

1-1-2009

There Are no Implied Easements over Trust Lands

M. Brent Leonhard

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indian and Aboriginal Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

M. B. Leonhard, *There Are no Implied Easements over Trust Lands*, 33 AM. INDIAN L. REV. 457 (2009),
<https://digitalcommons.law.ou.edu/air/vol33/iss2/3>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

THERE ARE NO IMPLIED EASEMENTS OVER TRUST LANDS

*M. Brent Leonhard**

Table of Contents

I. Introduction: An Issue of Implied Easements	457
II. Setting the Stage: Specific Statutes, the Quiet Title Act, and the Department of the Interior	461
III. Ways of Necessity and the Problem with Unity of Title	465
A. What is Unity of Title and What Does It Have to Do With Ways of Necessity?	465
B. Rules of Interpretation Concerning Government Property and Federal Indian Law	467
C. Where Is the Unity Of Title?	468
1. Federal Cases	468
2. State Cases	475
D. The So-Called “Public Policy” and “Harmony” Justification	478
E. Leo Sheep and the Argument from Congressional Intent	480
IV. Easements Implied from Congressional Intent	482
A. The Homestead Act	483
B. Federal Policies Preceding the Allotment Acts	485
V. Conclusion	489

I. Introduction: An Issue of Implied Easements

Those who regularly practice law in Indian Country have no doubt encountered the myriad of issues surrounding rights-of-way over Indian lands. They can be pernicious. Among them are claims by non-Indian fee land owners that they have an implied easement over adjacent trust lands. Far from

* J.D., 1997, University of Washington School of Law; B.A., 1993, Outstanding Graduate, Philosophy, Western Washington University. The author is the Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation. I would like to thank the editors of the *American Indian Law Review* as well as their anonymous reviewers for their helpful suggestions on improving this article.

being arcane, this issue is one faced by tribes on a regular basis.¹ This article shows why there are no implied easements over trust lands.

Private land owners often seek ways across tribal lands to access fee parcels. At times these owners have asserted a legal right to do so. Those assertions are typically grounded in the non-Indian common law doctrine of implied easements from necessity. Neither the United States Supreme Court nor any federal appellate court has ever directly addressed whether an easement can be implied from necessity against the government. Several federal district courts have weighed in on the issue, and the results are often contrary to tribal interests and, generally speaking, ill-reasoned. But the fundamental legal issue at play in these matters, whether an easement can be implied against a sovereign, is not limited to tribes. Many states faced this question in the early years of land patents. The better reasoned state court decisions held that an easement from necessity cannot be implied against a state. Likewise, this article argues that application of an implied easement theory against the lands of a sovereign, particularly lands held in trust by the United States for Indians and tribes, is inapposite.

However, implied easements are not limited to those arising from necessity. A land owner might reasonably argue that Congress intended for an implied easement to run against government lands in certain circumstances when it passed a given piece of enabling legislation. As this article will show, this is the real issue of concern in right-of-way disputes over Indian lands. However, when it comes to trust property there is little likelihood Congress intended Indian proprietary rights to be divested by mere implication under the various allotment acts. This is bolstered by federal court decisions holding that Congress did not intend to create implied easements under the Homestead Act.²

An experienced Indian law practitioner may wonder at this point why implied easements are even an issue in Indian Country. After all, there are specific federal statutes that authorize the granting of easements by the Department of the Interior and implied easements, of any kind, are not among them. Furthermore, the Quiet Title Act specifically does not waive the sovereign immunity of the federal government from suits seeking to quiet title

1. *In re Schugg*, 384 B.R. 263 (D. Ariz. 2008); *Brendale v. Olney*, No. C-78-145 (E.D. Wash. filed Mar. 3, 1981) (Memorandum Decision and Judgment). The author is also presently involved in litigation concerning whether the BIA can find a right-of-way over trust lands based on an implied easement theory.

2. *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006); *United States v. Jenks*, 129 F.3d 1348 (10th Cir. 1997).

over Indian lands.³ Consequently, for this to be a concern to tribes, implausibly, the Department of the Interior, which has a trust responsibility toward tribes, would have to find that a non-Indian fee owner has an implied easement over trust lands in an administrative proceeding. As explained in section two, regrettably, this unlikely set of circumstances may not be so far-fetched. Current documents emanating from Interior's Pacific Northwest Regional Solicitor's Office indicate there are at least some people at Interior who believe such easements are possible or desirable. Unfortunately, for this reason, implied easements are of real concern to tribes.

Road access across tribal lands is fundamentally grounded in the doctrine of implied easements. As the court in *Miller's Lessee* states, "It is a well settled principle that the statute of limitations does not run against a state. If a contrary rule were recognized, it would only be necessary for intruders on the public lands to maintain their possessions until the statute of limitations shall run, and they then would become invested with the title against the government, and all persons claiming under it."⁴ This rule applies equally to prescriptive easements insofar as, pursuant to American common law, they are the servitude equivalent of adverse possession.⁵ Thus, absent an explicit grant, the only way an easement can run against the United States, and consequently those lands held in trust by the government for Indians, is by implication.

For purposes of easements across Indian trust lands, implication could arguably come in two forms. First is an implied easement from necessity, also known as a way of necessity. Pursuant to American common law, implied easements from necessity have three necessary and sufficient elements: "(1) a conveyance, (2) of a physical part only of the grantor's land, and (3) after severance of the two parcels, it is 'necessary' to pass over one of them to reach a public right-of-way from the other."⁶ When these elements exist, the common law presumes the grantor actually intended for the grantee, or visa versa as the case may be, to have a way to access their property at the time the land was conveyed.⁷ However, when the United States is seeking an implied easement across lands the rule does not apply.⁸ The reason is obvious: eminent domain. The government always has a way to access its own lands,

3. 28 U.S.C. § 2409a (2006).

4. *Lindsey v. Miller's Lessee*, 31 U.S. (6 Pet.) 666, 672 (1832).

5. ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 8.7 (2d ed. 1993) [hereinafter *THE LAW OF PROPERTY*].

6. *Id.* § 8.5.

7. *Leo Sheep Co. v. United States*, 440 U.S. 668, 679 (1979).

8. *Leo Sheep*, 440 U.S. 668.

albeit with a forced payment.⁹ The second manner in which an easement might impliedly run through government land is via congressional intent.¹⁰ Here the idea is that an easement may be implied if it can be shown that Congress intended for lands to include an easement when disposed of under an authorizing statute.¹¹

For reasons detailed in section three of this article, the common law “way of necessity doctrine” does not apply when common ownership, also known as unity of title, is found in the federal government.¹² Consequently, ways of necessity cannot be implied across Indian trust lands. Section three analyzes state and federal cases that either directly address the issue of ways of necessity where unity of title is found in the federal government or tangentially touch on this issue. The issue remains an open question in the federal appellate courts.¹³ However, the most compelling and comprehensive state and lower federal court decisions are those that militate against finding an implied way of necessity over the lands of a sovereign.¹⁴ Section three also addresses the opinion of those legal commentators who maintain that ways of necessity can, or should, run against the government for two primary reasons: (1) because it is consistent with purported public policy favoring full utilization of land and (2) it is supposedly in “harmony” with the inference that parties intend to grant easements in these circumstances.¹⁵ Whether there is or ought to be a public policy favoring full utilization of lands in this day and age of environmental decline and whether such a policy ought to justify finding ways of necessity against the government in these circumstances rests with the policy making body—namely Congress and state legislatures—not the courts. This is especially true when those policy making bodies have created a statutory process for establishing easements across sovereign lands and have notably failed to provide for ways of necessity. Furthermore, application of

9. *Id.*

10. *Id.*

11. *Id.* at 681.

12. While the Third Restatement of the Law of Property: Servitudes states that “[s]ervitudes by necessity arise on conveyances by governmental bodies as well as by other grantors,” it does not give any analysis to support its conclusory statement. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (1998).

13. See *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006).

14. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913); *Sun Studs, Inc.*, 83 Interior Dec. 518 (1976); *Pearne v. Coal Creek Mining & Mfg Co.*, 18 S.W. 402, 404 (Tenn. 1891).

15. JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 4.7 (2007).

a public policy favoring full utilization of land to implicitly divest Indians of proprietary rights in trust lands is a ghastly cry back to the ethnocidal policies of the United States of the mid to late 1800s. Finally, as for inferred intent, while applying the theory to government lands may be “harmonious” with common law principles concerning private land, it is actually cacophonous to long-standing common law doctrines involving government lands.

Nor is there any congressional intent that implied easements run against Indian trust lands, as argued in section four. This is particularly so given the language of the General Allotment Act,¹⁶ the obvious intent of Congress to prevent unauthorized alienation of Indian lands in various other pieces of legislation,¹⁷ federal common law rules of interpretation involving federal proprietary interests generally¹⁸ and Indian Country specifically,¹⁹ similarities in purpose between the General Allotment Act and the Homestead Act, and Congress’s extensive statutory regulation of rights-of-way over Indian trust lands that do not provide for a way of necessity process but rather a consent by majority owner process.²⁰

II. Setting the Stage: Specific Statutes, the Quiet Title Act, and the Department of the Interior

There are a number of specific federal statutes that directly govern rights-of-way over Indian lands. Those statutes place certain conditions on the Secretary of the Interior’s exercise of power in granting easements, some of which specifically require the consent of a majority of the Indian beneficiary owners.²¹ In addition, the Quiet Title Act precludes suit against the government on the part of a fee owner who is denied such a request through

16. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (2006)).

17. Nonintercourse Act, ch. 33, § 4, 1 Stat. 137, 138 (1790) (codified at 25 U.S.C. § 177 (2006)); 25 U.S.C. § 461-479 (2006) (present codification of Indian Reorganization Act of 1932); FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 508 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

18. *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1937); *Burke v. Gulf, Mobile & Ohio R.R. Co.*, 465 F.2d 1206, 1209 (5th Cir. 1972); *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969).

19. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941); *United States v. Shoshone*, 304 U.S. 111 (1938); *Leavenworth, Lawrence & Galveston R.R. v. United States*, 92 U.S. 733, (1875).

20. 25 U.S.C. §§ 311-328 (2006).

21. *Id.* § 324.

administrative procedures.²² Consequently, it would appear that these factors join to render the question of implied easements over Indian lands a non-issue. After all, if specific statutes require majority consent and a denial of a request by a fee owner on the part of the federal government is not subject to review because sovereign immunity has not been waived, then there is no avenue for a fee owner to succeed with such a claim. Unfortunately, for the reasons set out in this section, this is not the case. One reason is that the Department of the Interior, and the Bureau of Indian Affairs in particular, may be persuaded by such implied easement arguments—or at least find them an appealing solution to thorny problems—and grant such rights in an administrative proceeding.

The Secretary of the Interior has certain statutorily imposed duties concerning rights-of-way on Indian lands. In 1899 Congress gave the Secretary the power to grant rights-of-way for railroad, telegraph, and phone lines on Indian lands.²³ While not specifically requiring consent of the beneficiaries, the statute has certain limitations on the grant of a right-of-way. For example, rights-of-way can only be granted if an applicant made the request in good faith.²⁴ Furthermore, if beneficiaries object to such a grant, they are to be afforded a full opportunity to be heard on the matter.²⁵ In 1901 Congress passed a law authorizing the Secretary of the Interior to grant rights-of-way to state or local authorities for the purpose of constructing public highways on Indian lands.²⁶ This statute constrains such grants to terms the Secretary deems appropriate and further requires that, at a minimum, state laws governing the establishment of public highways be followed.²⁷ A corollary to this statute is that a state does not have the power to construct such highways on Indian lands absent Secretarial consent under the specific federal statute regardless of the existence of other, more general federal statutes governing the construction of public highways.²⁸

22. 28 U.S.C. § 2409a (2006).

23. Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. § 312).

24. *Id.*

25. *Id.*

26. Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 311).

27. *Id.*

28. *Bennett County, S.D. v. United States*, 394 F.2d 8 (8th Cir. 1968); *see United States v. 10.69 Acres of Land, More or Less, in Yakima County*, 425 F. 2d 317, 320 (9th Cir. 1970) (supporting the premise that as between competing interests of the Secretary of Transportation and the Secretary of Interior, the Secretary of Transportation must also comply with the specific statute governing construction of public highways on Indian lands and follow the Department of the Interior's procedures governing such grants).

There are several other specific statutes governing certain types of rights-of-way, but the most noteworthy for the purposes of this article is a law passed by Congress in 1948 that authorized the Secretary of the Interior to grant rights-of-way over Indian trust lands for any purpose.²⁹ A conspicuous condition on such grants, however, is that majority beneficial owner consent must be obtained.³⁰

Arguably, the significant network of specific statutes governing the granting of specific and general types of rights-of-way over Indian lands is evidence that grants of rights-of-way over Indian lands must be grounded in a specific congressional authorizing statute. After all, it is clear that no interest in Indian lands can be obtained via common law theories governing long-term use, adverse possession, or prescription.³¹ Even laws governing condemnation of lands for purposes of highway construction are inapplicable on Indian lands.³²

The Quiet Title Act would also appear to render the issue of implied easements over trust lands moot. Pursuant to the Quiet Title Act, the United States has waived its sovereign immunity from suit so that it may be a named party as a defendant in a civil action to adjudicate a disputed title to real property in which the United States claims an interest.³³ However, there is a noted exception to this general waiver: It does not apply to trust or restricted Indian lands.³⁴ Furthermore, the Quiet Title Act is the exclusive means by which one can challenge the United States' title to real property because precisely drawn, detailed statutes preempt more general remedies.³⁵ Consequently, the waiver of immunity found in the Administrative Procedures Act will not serve to override the government's clear assertion of sovereign immunity under the Quiet Title Act as it pertains to Indian trust lands.³⁶ The Quiet Title Act would therefore appear to be a complete bar to anyone trying to assert an implied easement over trust lands, assuming the government rules against them in an administrative proceeding.

29. 25 U.S.C. § 323 (2006).

30. *Id.*; 25 C.F.R. § 169.3(a),(b) (2006).

31. *United States v. S. Pac. Transp. Co.* 543 F.2d 676 (9th Cir. 1976); *United States v. Colvard*, 89 F.2d 312, 314-15 (4th Cir. 1937); *Schilling v. Wis. Dep't of Natural Res.*, 298 F. Supp. 2d 800 (W.D. Wis. 2003).

32. *United States v. Minnesota*, 95 F.2d 468 (8th Cir. 1938).

33. 28 U.S.C. § 2409a (2006).

34. *Id.*; *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975).

35. *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 286 (1983).

36. *Fla. Dep't of Bus. Regulation v. U.S. Dep't of the Interior*, 768 F.2d 1248, 1255 (11th Cir. 1985).

Unfortunately, the Department of the Interior may not agree that the specific statutes and the Quiet Title Act bar a claim to an implied easement over trust lands. First, with regard to the Quiet Title Act, it is certainly a bar to a suit in federal district court concerning an administrative decision by the Department of the Interior insofar as such a suit sounds either directly or indirectly in an action to quiet title to Indian trust lands. However, the Quiet Title Act does not bar the Department of the Interior from ruling in favor of a party seeking an implied easement in an administrative proceeding.³⁷ Second, with regard to the need to find authority for the granting of an implied easement in a specific federal statute and that no such grant can be made without complying with, at least, the 1948 act governing the granting of rights-of-way for any purpose, the Department of the Interior may find that it does not serve as a bar to pre-1948 roads.

In fact, the Pacific Northwest Regional Office of the Solicitor has issued a memorandum unpersuasively concluding that it is possible for an implied easement to be found over Indian lands provided the road in question predates the 1948 statute and the easement is implied from necessity under the common law way of necessity theory.³⁸ Furthermore, despite a National Congress of the American Indian resolution specifically calling on the Bureau of Indian Affairs to formally and publicly declare that it must obtain majority beneficial owner consent before granting or recognizing a right-of-way across trust or restricted Indian lands,³⁹ the Director of the Bureau of Indian Affairs has indicated that the Bureau's original position (as contained in the Solicitor's memorandum) has not changed.⁴⁰ Consequently, Indian law practitioners need to be ready to deal with these arguments through the administrative process in the event the Department of the Interior fails to change its untenable position.⁴¹

37. 28 U.S.C. § 2409a (2006).

38. Memorandum from the Office of the Reg'l Solicitor Concerning Road Right-of-Way Issues on the Umatilla Indian Reservation (Mar. 2006) (on file with author).

39. Nat'l Cong. of Am. Indians, Consent Required for Right-of-Way, Resolution No. #DEN-07-009 (Nov. 2007), available at <http://www.ncai.org/ncai/resolutions/doc/DEN-07-009.pdf>.

40. Letter from Jerry Gidner, Director of the Bureau of Indian Affairs to M. Brent Leonhard, Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation (Mar. 26, 2008) (on file with author).

41. Arguably, if the Department of Interior sustains such a position in a given case it is liable for damages for breach of its trust responsibility.

III. Ways of Necessity and the Problem with Unity of Title

The idea of an implied easement running against the government due to necessity is not new but remains unsettled as far as federal appellate courts are concerned.⁴² For the reasons below, this article concludes that easements implied from necessity do not run against government lands. This is particularly the case with regard to lands held in trust by the federal government for tribes and their members. Before delving in to the details, however, it may be helpful to review just what “unity of title” is and how it pertains to ways of necessity.

A. What Is Unity of Title and What Does It Have to Do With Ways of Necessity?

Easements are servitudes in land. As such they do not give the holder a right to possession of land but only to use.⁴³ They are essentially burdens or encumbrances on the lands of others. Unlike licenses, which are terminable at will, easements exist for a determinate time or perpetually.⁴⁴ At common law, if certain conditions exist, an easement can be implied. There are generally three categories of implied easements: prior use, necessity, and plat.⁴⁵ Easements derived from prior use clearly do not apply to Indian lands.⁴⁶ Easements implied from plats or subdivisions are not relevant to this article. However, the application of the doctrine of easements implied from necessity remains an open question on Indian lands.

An easement implied from necessity is typically referred to as a “way of necessity”.⁴⁷ Ways of necessity have three elements: (1) a conveyance, (2) of a physical part only of the grantor’s land (consequently, they retain part of the original lot being divided); and (3) after severance of the two parcels it is necessary to pass over one to get to the other.⁴⁸ The second element in particular establishes the requirement that there be “unity of title”.

To make out a case for a way of necessity over another person’s land, the person seeking the easement must establish there was unity of ownership in the

42. See *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006).

43. THE LAW OF PROPERTY, *supra* note 5, § 8.1.

44. *Id.* at 439.

45. *Id.* at 443-51.

46. See 28 U.S.C. § 2409(a) (2006).

47. THE LAW OF PROPERTY, *supra* note 5, at 447.

48. *Id.*

land prior to the conveyance that separated the land into two tracts.⁴⁹ *Koonce v. J.E. Brite Estate*⁵⁰ provides a good example of this requirement.

In *Koonce*, the owner of a dominate estate (Brite Estate) filed a declaratory judgment action against owners of a servient estate (Koonce) seeking an order that the Brite Estate had an easement implied from necessity over Koonce's land.⁵¹ In that case, Brite Estate's land consisted of ten landlocked acres.⁵² After his wife passed away, Brite became the sole owner of the ten acres under his wife's will. On the death of Brite, the ten acres became part of the Brite Estate—the party seeking the way of necessity. The servient estate was a 142-acre tract owned by Koonce. The 142 acres was part of an original 284 acres owned by Koonce and Brite's wife as tenants in common. Brite's wife's undivided half interest in the 284 acres, along with the ten acres, passed to Brite under her will at the same time. At that point Brite partitioned the 284 acres between himself and Koonce. The 142 acres set aside for Koonce was the land constituting the servient estate over which the Brite Estate sought a way of necessity.⁵³

Although its ten acres were landlocked, the Supreme Court of Texas ruled against the Brite Estate.⁵⁴ Koonce successfully claimed there was no unity of ownership with respect to Brite Estate's ten acres and Koonce's 124 acres. There was no evidence the ten-acre tract and the original 284 acres were ever owned as a single unit by Brite.⁵⁵ Consequently, there was no evidence of unity of title between the dominant and servient estate necessary to establish a claim to a way of necessity.

Unity of title presents the fundamental problem to finding a way of necessity over Indian lands. Ways of necessity usually apply as between two private parties. That is, unity of title must be found in those private persons and conveyance of the burdened land must have come from that unity. However, when it comes to a claim for a way of necessity over Indian lands, unity of title could only be found in the federal government. And, for the reasons discussed below, it is exceedingly doubtful that the common law requirement of unity of title can be found in the federal government or any sovereign.

49. *Hollywyle Ass'n, Inc. v. Hollister*, 164 Conn. 389, 398 (1973).

50. 663 S.W.2d 451 (Tex. 1984).

51. *Id.* at 452.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

B. Rules of Interpretation Concerning Government Property and Federal Indian Law

It is well settled that federal statutes granting proprietary interests are to be construed in favor of the government, and in particular, nothing passes by implication.⁵⁶ Moreover, “[t]he Government, which holds its interests . . . 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; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”⁵⁷ There is no reason to assume this interpretive rule differs when the government holds the interests in trust for particular Indian tribes and their members, as opposed to the public at large.

These general principles, which reveal a markedly distinct treatment in the law between government lands on the one hand and private lands on the other, are as a rule even more stringent and divergent in the case of Indian trust lands.⁵⁸ Anyone receiving a right or interest in Indian lands only receives those rights specifically granted by the federal government.⁵⁹ Any intent to deprive Indian tribes of rights in land must be clearly and unequivocally stated and language appearing in such grants and statutes is not to be construed to the prejudice of Indians.⁶⁰ As the Court of Appeals for the Ninth Circuit has stated, “The whole purpose of trust land is to protect the land from unauthorized alienation.”⁶¹

Federal statutory law is replete with examples of regulations designed to curb the unauthorized alienation of Indian trust lands.⁶² As early as the seventeenth century, “colonial legislatures restrained private land purchases from the Indians, requiring all acquisitions of Indian land to be licensed or approved in advance by the colonial authorities.”⁶³ Since 1790, federal

56. See cases cited *supra* note 19.

57. *Unites States v. California*, 332 U.S. 19, 40 (1947).

58. *Unites States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

59. *Id.*

60. *Id.*; see *United States v. Shoshone*, 304 U.S. 111 (1938); *Leavenworth, Lowery & Galveston R.R. v. United States*, 92 U.S. 733 (1875).

61. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991).

62. See Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. § 312 (2006)).

63. COHEN, *supra* note 17, at 508.

regulations have been in place prohibiting the sale of Indian lands without the express approval of the Secretary of the Interior, even if tribes consent to the sales.⁶⁴ More recently, Congress has specifically regulated the area of rights-of-way over Indian lands by way of a statute that permits the Secretary of the Interior to grant rights-of-way only if certain conditions are met.⁶⁵ Among the statutory conditions is that the Secretary first obtain the express consent of the tribe in the case of tribal trust lands or individual Indians in the case of allotted trust lands.⁶⁶

Given this background of interpretive rules governing federal laws, black-letter federal Indian law, and the enactment of specific statutes regulating the disposition of proprietary interests in Indian trust land (and of servitudes in particular), it is doubtful Indian trust lands can be burdened or otherwise divested by mere implication. Nonetheless, for sake of argument, if federal common law doctrines otherwise generally permit ways of necessity over federal lands one might assume the principle applies equally to Indian trust lands. At least, if this were the case, there would be a much stronger argument that those principles apply to lands in Indian Country. However, it is doubtful that federal common law permits the doctrine of ways of necessity to be applied to federally owned lands.

C. Where Is the Unity Of Title?

The application of common law rules governing implied servitudes, and ways of necessity in particular, to federal lands is questionable at best. The argument has been raised on occasion, but outside a few problematic federal district and state court decisions, the issue has never been directly or conclusively decided. The core issue is whether unity of title can be found in the government.

1. Federal Cases

The most thorough analysis of the problem of unity of title being found in the federal government is the 1976 Interior Board of Land Appeals case *Sun Studs, Inc.*⁶⁷ In 1973, Sun Studs applied for a right-of-way to construct a road across federal Bureau of Land Management (BLM) land.⁶⁸ The BLM denied

64. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177).

65. 25 U.S.C. § 323.

66. *Id.* § 324.

67. *Sun Studs, Inc.*, 83 Interior Dec. 518 (1976).

68. *Id.* at 518.

the application.⁶⁹ Sun Studs appealed that denial to the Interior Board of Land Appeals.⁷⁰ Sun Studs owned land bounded on the east by BLM land; both plots were bounded to the south by a river.⁷¹ The company maintained that it needed a right-of-way because there was no road access to its property.⁷² While the application was denied for environmental reasons, which the company challenged, it also raised the argument that it was a successor in interest to the original patentees of the land and as such it was entitled to an easement by way of necessity for access to its land.⁷³ The BLM argued that ways of necessity are not applicable to federal lands.⁷⁴

The Interior Board of Land Appeals, in siding with the federal government, carefully analyzed the problem of unity of title being found in the government.

The court's analysis is particularly convincing insofar as it readily distinguishes cases cited in support of a finding of a way of necessity⁷⁵, shows the law's treatment of private parties and the federal government is significantly different with respect to land owners,⁷⁶ and shows that Congress has specifically regulated rights-of-way across federal lands,⁷⁷ all boding against a finding that a way of necessity can be implied against the government.

The company in *Sun Studs* primarily relied on *United States v. Dunn*⁷⁸ as the controlling authority for its claim that unity of title could be found in the government or that an easement could otherwise be implied against the government.⁷⁹ However, the only discussion of the issue in *Dunn* is in a footnote that reads: "[S]ince the government did not, in our judgment, raise the point . . . we have not discussed it in the opinion, but nevertheless did give it due consideration and concluded that it lacked merit."⁸⁰ Understandably, the Court of Appeals for the Ninth Circuit has since held in *Fitzgerald Living*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 518-19.

73. *Id.* at 519.

74. *Id.*

75. *Id.* at 521.

76. *Id.* at 523 (noting the government "holds its interests . . . in trust for all the people," and "is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property" (quoting *United States v. California*, 332 U.S. 19, 40 (1947))).

77. *Id.* at 524.

78. 478 F.2d 443 (9th Cir. 1973).

79. *Sun Studs, Inc.*, 83 Interior Dec. at 519.

80. *Id.* at 445 n.2.

Trust that the *Dunn* footnote does not constitute a holding on the issue and further held that it has never decided the issue.⁸¹

The company also relied on *Bydlon v. United States*,⁸² *Superior Oil Co. v. United States*,⁸³ *Herrin v. Sieben*,⁸⁴ and *Violet v. Martin*⁸⁵ to support its position.⁸⁶ As the Interior Board of Land Appeals noted, *Superior Oil* and *Bydlon* never addressed the problem of unity being found in the federal government, and the federal government was not a party in the Montana cases.⁸⁷ In addition, the *Violet* court gave no analysis for its claim that an easement can be implied against the federal government,⁸⁸ and the *Herrin* court asserted, without further discussion, there is no difference between a grant by the federal government and a grant by a private person to another.⁸⁹

Ultimately, the Interior Board of Land Appeals found that unity of title could not be found in the federal government for several convincing reasons. First, in the absence of a specific statute conferring such a right, there is nothing to suggest that Congress intended for implied easements to be created when it granted public lands.⁹⁰ Second, "Congress has not ignored the problem of access to public lands," as there are many statutes explicitly granting such rights in particular circumstances.⁹¹ Third, "[t]he fact that Congress has enacted specific statutes for specific rights-of-way weighs against a finding of an easement by implication."⁹²

81. *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266-67 (9th Cir. 2006) ("Thus, *Dunn* is at most persuasive authority for the argument that an easement by necessity may be taken against the United States when it owns the servient tenement.")

82. 175 F. Supp. 891 (Ct. Cl. 1959).

83. 353 F.2d 34 (9th Cir. 1965).

84. 127 P. 323 (Mont. 1912).

85. 205 P. 221 (Mont. 1922).

86. *Sun Studs, Inc.*, 83 Interior Dec. 518, 521 (1976).

87. *Id.*

88. *Violet*, 205 P. at 223.

89. *Herrin*, 127 P. at 328 ("The grant by the federal government to the railway company, so far as the question at issue is concerned, does not differ from a grant by one private person to another.")

90. *Sun Studs, Inc.*, 83 Interior Dec. at 291.

91. *Id.* (identifying specific circumstances where access has been granted to public lands by statute).

92. *Id.* at 291-92 ("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 Department of the Interior can alienate interests in public land only within the limits authorized by law. 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

Similarly, in Indian Country, Congress has heavily regulated the area of easements over trust lands but has notably failed to pass any legislation remotely suggesting an easement can be found or conferred by mere implication.⁹³ This, in conjunction with background rules of interpretation concerning Indian lands and federal lands in general, make it nearly certain that easements cannot be implied against trust lands absent a congressional statute expressly providing for one.

Nevertheless, there are several problematic federal court cases. In *Montana Wilderness Ass'n v. U.S. Forest Service*, the United States District Court for the District of Montana directly addressed the issue of implied ways of necessity over federal lands and concluded they were permissible.⁹⁴ However, the court's decision relied on *Superior Oil and Dunn* as persuasive authority for the proposition that a way of necessity could be found against the federal government.⁹⁵ As noted in the discussion of *Sun Studs*, reliance on either of these cases is problematic, and insofar as the court relied on these cases to support its holding, it is questionable. But there is an additional curiosity in the *Montana Wilderness* court's ruling that strongly suggests there are no implied easements against federal lands.

After citing *Superior Oil and Dunn* and holding that ways of necessity can run against the government, the court went on to say this alone did not establish the easement (despite finding that the elements for a way of necessity had been met).⁹⁶ This means, at the very least, that the common law elements necessary to establish a way of necessity are not sufficient when the issue involves the government. An additional factor must be addressed—that of the intent of Congress when it passed the statute authorizing the land grant.⁹⁷ This, however, confuses the issue.

As will be discussed in more detail below, the United States Supreme Court's *Leo Sheep* case indicates that a way of necessity and an easement implied from congressional intent are two different and independent means of establishing the existence of an easement.⁹⁸ Otherwise, the Court would not have concluded that the issue of necessity was of little significance to the case

the United States.") (internal citations omitted).

93. 25 U.S.C. §§ 311-328 (2006).

94. *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 496 F. Supp. 880 (D. Mont. 1980), *aff'd* 655 F.2d 951 (9th Cir. 1981).

95. *Id.* at 885.

96. *Id.*

97. *Id.*

98. *Leo Sheep Co. v. United States*, 440 U.S. 668, 681 (1979).

and that the real issue was one of congressional intent.⁹⁹ If the common law elements for a way of necessity do not in themselves establish a way of necessity when unity of title is in the government, then the common law doctrine does not create the easement. If congressional intent must first be determined, then that is the beginning and end of the inquiry. *Leo Sheep* establishes this as an independent basis.¹⁰⁰ Consequently, the *Montana Wilderness* case is confused and of dubious persuasive value.

Moreover, the federal government appealed the decision in *Montana Wilderness*.¹⁰¹ The appellate court side-stepped the implied way of necessity issue and instead found the plaintiff had a statutorily conferred right of access.¹⁰² Between the district court ruling and the appellate court holding, the United States Attorney General issued an opinion on the matter that specifically addressed the way of necessity issue, finding that a way of necessity does not run against the federal government.¹⁰³ The Attorney General concluded that, like the Court in *Leo Sheep*, applying the way of necessity doctrine against federal lands is strained and of little significance given that the real issue is the intent of Congress.¹⁰⁴

For these reasons reliance on *Montana Wilderness* for the proposition that a way of necessity can run against the federal government, or where unity of title can only be found in a sovereign, is doubly dubious.

Another problematic federal case is the District Court for the Eastern District of Washington's unpublished memorandum decision and judgment in *Brendale v. Olney*.¹⁰⁵ Unlike many of the cases discussed above, this case directly concerned a right of access across Indian trust lands.¹⁰⁶ In particular, it involved a right of access to a BIA road that ran across trust lands to the petitioner's fee lands.¹⁰⁷ Like the *Montana Wilderness* court, it

99. *Id.*

100. *Id.* at 680-81.

101. *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 655 F.2d 951 (1981).

102. *Id.* at 952.

103. 43 U.S. Op. Att'y Gen. 243 (1980).

104. *Id.* at 259-60 ("These same reasons lead me to conclude, as did the Court in *Leo Sheep*, that the doctrine of easements by necessity as applicable to Federal lands is 'somewhat strained, and ultimately of little significance' and that the 'pertinent inquiry . . . is the intent of Congress.'")

105. See *Brendale v. Olney*, No. C-78-145 (E.D. Wash. filed Mar. 3, 1981) (Memorandum Decision and Judgment).

106. *Id.*

107. For a discussion about why the road's status as a BIA road should have rendered the issue moot, see M. Brent Leonhard, *The Public Nature of Indian Reservation Roads (Some Initial Thoughts)*, OR. ST. B. INDIAN L. SEC., <http://www.osbar-indianlaw.org/files/ThePublic>

problematically relied on *Dunn* and *Superior Oil*.¹⁰⁸ However, the court also cited *Kinscherff v. United States*¹⁰⁹ for the proposition that an easement can be implied if it can be found from congressional intent.¹¹⁰ As discussed below this is the correct line of analysis, however, the opposite conclusion should be reached. The court went on to cite *Confederated Salish and Kootenai Tribes v. Namen*¹¹¹ as holding that Congress intended grants of allotted lands to include the conveyance of customary common law easements.¹¹² The court's reliance on *Namen*, however, was misplaced.

Namen presents a unique situation and cannot stand for the proposition that the common law right of a way of necessity applies to federal lands, but rather that the well-established federal common law governing riparian ownership rights applies to tribal lands.¹¹³ The *Namen* court notably cited *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*¹¹⁴ to support its conclusion that Congress intended to grant access and wharfage rights when issuing riparian land grants on the Flathead Reservation.¹¹⁵ *Potomac* makes it clear that since the early days of the United States of America, the nature of riparian ownership carries with it the right to access the navigable part of the river from the front of the lot in question, the right to landing, and wharfage.¹¹⁶ That is to say, it is not an easement implied from anything, but rather part and parcel of ownership of riparian property—it is one of the property rights that come with riparian ownership.¹¹⁷ Certainly, with this background federal common law governing riparian ownership, Congress must have intended that an allotment of riparian land carries with it the same ownership rights as any other piece of riparian land unless it expressly said otherwise. That is significantly different than what may have been intended if the issue involved non-riparian lands.

In *Burdess v. United States* the United States District Court for the Eastern District of Arkansas also found that an implied way of necessity could run

NatureOfIndianReservationRoads.pdf.

108. *Brendale v. Olney*, No. C-78-145, at 6 (E.D. Wash. filed Mar. 3, 1981) (Memorandum Decision and Judgment).

109. 586 F. 2d 159 (10th Cir. 1978).

110. *Brendale*, No. C-78-145, at 6.

111. 380 F. Supp. 452, 461 (D. Mont. 1974).

112. *Brendale*, No. C-78-145, at 6.

113. *Id.* at 6-7.

114. 109 U.S. 672 (1884).

115. *Id.* at 682.

116. *Id.*

117. *Id.*

against the federal government.¹¹⁸ However, the *Burdess* court merely proclaimed such a right existed and cited *Montana Wilderness* and *City of Denver v. Bergland*¹¹⁹ as a basis for the right.¹²⁰ *Montana Wilderness* is mentioned above. The court's reliance on *Bergland* is troubling insofar as *Bergland* never addressed the issue or otherwise held an implied way of necessity could run against the government.

The *Bergland* court inconclusively addressed the possibility of applying estoppel against the federal government,¹²¹ but it never directly addressed the issue of an implied easement of necessity against the government.¹²² Rather, the court dealt with the issue as to whether jurisdiction could be had under the federal Quiet Title Act.¹²³ Nothing in the discussion of easements and the Quiet Title Act even broaches whether implied easements of necessity can run against the government. Of course, other than in Indian Country, anyone attempting to quiet title in federal lands by way of an assertion of an easement claim based on the common law doctrine of the way of necessity would find federal jurisdiction to hear the matter in the Quiet Title Act.¹²⁴ However, this has nothing to do with whether a way of necessity can be found against a sovereign.

The most recent case to address the issue is *McFarland v. Kempthorne*, another Montana federal district court case.¹²⁵ In *McFarland*, the defendants cited *Leo Sheep* and the 1980 United States Attorney General Opinion for the proposition that an implied easement from necessity cannot run against the federal government.¹²⁶ Instead of noting that both opinions relied on by the defense state that the issue is not one of a common law way of necessity but one of congressional intent, the court curiously claimed *Leo Sheep* and the Attorney General's opinion did not directly address the issue.¹²⁷ The court went on to cite *Montana Wilderness* as precedent.¹²⁸

Insofar as *McFarland* relies on the earlier Montana case and insofar as the earlier case is doubtful for the reasons stated above (namely that the issue of

118. *Burdess v. United States*, 553 F. Supp. 646 (E.D. Ark. 1982).

119. 517 F. Supp. 155 (D. Colo. 1981).

120. *Burdess*, 553 F. Supp. at 648.

121. *Bergland*, 517 F. Supp. at 194-97.

122. *Id.* at 175.

123. *Id.*

124. 28 U.S.C. § 2409(a) (2006).

125. *McFarland v. Kempthorne*, 464 F. Supp. 2d 1014 (D. Mont. 2006).

126. *Id.* at 1020.

127. *Id.*

128. *Id.*

congressional intent—an independent basis under *Leo Sheep*—was the factor carrying all the weight as to whether an implied easement existed), it, too, is of dubious persuasive value. It is, however, informative when it comes to Indian land issues because the defendant in the case was the Department of the Interior, which appears to be maintaining, consistent with *Sun Studs, Inc.*, that ways of necessity cannot run against the federal government. Perhaps the attorney representing the government in *McFarland* should speak with the solicitors at Interior about this clear conflict in their positions.

2. State Cases

The majority of state courts grappling with the unity of title issue have held that it cannot be found in a sovereign.¹²⁹ The first court to directly address the issue was the Tennessee Supreme Court in *Pearne v. Coal Creek Mining & Manufacturing Co.*¹³⁰

In 1837 Tennessee granted to Moore & Spessard a 2000-acre parcel.¹³¹ In 1848, the state granted to Mr. Richmond 5000 acres and to Mr. Wiley another 5000 acres.¹³² Inopportunately, the land granted in 1848 left the Moore & Spessard acreage landlocked.¹³³ In 1855 Moore & Spessard nonetheless conveyed 200 acres of its landlocked parcel to Mr. Diggs.¹³⁴ Mr. Diggs' land, as it turned out, had coal deposits about 600 feet below the surface.¹³⁵ Unfortunately for him, that tract lay near the top of a mountain and had no frontage through which he could remove the coal.¹³⁶ For this reason, he sought a way of necessity over and through the adjacent lands to try and profitably

129. See *Bully Hill Copper Mining & Smelting Co. v. Brunson*, 87 P. 237, 238 (Cal. App. 1906); *Guess v. Azar*, 57 So. 2d 443, 444-45 (Fla. 1952) (“It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his title, would have an implied right-of-way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State.”); *Cont’l Enter. Inc. v. Cain*, 296 N.E.2d 170, 171 (Ind. App. 1973); *Dudley v. Meggs*, 153 P. 1121, 1122 (Okla. 1915) (noting that a way of necessity requires past ownership of two tracts by one individual, but that “the two tracts of land must have at one time belonged to some one person other than the government”); *Pearne v. Coal Creek Mining & Mfg. Co.*, 18 S.W. 402 (Tenn. 1891); *State v. Black Bros.*, 297 S.W. 213, 218-19 (Tex. 1927).

130. *Pearne v. Coal Creek Mining & Mfg. Co.*, 18 S.W. 402 (Tenn. 1891).

131. *Id.* at 402.

132. *Id.* at 403.

133. *Id.*

134. *Id.* at 402.

135. *Id.* at 404.

136. *Id.*

mine the coal.¹³⁷ In particular, Mr. Diggs contended that the State of Tennessee impliedly granted such an easement to Moore & Spessard when it conveyed the 2000 acres of which his 200 acres is a part while retaining the 10,000 acres engulfing his land.¹³⁸

In 1891 the issue worked its way up to the Supreme Court of Tennessee, which held that unity of title cannot be found in the state government.¹³⁹ The court's primary reason for the holding was if unity of title could be found in the state, every grantee would have an implied right-of-way over every adjacent parcel held under junior grants.¹⁴⁰

The same reasoning applies equally well in the case of Indian lands. Every allotment or fee parcel would potentially have an implied easement over all surrounding and adjacent junior allotments, absent the discontinuation of necessity. It is hard to imagine this was the intent of the federal government or Congress in the original grant of the various parcels, whether or not it would be useful or appropriate in a given case. Those receiving the parcels, as well as the government in granting the parcels, could easily have included or insisted on a recorded easement in the grant or at least have ensured that the needed rights-of-way were reflected in the survey of each tract.

One commentator has criticized *Pearne* for ignoring that an easement ends when necessity ends.¹⁴¹ This is hardly consoling, particularly for those who live in Indian Country. Necessity can persist through multiple generations and changes in land ownership. The reason why these issues persist today is because from time to time individuals find themselves proud owners of land their predecessors in interest accessed through neighboring lands by way of, at best, a license. If those who are persuaded by this criticism believe the issuance of a revocable license to cross land by some surrounding property owner at some point in the past defeats the application of the way of necessity doctrine then, for all practical purposes today, a way of necessity will never be found when unity of title is to be found in the sovereign. Assuming a mere license does not defeat the necessity requirement, *Pearne* remains convincing. The problem faced on the checkerboard that is Indian Country today arises when a landlocked parcel changes hands and the former friendly bordering neighbor decides they do not want the new owner crossing their land. Instead

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.07 [4] (Michael Allan Wolf ed., Lexis Nexis (2000)).

of a license the new owner finds a locked gate. In the very real cases that persist today, if unity of title can be found in the government, then it remains true that “every grantee, from the earliest history of the [reservation], and those who succeed to his title, would have an implied right-of-way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the [reservation]”¹⁴², and more importantly, that this was the intent of the government at the time the lands were allotted. This hardly seems plausible.

Despite the majority view, courts in Arkansas, Missouri, and Montana have been cited for coming to the opposite conclusion.¹⁴³ However, a quick review of those cases reveals the paucity of reliance on them for the proposition that unity of title can be found in a sovereign.

The Supreme Court of Arkansas in *Ark. State Highway Commissioner v. Marshall* held that unity of title could be found in the State.¹⁴⁴ However, the court’s conclusion rests on a lone cite to the court’s 1965 *Kesner* decision.¹⁴⁵ In *Kesner* the issue of unity of title in the government was neither raised nor discussed.¹⁴⁶ The *Kesner* court simply assumed it was permissible.¹⁴⁷ Consequently, to rely on the *Marshall* opinion is ultimately to rely on a mere assumption.

Snyder v. Warford,¹⁴⁸ a case decided by the Missouri Supreme Court, has also been cited for the minority view. Reading the case, it is readily apparent that it involved a constitutional challenge to a way of necessity statute.¹⁴⁹ The defendant claimed the statute permitted an unconstitutional taking.¹⁵⁰ The court’s decision turned not on the issue of unity of title being in the sovereign, but on the nature of a fee simple title and the application of the common law doctrine of ways of necessity.¹⁵¹ It provides no analysis as to why a way of necessity can be found where unity of title only existed in the sovereign.

142. *Pearne*, 18 S.W. at 404.

143. *See* *Ark. State Highway Comm’n v. Marshall*, 485 S.W.2d 740, 743 (Ark. 1972); *Snyder v. Warford*, 11 Mo. 513, 514 (1848); *Violet v. Martin*, 205 P. 221, 223 (Mont. 1922).

144. *Marshall*, 485 S.W. 2d 740.

145. *Id.* at 743.

146. *Ark. State Highway Comm’n v. Kesner*, 388 S.W.2d 905 (Ark. 1965).

147. *Id.*

148. 11 Mo. 513 (1848).

149. *Id.*

150. *Id.*

151. *Id.*

Finally, on this issue, the Montana Supreme Court in the case of *Violet v. Martin*¹⁵² has been cited to support the minority view. However, the entirety of the *Violet* court's analysis consisted of stating that unity of title could be found in the federal government but that the case before them did not warrant it because there was no necessity.¹⁵³ The case was later overruled in *Simonson v. McDonald*¹⁵⁴ insofar as it might have been read for the proposition that a way of necessity could be found when the power of eminent domain is available to the government.

The conclusion to be drawn from a review of the cases addressing the problem of unity of title being found in the sovereign is those that directly address and analyze the issue come to the conclusion that unity cannot be found in the sovereign. Those cited for the proposition that such a unity can be had either do not address or analyze the problem or cite to cases that do not themselves address or analyze the problem.

D. The So-Called "Public Policy" and "Harmony" Justification

Some commentators have opined that allowing unity of title to be found in a sovereign is consistent with two purported theories underlying the way of necessity doctrine and presumably for this reason the doctrine does or should apply to federal lands.¹⁵⁵ Those theories are that an easement is implied because it is presumed the parties intended for such an easement to exist and public policy favors the full utilization of the land.¹⁵⁶ This is problematic, particularly in the case of tribes.

As for consistency with the inferred intent theory, when unity of title is in the government it is highly unlikely the government intended for easements to exist in this situation for the reasons set forth above and explained in *Pearne* and *Rindge*. Furthermore, such a doctrine is flagrantly inconsistent with the common law's markedly different treatment of government lands from private lands, the most relevant being the doctrine that nothing is to pass by implication.¹⁵⁷ The difference in treatment and inconsistency with existing law is heightened all the more when those government lands are held in trust for

152. *Violet v. Martin*, 205 P. 221 (Mont. 1922).

153. *Id.* at 223.

154. *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957).

155. 3 HERBERT T. TIFFANY & BASIL JONES, *THE LAW OF REAL PROPERTY* § 793 (1939 & Supp. 2004); ELY & BRUCE, *supra* note 15, § 4.7.

156. ELY & BRUCE, *supra* note 15, § 4.7.

157. *See supra* note 19 and accompanying text.

the benefit of Indians.¹⁵⁸ Finally, if the question is one of inferred intent, when the transaction in question pertains to the intent of the federal government due to unity of title only being found in the sovereign, then the real question is the intent of Congress in enacting the statute giving rise to the power to dispose of the federal lands and not the intent of the government and grantee at the time of a particular conveyance.

The idea that a public policy favoring the “full utilization of land” could result in an implicit alienation of proprietary rights in Indian lands ought to make every Indian Country advocate, practitioner, and tribal member cringe in horror. This is the kind of “public policy” that historically was used to justify decimation of tribes and the Indian people.¹⁵⁹ Moreover, what public policy should dictate is an issue for the policy makers to decide. Certainly those of an environmental bent may deem that the better public policy is to leave the nation’s remaining public lands as under utilized as possible. That a rule of law could be created out of whole cloth because a court deems it expedient or appropriate for “public policy” reasons ought to make everyone else cringe in horror at such a brazen assumption of the legislature’s role. This is especially problematic when the legislature has regulated the area and conspicuously has not provided for a way of necessity statute, as in the case of Indian Country.¹⁶⁰ And as noted in *Snyder*, states have already created ways of necessity statutes that can, if the legislature deems appropriate as a matter of public policy, include the creation of easements across the sovereign’s lands. At the very least, what the better public policy would be in these circumstances (whether to allow for or prohibit a way of necessity to run against government lands and Indian trust lands in particular) is not obvious, and rational minds certainly differ on the issue. In such circumstances, it would seem the courts ought to be the last ones dictating which policy is to rule the day.

In the end, the issue as to whether an implied easement by necessity can exist when the unity of title is in the federal government remains unresolved. However, those cases giving an in-depth analysis of the issue conclude, rightfully in the opinion of the author, that such easements cannot be implied when it comes to the sovereign. Those cases going the other way are often less well reasoned and at times confused (e.g., *Montana Wilderness*). And finally,

158. See *supra* note 31 and accompanying text.

159. Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983).

160. See Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. § 312 (2006)).

the notion that governmental unity is consistent with the supposed twin theories of the common law unity of title requirement is highly questionable and, in this author's opinion, wrong on both counts—especially when it comes to Indian Country.

E. Leo Sheep and the Argument from Congressional Intent

In 1979 the United States Supreme Court had an opportunity to touch on the issue of unity of title but did not directly resolve it. Nonetheless, given the Court's holding, the problem of unity of title being found in the federal government is no longer the thicket it initially appears to be. In *Leo Sheep Co. v. United States*¹⁶¹ Justice Rehnquist, penning a unanimous opinion, proclaimed the appropriate inquiry in these situations to be Congress's intent when it enacted the law giving rise to the original land grant.¹⁶²

The facts underlying *Leo Sheep* are somewhat different than the typical implied easement case. The federal government had constructed a public road on a railroad company's property and the Wyoming district court found that it had done so wrongly.¹⁶³ The government conceded that there was no express reservation for an easement when it initially granted the land to the railroad.¹⁶⁴ Consequently, the government was left with arguing that it had a way of necessity across the railroad's lands.¹⁶⁵

The Court noted a critical problem in the government's theory: there is no necessity because the government has the power of eminent domain.¹⁶⁶ Consequently, application of the theory was strained and ultimately of little significance.¹⁶⁷ Interestingly, in coming to this conclusion, the Court cited *Pearne* and *Black Bros.*—cases finding that unity of title cannot be found in the federal government—with apparent approval, but cited them for the issue concerning eminent domain.¹⁶⁸ The relevant question for the Court was not one of necessity or unity of title, but rather what Congress intended when it granted the land to the railroad.¹⁶⁹

Justice Rehnquist hits the nail on the head when he states that this is not the real issue; the issue is whether Congress intended to grant easements when it

161. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

162. *Id.* at 681.

163. *Id.* at 669.

164. *Id.* at 678.

165. *Id.* at 679.

166. *Id.* at 680.

167. *Id.* at 680-81.

168. *Id.* at n.17.

169. *Id.* at 680.

passed the laws under which the grants occurred.¹⁷⁰ If there is congressional intent, that should be the end of the inquiry.¹⁷¹ In that case it does not matter if the common law elements of a way of necessity are met. If there is no congressional intent one would think that concludes the analysis of what the intent of the parties were at the time of conveyance, regardless of whether an individual is left landlocked. Furthermore, if the issue is the intent of the parties at the time of conveyance, as is certainly the primary issue in ways of necessity cases at common law¹⁷², when the transaction in question involves a conveyance from the government the question really is the intent of the government. Such intent would have to be found in the statute giving rise to the power to dispose of the federal lands in the first place, e.g., Congress's intent at the time it passed the law. It certainly is not the intent between the grantee and a particular government official at the time of the conveyance.

A few months after the decision in *Leo Sheep* the U.S. District Court for the District of Utah issued its decision in *Utah v. Andrus*.¹⁷³ In that case the United States filed suit seeking a restraining order to prevent the lessee of state school trust lands from constructing a road.¹⁷⁴ The school trust lands in question were landlocked by federal lands.¹⁷⁵ The court found an implied easement existed for the construction of the roadway. However, rather than focus on a common law way of necessity, the court turned its attention to Congress's intent when it passed the legislation enabling school land grants. The court noted that while land grants by the federal government are typically strictly construed, when it comes to school trust lands, the laws are to be liberally construed.¹⁷⁶ It went on to note that the primary purpose Congress had in mind when enacting the legislation was to put new states on equal footing with the original thirteen colonies by allowing the states to generate funds to support schools by the sale and use of trust lands.¹⁷⁷ Given that

170. *Id.*

171. *Id.*

172. While both cases and commentators have stated that the way of necessity doctrine is founded on two theories (implied intent and public policy favoring full utilization of land), implied intent is always a central issue but public policy concerns, when mentioned, only serve as additional justification for the rule. However, *Buss v. Dyer*, 125 Mass. 287 (1877), appears to lay the foundation for the rule solely on the purported public policy "that no land should be left inaccessible for purposes of cultivation." *Id.* at 291.

173. 486 F. Supp. 995 (D. Utah 1979).

174. *Id.* at 999.

175. *Id.* at 999-1000.

176. *Id.* at 1001-02.

177. *Id.* at 1002.

backdrop, the court concluded that Congress intended for the State of Utah to have access to school lands, even if by implication, as the lands would otherwise become worthless, thereby defeating the purpose of the grant.¹⁷⁸

While *Andrus* is sometimes cited in support of the claim that a way of necessity can be had against the federal government, it is clear the decision turned on the intent of Congress in passing the legislation governing school land grants and not on the common law elements for a finding of a way of necessity.¹⁷⁹

IV. Easements Implied from Congressional Intent

Both the Attorney General in the 1980 Opinion on the *Montana Wilderness* case and Justice Rehnquist's decision in *Leo Sheep* appear to have exposed what the real issue is—or ought to be—in these cases, namely whether Congress intended for easements to exist in the original grants. This was certainly the case with school land grants in *Andrus*. However, it is doubtful in the case of Indian trust lands.

As previously stated federal statutes granting proprietary interests pass nothing by implication and are to be strictly construed in the government's favor. This is especially the case when it comes to Indian trust lands. Since the late eighteenth century the United States Congress has passed legislation limiting the ability for these lands to be alienated. The whole point of having these lands in trust, as aptly put by the Court of Appeals for the Ninth Circuit in *Imperial Granite*, is to protect the land from unauthorized alienation.¹⁸⁰ Additionally, Congress has expressly provided for a method whereby one can seek rights of way across trust lands.¹⁸¹ Those provisions require consent of either the tribe in the case of tribal trust lands or the majority individual allottees in the case of allotted trust lands. If Congress wanted to provide for ways of necessity across Indian lands it could have done so by explicit legislation. What is more, the problem of rights of access was nothing new to the federal government when it allotted Indian lands under the General Allotment Act in 1887.¹⁸² If it intended to grant rights-of-way it certainly

178. *Id.*

179. *Id.*

180. See cases cited *supra* note 31.

181. See Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. § 312 (2006)).

182. This article does not address the allotment acts concerning specific tribes, such as the Slater Act of 1885 affecting the Confederated Tribes of the Umatilla Indian Reservation. However, the specific acts were the template from which the General Allotment Act was born

could have done so expressly either in the legislation or in the actual survey of each allotted parcel.

A. The Homestead Act

Any argument that Congress intended for there to be implied rights of access over tribal trust lands when it passed the various Indian Allotment Acts would indubitably turn on factors that apply with equal force to the Homestead Act. That act was passed shortly before the General Allotment Act, involved lands in the same region as those in the General Allotment Act, and its purpose was to grant public land to individuals in fee simple for use as homes and farmland, which is at least one of the ultimate purposes of the Allotment Act.

The Court of Appeals for the Tenth Circuit in *United States v. Jenks* specifically addressed the Homestead Act as it pertained to implied easements.¹⁸³ The defendant there claimed the government granted his predecessors an interest in an implied easement to use access roads to reach his land.¹⁸⁴ Specifically, Jenks claimed the language of the Homestead Act, which gave individuals 160 acres of public land if they agreed to live on and improve the land for a certain period of time, supported a finding that Congress intended to grant an implied access easement for patented land.¹⁸⁵ However, the court came to a different conclusion. The court noted that while an access right was implied if necessary to carry out the purpose for which land was granted, it did not follow that the right of access was an implied easement.¹⁸⁶ Citing an earlier decision in the same case and the 1890 United States Supreme Court case of *Buford v. Houtz*, the court decided what was granted was an implied license to cross open public lands.¹⁸⁷ In *Buford* the Supreme Court specifically held that individuals had an implied *license*, derived from what was then a nearly 100-year-old custom, to cross or otherwise use open public lands for grazing.¹⁸⁸ Individuals, however, did not have an easement over government lands.

The Court of Appeals for the Ninth Circuit came to the same conclusion in *Fitzgerald*.¹⁸⁹ In *Fitzgerald*, the plaintiff argued that Congress intended for an

and it is doubtful one would find a basis to treat lands allotted under the specific acts differently than those under the general act, at least with regard to implied servitudes in land.

183. *United States v. Jenks*, 129 F.3d 1348 (10th Cir. 1997).

184. *Id.* at 1354.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Buford v. Houtz*, 133 U.S. 320, 326(1890).

189. *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1265-66 (9th Cir. 2006).

inholder to have access to their property over public lands when it passed the Homestead Act.¹⁹⁰ The court agreed with the plaintiff, but like the court in *Jenks*, found the nature of the access right was simply a license.¹⁹¹ The court also cited *Buford* for the rule that the access right settlers had under the Homestead Act was a license to cross open public lands. However, the court went on to cite *Light v. United States*,¹⁹² which further clarified *Buford* by holding that the government's grant of a license to the public to use open public lands did not confer a vested public right.¹⁹³ Consequently, the *Fitzgerald* court concluded that Congress did not intend to grant an implied easement over public lands when it passed the Homestead Act.¹⁹⁴ The court also held that the general public license did not somehow transform into a vested right to an easement over adjacent land when the land in question was patented.¹⁹⁵ Finally, the court noted its conclusion was supported by the fact that Congress, after enacting the Homestead Act, passed legislation that specifically granted a right of access over federal lands, which would not have been necessary if Congress intended for such a right to have existed by implication under the Homestead Act.¹⁹⁶

These federal appellate and Supreme Court opinions interpreting the Homestead Act are insightful when looking at the General Allotment Act. The Homestead Act was passed in 1862 and was designed to open public lands to settlement by those who were willing to live on the land and make improvements for at least five years.¹⁹⁷ Certainly those settlers were in need of access to those lands. Regardless, the right conveyed for such purposes was not in the nature of an easement, but a license to traverse public lands.¹⁹⁸ And as noted by the Ninth Circuit in *Fitzgerald*, subsequent acts by Congress granting a process for obtaining rights of access over federal lands would have made no sense. Likewise, in the case of Indian Country, if indeed the General Allotment Act granted allottees vested implied easements across bordering lands, then subsequent enactments providing for a process whereby one can obtain a right of access over Indian lands would make absolutely no sense.¹⁹⁹

190. *Id.* at 1266.

191. *Id.*

192. 220 U.S. 523, 535 (1911).

193. *Fitzgerald*, 460 F.3d at 1266.

194. *Id.*

195. *Id.*

196. *Id.* at 1265-66.

197. *United States v. Jenks*, 129 F.3d 1348, 1354 (10th Cir. 1997).

198. *Buford v. Houtz*, 133 U.S. 320 (1890).

199. 25 U.S.C. §§ 323-324 (2006).

Moreover, the Indian Allotment Acts were enacted in the same general period as the Homestead Act.²⁰⁰ At the time there was a great deal of open public land settlers customarily used for access, grazing, and the like.²⁰¹ There is no reason to suppose the intent of Congress in the case of the Homestead Act differed in the case of the Indian Allotment Acts on the singular issue of ingress and egress to allotted or granted lands. Indeed, Indian allotted lands and lands open to settlement under the Homestead Act likely bordered each other in many instances. And finally, as will be shown, one of the primary purported purposes of the General Allotment Act was to “civilize” the Indian population by giving them land on which they could farm, settle, and own individually in a similar fashion as the white settlers under the Homestead Act.

B. Federal Policies Preceding the Allotment Acts

To understand what the intent of Congress was when it passed the General Allotment Act it is necessary to look at the federal policies and recommendations preceding its passage. Fundamentally, the purpose was to assist in solving the “Indian question”—that question being how to “civilize” the Indians.²⁰² On November 27, 1851, eleven years before the passage of the Homestead Act, Indian Commissioner Lea framed the question and national discourse in the years preceding the passage of the General Allotment Act in all its ugliness and stated the answer must include the “incorporation” of individual Indians into the American population.²⁰³

After the “question” and proposed “answer” had initially been set, Commissioner Lea’s successors continued to voice similar racist views.

On November 6, 1858, Indian Commissioner Mix in his annual report wrote there were three errors marking the federal policy toward Indians: removal, giving them too much land to be held in common, and giving them too much money for lands the Indians ceded to the government.²⁰⁴ These “errors” in turn were seen as impeding the government’s ability to “domesticate and civilize

200. General Allotment Act, ch. 119, 24 Stat. 388 (1887).

201. *Buford*, 133 U.S. at 320.

202. DOCUMENTS OF THE UNITED STATES INDIAN POLICY 86 (Francis Paul Prucha ed., 2d ed. 1990) (extract from Annual Report of the Commissioner of Indian Affairs (Nov. 27, 1851)).

203. *Id.* (“The great question, How shall the Indians be civilized? yet remains without a satisfactory answer. . . . I therefore leave the subject for the present, remarking, only, that any plan for the civilization of our Indians will, in my judgment, be fatally defective, if it does not provide, in the most efficient manner, first, for their ultimate incorporation into the great body of our citizen population.”)

204. *Id.* at 92-93 (extract from Annual Report of the Commissioner of Indian Affairs (Nov. 6, 1858)).

them” because it prevented the Indians from gaining an understanding of individual property ownership.²⁰⁵

On November 23, 1869, the Board of Indian Commissioners issued a report that stated the reason “Indians will not work” is because they have been taught that any product of their labor would be taken away by the white man and they should be put on reservations, taught about individual ownership of land to encourage agricultural production, and taxed as citizens of the United States.²⁰⁶

Indian Commissioner Smith, in his November 1, 1874, annual report to Congress, wrote that “75,000 wild Indians” need appropriate laws governing them as they pass out of a “savage tribal government” into control of the United States and, in particular, laws that would eliminate the common ownership of lands by allotting lands in severalty, which in turn would initially be inalienable but eventually pass into fee.²⁰⁷

In his October 30, 1876, annual report Commissioner Smith wrote that “[i]t is doubtful whether any high degree of civilization is possible without individual ownership of land.”²⁰⁸ He urged that the head of each Indian family be required to accept an allotment of land for himself and his heirs and that these allotments remain inalienable for twenty to fifty years before passing into fee.²⁰⁹

Secretary of Interior Schurz, in his November 1, 1880, annual report, wrote that it was a mistake to gather the Indians together on large reservations to keep them away from white settlers.²¹⁰ Instead, he wrote, it would be better to introduce Indians to the habits of “civilized life,” namely, individualized private property ownership. This in turn would be accomplished by allotting individual tracts of land that would remain inalienable for a period of time and then eventually pass into fee ownership.²¹¹ The remaining land they could not use or cultivate would pass to white settlers. Eventually, this would “dissolve tribal cohesion” and “merge” Indians into the rest of the nation.²¹²

Indian Commissioner Price wrote about “civilizing the Indians” in his October 24, 1881, annual report to Congress and noted one cause of the

205. *Id.*

206. *Id.* at 133 (reprint of Report of the Board of Indian Commissioners (Nov. 23, 1869)).

207. *Id.* at 144-45 (extract of Annual Report of the Commissioner of Indian Affairs (Nov. 1, 1874)).

208. *Id.* at 149 (extract of Annual Report of the Commissioner of Indian Affairs (Oct. 30, 1876)).

209. *Id.*

210. *Id.* at 153 (extract of Annual Report of the Secretary of the Interior (Nov. 1, 1880)).

211. *Id.* at 154.

212. *Id.*

“unsatisfactory condition” of Indian affairs was the failure to give Indians individual private ownership of lands.²¹³

Commissioner Price also commented on the findings of a group gathered to study the conditions of the Mission Indians of California in his October 10, 1883, report, which stated in part: “[F]rom poverty and ignorance and unwillingness to abandon their custom of dwelling together in villages, under a tribal or village government, they have failed to secure individual titles to their lands, under the public land laws, or under the Indian homestead act.”²¹⁴

Finally, in September 1884 the Program of the Lake Mohonk Conference reported tribal governments were one of the most serious barriers to the advancement of Indians toward civilization, and as such the federal government should stop recognizing tribes as political bodies.²¹⁵ To this end, they suggested Indians should be given individual allotments of land, which would first be made inalienable for ten to twenty-five years before vesting in fee.²¹⁶ Thus, according to the report, the breakup of the reservation system itself was the most appropriate action to take in “civilizing” Indians, and the conference believed this was best accomplished by ending the common ownership of Indian lands.²¹⁷

All of this culminated in passage of the General Allotment Act in 1887. Its purpose, to be blunt, was to eliminate tribes and put Indians on individually owned lands so they could become “civilized” and cultivate the lands much as the white settlers. It was in effect a bill designed to parcel out reservation lands into small farms for individual ownership by tribal members to hold in fee and farm, leaving the remaining lands open to further settlement by the non-Indians and in the process eliminate all remnants of tribal governments,

213. *Id.* at 156-57 (extract of Annual Report of the Commissioner of Indian Affairs (Oct. 24, 1881)).

214. *Id.* at 158-59 (extract of Annual Report of the Commissioner of Indian Affairs (Oct. 10, 1883)).

215. *Id.* at 163 (reprint of Program of the Lake Mohonk Conference (Sept. 1884)).

216. *Id.*

217. *Id.* Prucha writes the following about the Lake Mohonk Conference:

Reformers interested in Indian affairs met each year from 1883 to 1916 at Lake Mohonk, New York, to discuss Indian matters and to make recommendations. These Lake Mohonk Conferences of Friend of the Indian had tremendous impact on the formulation of federal policy. In 1884, in a series of resolutions, the conference gave a preview of the topics that would concern it during the following decades.

Id.

society, and culture. The lands were placed into trust to keep them inalienable for a certain period of time.

The stated purpose for making the land inalienable was to ensure the Indians learned how to farm and use the lands like their white neighbors, to keep them from state taxation, and protect them from any white man who might try and “cheat” them out of their land.²¹⁸ During the period in which these lands remained inalienable, or in trust, encumbrances or conveyances were void.²¹⁹ In short, the lands were placed in trust to keep them from any kind of alienation or encumbrance, particularly as against other individuals who desired the lands. There is no reason to suppose this restraint on alienation was intended to exclude implied servitudes through the land.

If the intent of Congress in enacting the General Allotment Act was to give individual Indians land in fee to encourage them to farm it the same as white settlers then there is little reason to suppose their intent with respect to rights of ways over those lands differed from that in enacting the Homestead Act, which opened public lands to individual fee ownership by white settlers for farming and homesteading.

The General Allotment Act also expressly states that “[n]othing in this act contained shall be so construed as to affect the right and power of Congress to grant the right-of-way through any lands granted to an Indian, or a tribe of Indians.”²²⁰ If the intent of Congress was to allow for implied easements as necessary for ingress and egress there would be little need for this additional language specifically stating Congress retains the right to grant rights-of-way over those lands.

While the purpose of the General Allotment Act was arguably to decimate tribes by eliminating common ownership of their lands, thereby forcing members to become assimilated into the white culture, and while Indian lands were slashed from 138 million acres in 1887 to 48 million in 1934,²²¹ the policy was thankfully ended by enactment of the Indian Reorganization Act of 1934.²²² At all times, however, those lands held in trust were so held to ensure against alienation and by express statutory language void of any encumbrances. Presumably, this includes encumbrances in the form of

218. 18 CONG. REC. 190 (1886); *see also* *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980).

219. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887).

220. *Id.* § 10, 24 Stat. at 391.

221. COHEN, *supra* note 17, at 138.

222. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

implied divestitures of proprietary rights in the form of easements or otherwise.

V. Conclusion

For an easement to be implied against federal lands, and Indian trust lands in particular, the unity of title element must be capable of being found in the sovereign. The federal courts have not clearly resolved the issue. However, finding unity in the sovereign is implausible insofar as one would have to presume the government intended to give every allottee of Indian land an implied right-of-way over the adjacent trust lands, including an easement over a junior grant thereof if necessary to reach their own land so long as the necessity persisted, and intended to give junior grantees and their successors in interest a way over a prior senior grant under similar circumstances. To find that such easements exist at law would essentially amount to the creation of a new rule of common law from whole cloth to further what a given court deems to be appropriate as a matter of public policy. Reliance on public policy to find such an easement at law, however, runs contrary to what most people deem the proper role of a court. If public policy dictates such an easement should exist, the policy makers, namely Congress or a state legislature, can create statutes to grant easements in those cases. As mentioned above, some states have done exactly this, though they may still not allow for easements against the sovereign. Finally, the real question in this situation is whether Congress intended for easements to run against government lands. To find this intent one looks to the authorizing statutes and rules of statutory construction in the given context, not to the status of individual grantees or the relationship existing between the grantee and the federal government at the time of a given conveyance of land.

The most convincing argument for finding an implied easement against the federal government is to look to the intent of Congress when it enacted statutes giving rise to the power to dispose of the lands. Some courts have found such intent when it comes to school trust and riparian lands.²²³ However, in the case of school trust lands the law is such that statutes governing them are to be liberally construed in their favor, precisely opposite to the rule that normally applies when addressing federal land issues. In the case of riparian lands, it

223. With regard to riparian lands the issue is not so much whether Congress intended to permit easements to run across the lands, but whether Congress intended to divest riparian ownership of the common law right this type of ownership had always carried—namely the right to riparian ingress and egress.

has been federal common law since the inception of the United States government that ownership of riparian lands includes ownership of rights of access by riparian means. These circumstances are unique, as they should be. Typically, grants from the federal government are not to be implied, particularly in the case of Indian lands. The whole point of Indian trust lands is to prevent the unauthorized alienation of proprietary rights. There are statutes in place that specifically govern the granting of rights-of-way over Indian lands. Notably, they do not provide for a way of necessity process. The Indian Allotment Acts by their express language prohibit any conveyance or encumbrance of any kind with respect to lands held in trust, arguably including implied easements, or at least evincing congressional intent not to implicitly dispose of proprietary rights over those lands. Furthermore, the Indian Allotment Acts are much more akin to the Homestead Act, which has been held not to have conveyed implied easements, but rather licenses over open public lands, which themselves do not amount to vested public rights. If Congress wanted easements in necessity situations it could have, but did not, provided for them. Given this context, it is implausible to say Congress actually intended for easements to be implied across Indian trust lands.

Those who fancy ways of necessity over Indian trust lands should seek their congressional representative, not the courts.