minerals, from the property without authorization.

f. The regulations do not specify the width to be granted.

g. Term: Must be reasonable, but if for 20 years or more, is subject to periodic review. May be renewable under certain conditions if so stated in the grant.

h. Are subject to special stipulations with regard to the environment, restoration, maintenance and safety.

i. Applications must be filed in the proper office of the BLM, and simultaneously with any other agency having jurisdiction.

   1. Form must be one approved by the director.

   2. The application may be denied for various reasons, for example, inconsistency with public policy.

   3. Approval requires an Environmental Analysis.

j. Special procedures for validation of unauthorized rights of way that existed prior to Oct. 21, 1976. Must apply within four years of the effective date of the subpart.

k. Provisions for suspension or termination, if the holder fails to comply with regulations, or stipulations of the right of way.

3. Rights of Way for Pipelines pursuant to the Mineral Leasing Act

   a. Regulations appear at 43 C.F..R Part 2880.

   b. The United States retains the right to use the right of way granted for purposes not inconsistent with its use for a pipeline.

   c. The holder may not use the right of way for any purpose other than a pipeline.

   d. Width is 50 feet unless specifically authorized to be wider.

   e. Term - no more than 30 years or any longer than is necessary to accomplish the purposes of the grant.

   f. Renewable under certain conditions.

   g. The application must be filed in the proper office of the BLM, on a form approved by the Director.

1. The Bureau must promptly process the application

2. Notice is published by the Federal Register

3. Application may be rejected if defective, but time to cure may be granted.

h. If the right of way passes over the surface administered by another agency, the Secretary must obtain that agency's consent before issuance.

i. Pipelines must be maintained as common carriers.

j. Rights may be suspended or terminated if any conditions of its issuance or regulations are violated.

4. Energy Rights of Way

a. November 23, 1979 - The Assistant Director of the BLM directed all state directors to expedite backlog cases involving energy rights of way. (Memo-80-107, NOv. 23, 1979)

b. Ordered state directors to streamline procedure for processing oil and gas gathering system rights of way and authorizing access roads.

c. Interagency cooperation used to prevent a double application requirement for proposed operating plant and access procedures.

d. The EA for proposed operating plans will suffice for any rights of way involved also.

G. NON-FEDERAL SURFACE OWNERSHIP

1. State Lands

a. Access governed by various state rights of way statutes:

C.R.S. 1973, 38-4-101
Wyo. Stat. Ann. 36-2-107 (1977)
Utah Code Ann. 63-11-17 (Supp. 1981)

b. Under the Mining Law of 1866, whatever was needed to acquire a road under a state statute sufficed to establish a road for purposes of the federal statute.

c. Today most rights of way state statutes require the filing of an application, payment of a fee and filing a legal description and survey of the land to be included.

d. An applicant should expect the process to be slow.

e. The state has a great deal of discretion to impose conditions for protection of the lands.

H. PROCEDURES TO ACQUIRE ACCESS

1. Severed Estates

a. Generally

1. Mineral estates are still generally dominant, although there are increasing limitations on what the mineral holder can do with the surface.

2. The mineral owner can usually use so much of the surface as is reasonably necessary to develop the minerals.

b. Stock-Raising Homstead Act, 43 U.S.C. § 299

1. Effected a severence of the mineral and surface estates.

2. Says that persons may enter, prospect, etc. provided that the entryman doesn't damage or destroy permanent improvements of the patentee.

3. Mineral holder has the right to enter and occupy the surface for purposes reasonably incident to the mining or removal of the mineral upon the conditions in the statute - but must reimburse the surface entryman for any injury to crops or permanent improvements.

4. Test: is the surface use necessary or incidental to production, and considerations of custom, usage and prudent operation come into play.

5. See Kinney-Coastal Oil Corp. v. Kieffer, 1 F.2d 795 (D. Wyo. 1924), for the rights of a lessee against a homestead entryman.

c. Taylor Grazing Act of 1934, 43 U.S.C. § 315

1. Entry permitted for mineral exploitation upon payment to the surface owner of damages to land and improvements.

2. Absent an agreement with the owner to the contrary, the mineral holder is limited to "good faith" and common sense surface uses.

d. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq.

1. All conveyances by the Secretary must reserve to the U. S. all the minerals together with the right to prospect for and remove the same.

2. The Act provides no guidelines for surface use.

2. Private Surface

a. Easement by Prescription

1. Law differs from state to state

2. Perfection requires use that is:

a. Open and notorious

See Houston Pipeline Co. v. Brown, 361 SW.2d 884, (Tex. Civ. App. 1962) holding that a pipeline buried 24 inches underground, with no signs or markers to bring it to the owner's attention, was not open and notorious.

b. Continuous and uninterrupted for the statutory period.

c. Wrongful on the part of the user.

b. Common Law Way of Necessity

1. Common law easement founded upon implied grant or reservation

2. Requires:

a. Tract of land completely surrounded by land from which it was severed so that access to the public road is shut off.

b. Intent to retain or convey whatever is necessary for the beneficial use of the property.

c. Unity of ownership - a common grantor must exist at some point. Note that the United States or a state's original ownership does not satisfy the requirement of unity, except when dealing with the checkerboard land grants to the railroads.

See U. S. v. Rindge, 208 F. 611 (S.D. Cal. 1913), Bully Hill Copper Mining and Smelting Co. v. Brown, 4 Cal. App. 180, 87 P. 237 (1906), but also see: Snyder v. Warford and Thomas, 11 Mo. 513 (1848) for a contrary holding allowing federal ownership to satisfy the unity requirement.

See Herrin v. Sieber, 46 Mont. 226, 127 P. 323 (1912), granting access to checkerboard grants.

d. Degree of necessity-Majority of western states use the "reasonable" necessity test and will grant a way of necessity upon, for example, a showing of substantial physical difficulty or unreasonable expense. Montana and California apparently use a strict or absolute necessity test.

3. Ways of Necessity do not ripen into prescriptive easements so long as the necessity exists.

4. No ways of necessity pass for the U. S. or a state lands by implication, any easement must be found in statutory grants or agency discretion.

5. No way of necessity exists over private lands to reach public lands. Leo Sheep v. United States, 440 U.S. 668 (1979).

c. Condemnation

1. Not available for access across federal, state or other public lands or properties already dedicated to a public purpose unless there is a specific delegation, nor for access to lands qualifying for ways of necessity or implied access rights.

2. Available to private parties only if specifically so delegated and then only to a certain class of persons for certain purposes which must qualify as public uses.

3. Requirements

   a. Public use - definition varies from state to state and each state has wide authority to define public purpose. Public use is defined in constitutional and statutory provisions.

   b. Necessity for taking - "reasonable" necessity - what is reasonable necessity varies from state to state.

4. Conflict in the laws regarding standing of federal lessee

H. ACCESS FOR NON-MINING RELATED USE

1. Grazing

2. Recreation

3. Timber

4. Hunting

I. CURRENT PROBLEMS REGARDING FLPMA ACCESS-RELATED ISSUES

L. Environmental Analysis

2. Inconsistent Uses