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Was an Easement by Necessity Impliedly Reserved in the Checkerboard Land Grants: Leo Sheep Company v. United States

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WAS AN EASEMENT BY NECESSITY IMPLIEDLY RESERVED IN THE CHECKERBOARD LAND GRANTS?: LEO SHEEP COMPANY V. UNITED STATES[1]

INTRODUCTION

In 1862 the United States Government, to subsidize and promote the construction of a transcontinental railroad, granted large portions of the public domain to the Union Pacific Railroad.[2] The odd-numbered sections were granted to the railroad while the even-numbered sections were reserved. The government, however, did not reserve a right of way across the granted lots to provide access to the retained lots. This omission resulted in litigation between successors to the railroad's lands and persons who desired to use the public lands.

In the years immediately following the grants there was little conflict. When it did occur it usually resulted from attempts to trail stock across private land to pasture on public land.[3] Today the public land is subject to recreational uses and demands unimagined at the time of the checkerboard land grants.[4] Hunters, fishermen, snowmobilers, and backpackers all want access to public land which is often completely surrounded by private land. Though the question of access to these lands is mundane,[5] its answer threatened a substantial impact on property rights in millions of acres of land in the Western United States.[6]

In Carbon County, Wyoming, some of the Union Pacific Railroad land passed to the Leo Sheep Company. The Seminoe Reservoir, used by the public for hunting and fishing, is situated to the west and south of these specific sections and cannot be reached without crossing private land. Controversy began when Bureau of Land Management officials received complaints that Leo Sheep Company and other private

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

2. Act of July 1, 1862, ch. 120, 12 Stat. 489, 492(3) and (4), *as amended* Act of July 2, 1864, ch. 216, 13 Stat. 356, 358(4).

3. *See, e.g.*, Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912); Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914); Jastro v. Francis, 24 N.M. 137, 172 P. 1139 (1918); Western Wyoming Land & Livestock Co. v. Bagley, 279 F. 632 (8th Cir. 1922).

4. Gould, *Access to Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149 (1973) discusses the impact of recreational demands on the public land and raises the question of access. In 1976 the Montana Legislative Subcommittee on Agricultural Lands concluded that access problems were being caused by increasing recreational demands and that "blocks of public land once available are now closed due to lack of legal access." MONTANA LEGISLATIVE COUNCIL, PUBLIC ACCESS TO PUBLIC LANDS: INTERIM STUDY, 1 (1976). *See also* PUBLIC LAND LAW COMMISSION: ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970) which catalogs the extensive uses, recreational and non-recreational, of the public land.

5. Leo Sheep Co., 440 U.S. at 669.

6. *Id.* at 678.

landowners were either denying access or were charging a fee to cross their land. After attempts to negotiate failed, the B.L.M. cleared a road across Leo Sheep Company land and posted signs inviting the public to use it for access to the reservoir.

Leo Sheep Company, pursuant to provisions of the Quiet Title Act,[7] sued for declaratory and injunctive relief. The United States District Court, District of Wyoming, upheld the Company's claim that the United States had, in clearing the access road, unlawfully entered their land. The Court of Appeals for the Tenth Circuit reversed[8] and the United States Supreme Court granted certiorari to the question "[w]hether the government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad . . . ."[9]

Before the Supreme Court, the United States argued that settled principles governing implied easements and easements by necessity were available to support a finding that easements permitting access to the public land were reserved by the Union Pacific Act.[10] In holding that the United States does not have an implied easement that would permit uncompensated use of a right of way across Leo Sheep Company land, the Supreme Court resolutely rejected this argument.[11]

This note will briefly examine the Court's ruling that the common law doctrine of easements by necessity is unavailable to support the position urged by the United States.

DISCUSSION

The doctrine of easements by necessity is straightforward and well settled. It applies "where the grantor retains an adjoining parcel which he can reach only through the lands conveyed to the grantee."[12] Two theories back the doctrine. One states that the easement results from the operation of law to further public policy by making the retained land usable. The other finds the easement in implications made from the terms and conditions of the grant.[13] Regardless of the underlying theory, authorities have noted that

> whether easements by necessity are believed to be products of public policy or to be embodiments of inferences as to the intent of the parties, they should be establishable by proof that they are necessary to the reasonable utilization of the

7. 28 U.S.C. § 2409a (1976).
8. Leo Sheep Co. v. United States, 570 F.2d 881 (10th Cir. 1978).
9. Leo Sheep Co., 440 U.S. at 669.
10. *Id.* at 679.
11. *Id.* at 681, 682.
12. Hollywyle Ass'n v. Hollister, 164 Conn. 389, 398, 324 A.2d 247, 252 (1973).
13. 3 R. POWELL, THE LAW OF REAL PROPERTY para. 410 (1979).

> claiming dominant parcel. Only so can the public interest in land utilization be safeguarded. Only so can the probable intent of the parties be effectuated.[14]

As the Court recognized in *Leo Sheep Company*, the determinative question is whether the claimed access is necessary to the reasonable utilization of the retained public land.

Two decisions by the Montana Supreme Court, one overruling the other, are examples of the opposite sides of this issue. For the purpose of this note, *Herrin v. Sieben*[15] and *Simonson v. McDonald*[16] are illustrative.

In *Herrin v. Sieben* the plaintiff acquired checkerboard lands that had been granted to the Northern Pacific Railroad. The defendant trailed sheep across these sections to reach pasture on public lands. The plaintiff, suing for damages caused by the trespass, questioned the extent to which the public may use private land for access to public land.[17]

The Montana court recognized the common law rule that where a "grantor has no means of access to other lands owned by him except by passing over the lands granted, a way of necessity is impliedly reserved in his grant."[18] In 1912, the Montana court did not distinguish a grant of land by the government from a grant by a private party. Since access to the public lands was impossible without crossing some part of the odd-numbered sections, an easement by necessity was reserved by the United States.

This easement operated not only in favor of the United States, but in favor of citizens who wanted to enter the public land for settlement, timber development, mineral exploration, and grazing. Any contrary view, in the words of the court, would grant to the railroad "a monoploy of all the public lands within the limits of the grant. . . ."[19]

At first glance this view seems reasonable, and ignoring the impact of a decision like *Herrin* on long established property rights, the logic is appealing. The public lands in the checkerboard scheme are, after all, completely surrounded by private land, and the private landowner may easily deny the public access. The same argument was made by the United States in *Leo Sheep Company*.

Other courts, like the Supreme Court in *Leo Sheep Company*, have disagreed with the reasoning in cases like *Herrin*. For example, a 1927

14. *Id. See also* Simonton, *Ways By Necessity*, 25 COLUM. L. REV. 471, 579-580 (1925).
15. 46 Mont. at 226, 127 P. at 323.
16. 131 Mont. 494, 311 P.2d 982 (1957).
17. Herrin, 46 Mont. at 231, 127 P. at 326.
18. *Id.* at 234, 127 P. at 328.
19. *Id.* at 235, 127 P. at 328.

Texas decision, *State v. Black Brothers*,[20] declared that the doctrine of necessity does not apply to government grantors in the same manner that it applies to private grantors.

In *Black Brothers*, the State of Texas sued for and obtained an easement across land owned by the defendant, a private individual. On appeal, the Texas Supreme Court refused to find an easement based on necessity.[21] Recognizing its previous holding that an implied reservation may be found where a grantor has no access to retained lands, the court stated that the application of this rule was limited to situations "where the grantor was another than the sovereign."[22] The Texas court, furthermore, had always

> strongly emphasized that strict necessity is the basis for any such right as that here asserted. The same necessity does not exist in the case of the sovereign as in the case of the individual landowner. As long as title remains in the state . . . there can be no doubt that the state, in the exercise of the power of eminent domain . . . can obtain any and all reasonable rights of way.[23]

In *Black Brothers*, the power of eminent domain disproved the strict necessity upon which the easement by necessity was deemed to be grounded.

Various cases have stated two degrees of necessity that will support the implication of an easement by necessity. One view requires absolute or strict necessity,[24] while the second view permits the easement upon a showing of reasonable necessity.[25] Regardless of the degree of necessity required, however, the availability of the power of eminent domain eliminates the need to derogate the deed by implying the reservation of an easement.

In 1957, the Montana Supreme Court came to agree with *Black Brothers* and overruled *Herrin*. For the court in *Simonson v. McDonald*, a conveyance of land was a solemn and deliberate transaction which should not be enlarged by implication.[26] Again, it was stated that the power of condemnation served to " 'negative the strict necessity on which the implication of the reservation of the right of way . . .

20. 116 Tex. 615, 297 S.W. 213 (1927). *See also* United States v. Rindge, 208 F. 611, 619 (S.D. Cal. 1913).

21. Black Bros., 116 Tex. at 624, 297 S.W. at 216.

22. *Id.* at 626, 627, 297 S.W. at 217, 218.

23. *Id.* at 629, 297 S.W. at 218.

24. *See, e.g.*, Kripp v. Curtis, 71 Cal. 62, 65, 11 P. 879, 880 (1886); Black Bros., 116 Tex. at 629, 297 S.W. at 218; Mackie v. United States, 194 F. Supp. 306, 308 (D. Minn. 1961); Rindge, 208 F. at 620.

25. *See, e.g.*, Adams v. Cullen, 44 Wash. 2d 502, 507, 268 P.2d 451, 454 (1954); Hollywyle Ass'n., 164 Conn. at 399, 324 A.2d at 252.

26. 131 Mont. at 497, 311 P.2d at 984.

must be grounded.' "[27]

The Supreme Court in *Leo Sheep Company*, like the Montana and Texas courts, recognized the common law rule that a grantor conveying a portion of his lands while retaining the remainder reserves the passage way necessary to reach the retained property.[28] Like the Montana and Texas courts, the Supreme Court believed that the existence of the power of eminent domain meant that "the easement is not actually a matter of necessity."[29]

This was not the only possible result. Some courts, discussing grants from private parties, have found that the existence of a power of condemnation is not a sufficient reason to deny an easement by necessity and have refused to force private parties seeking the easement to utilize statutorily provided condemnation powers.[30] It is possible the argument that an easement by necessity is a vested right existing independently of the power of condemnation,[31]—that the easement came into being at the time the servient and dominant parcels were severed by the grant[32]—could be extended to the situation in *Leo Sheep Company*.

Despite this argument, however, it appears that the Supreme Court properly refused to extend the doctrine of easements by necessity to grants made by the sovereign. Extending the doctrine not only would have had a "substantial impact . . . on property rights granted over 100 years ago . . ."[33] in over 150 million acres of land,[34] but would not have been faithful to the theory underlying the doctrine. Clearly on the facts in *Leo Sheep Company* the easement is not a matter of necessity because the government has the power of eminent domain.

Requiring the United States to condemn the necessary rights of way has the obvious benefit of providing compensation for the taking of private land. Condemnation, furthermore, allows creation of the easement without derogation of the grant embodied in the 1862 Union Pacific Act. Finally, as the Court noted, not only is it possible "that Congress gave the problem of access little thought; but it is at least as likely that the thought focused on negotiation, reciprocity considera-

27. *Id.* at 499, 311 P.2d at 985, quoting Black Bros., 116 Tex. at 629, 297 S.W. at 219. Thisted v. Country Club, 146 Mont. 87, 405 P.2d 432 (1965) later limited the ruling in Simonson to the facts existing in that case.

28. Leo Sheep Co., 440 U.S. at 679.

29. *Id.* at 679, 680.

30. Proudfoot v. Safle, 62 W. Va. 51, 57 S.E. 256, 257 (1907); Moore v. White, 159 Mich. 460, 464, 124 N.W. 62, 64 (1909); Horner v. Heersche, 202 Kan. 250, 256, 447 P.2d 811, 816 (1968).

31. Moore, 159 Mich. at 464, 124 N.W. at 64.

32. Horner, 202 Kan. at 257, 447 P.2d at 817.

33. Leo Sheep Co., 440 U.S. at 682.

34. *Id.* at 678.

tions, and the power of eminent domain as obvious devices for ameliorating disputes."[35] The Supreme Court, rightfully, was "unwilling to upset settled expectations to accomodate some ill-defined power to construct public thoroughfares without compensation."[36]

CONCLUSION

In the case of checkerboard lands reserved in the Union Pacific Act, the common law doctrine of easements by necessity is unavailable to create a right of access to the public lands. Numerous other grants reserving the even-numbered sections were made to railroads.[37] This decision will likely extend to those grants as the power of condemnation will, in each grant, contradict the necessity upon which the doctrine of easements by necessity is bottomed. Accomodation between demands made for access to the public lands and the rights of landowners whose property must be crossed must now be made by requiring the public to compensate the private landowner for his lost property rights.

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35. *Id.* at 681.

36. *Id.* at 687, 688.

37. *See, e.g.*, Act of Sept. 20, 1850, ch. 61, 9 Stat. 466 (granting land to the States of Illinois, Mississippi and Alabama, some of which eventually passed to the Illinois Central R.R.); Act of June 10, 1852, ch. 45, 10 Stat. 8 (granting land to the State of Missouri, some of which eventually passed to the Missouri Pacific, the Chicago, B & Q R.R., and the St. Louis & Santa Fe R.R.); Act of March 3, 1857, ch. 99, 11 Stat. 195 (granting land to the State of Minnesota, some of which eventually passed to the Great Northern and Northern Pacific railroads); and Act of July 25, 1866, ch. 242, 14 Stat. 239 (granting land to the States of Oregon and California, some of which eventually passed to the Southern Pacific Co.).