Acquiring Access Easements Over State-Owned Lands

by

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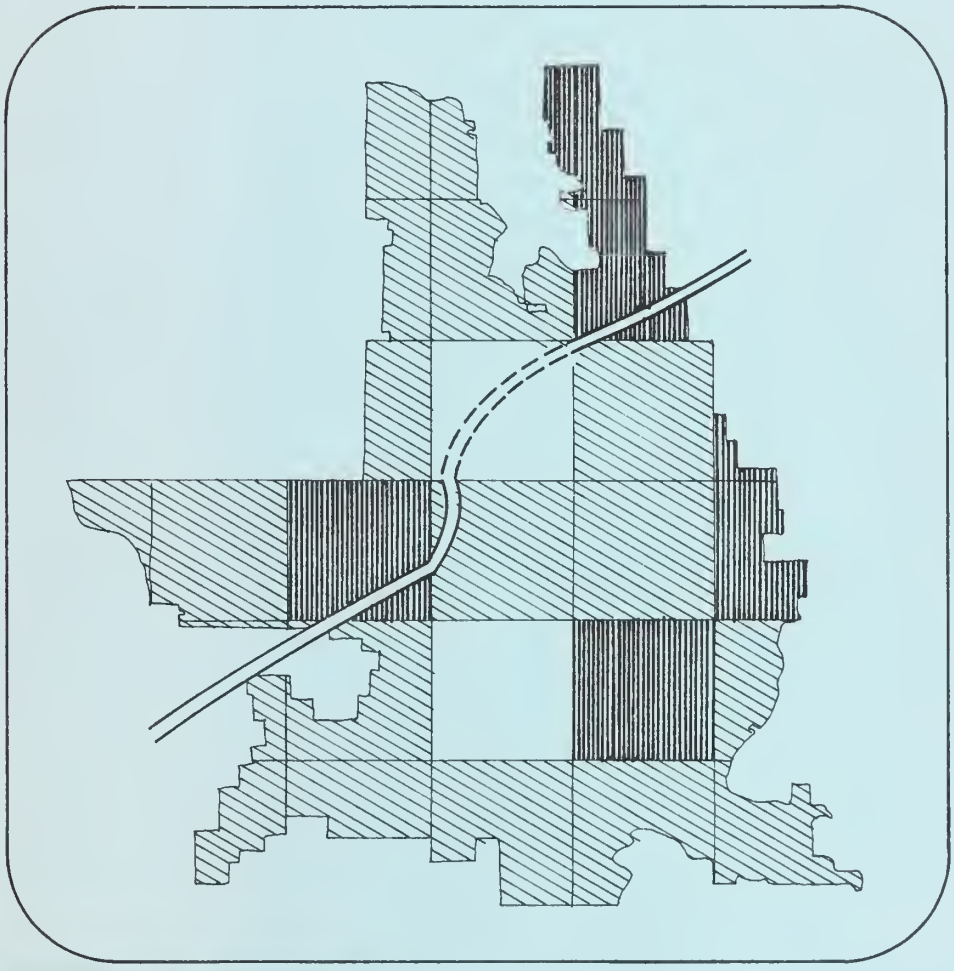

U.S. DEPARTMENT OF THE INTERIOR – BUREAU OF LAND MANAGEMENT

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SECTION 1 - INTRODUCTION

When the Bureau of Land Management (BLM) undertakes the development of any of the lands under its control, one of the first problems it may encounter is that of acquiring access to those areas which are surrounded by private or state-owned lands, or are otherwise inaccessible.

When the land over which an access easement is required is privately owned, the easement is virtually always acquired using a standard BLM form (Illustration 1). The advantages which accrue from using a standard document form are clear: easements acquired by BLM uniformly meet Congressional, Department of Justice, and BLM requirements, and no essential provisions are inadvertently excluded. However, agencies which grant easements over state-owned lands must work within the authority granted to them by their respective state constitutions and statutes. Agency regulations or policies may also serve to limit an agency's willingness to include in an easement provisions which are ordinarily contained in easements acquired by BLM. The conflict between BLM's need to acquire certain rights and a state agency's unwillingness to grant them has frequently resulted in an acquisition by BLM which does not meet minimum Congressional, Department of Justice, and BLM standards.

As has been indicated, the basic rights which BLM must acquire in an access easement are mandated by Congressional, Department of Justice,[1] and BLM requirements. They can be summarized as follows:

1. The easement should be granted to "The United States of America and its assigns."[2] This wording plainly establishes that the easement is freely assignable without further permission from the owner of the underlying fee, and without the payment of additional consideration. If BLM is given authority to grant or assign easements, a situation might arise where, due to a change in development plans

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[1]Dept. of Justice authority to set standards for sufficiency of title to land being acquired by any agency of the United States derives from 40 U.S.C. § 255 (1970)).

[2]Bureau of Land Management Manual 2130 - ACQUISITION OF EASEMENTS BY PURCHASE OR CONDEMNATION (1968), *as amended (see* 2130.1, 1974) [hereinafter cited as BLM Manual 2130]; STANDARDS FOR THE PREPARATION OF TITLE EVIDENCE IN LAND ACQUISITIONS BY THE UNITED STATES, Dept. of Justice, at 17 (1970) [hereinafter cited as LAND ACQUISITIONS STANDARDS].

in an area, the need for an access easement may shift from BLM to a state or county. So long as the easement was originally granted to "the United States of America and its assigns," BLM would be free to assign the easement to that state or county.

2. The easement should "contain a reference to the name of the agency for which the lands are being acquired. This statement should follow the description of the land and in no instance should it be included in the granting, habendum or warranty provisions of the deed."[3] This precaution should be taken so that, while the acquiring agency can be readily identified, the grant will not be construed as applying solely to the acquiring agency.

3. The document should grant a "perpetual exclusive easement to locate, construct, use, control, maintain, improve, relocate, and repair a road."[4]

   The easement must be perpetual and exclusive when improvements of substantial value will be erected on the acquired right-of-way or on the national resource lands served by the right of way; when the right-of-way is needed to manage lands under multiple use or sustained yield management; or when the land served by the right-of-way has significant outdoor recreation value.[5] That the easement is intended to be exclusive must be explicitly spelled out in the document, since easements are normally non-exclusive [i.e., the easement owner has no right to exclude others from the use of the way], and will be so construed unless the easement clearly indicates that the grant is to be exclusive.[6]

   The rights to "locate, construct, use, control, maintain, improve, relocate, and repair" the road should also be explicitly granted in the easement. A more general easement which does not specifically grant these rights could be interpreted to grant narrower rights than those desired by BLM. Although some of these rights might be implied in a less specific grant, the right to control the road

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[3]LAND ACQUISITION STANDARDS at 17.

[4]This language is from the standard BLM easement form (Illustration 1). Although the wording of the granting clause need not be identical to that used here, care should be taken that the language used has the same legal effect.

[5]BLM Manual 2130.11A1a-c.

[6]25 AM. JUR. *Easements and Licenses* § 77 (1966).

almost certainly would not be implied. BLM must obtain control so that it may require payment of user fees, be able to close the road for fire control purposes, and carry out other regulating measures.

4. The easement should not contain any type of reverter clause, or any other language which makes the easement defeasible. The following clauses are from easements accepted from states in the past, and are examples of the type of language which should not be accepted:
   a. "This grant is made with the understanding that [BLM] must construct said roadway ... within two years from date hereof, failing in which this grant shall be subject to cancellation..."
   b. "[S]hould said road be abandoned or discontinued for a period of twelve consecutive months, this right-of-way ... shall automatically and without notice terminate..."

5. The easement should not contain any clause which may constitute a commitment of funds not appropriated, since such a commitment is unlawful.[7] An example of this type of clause is one in which BLM agrees to relocate its facility on the right-of-way at its expense on notice from the grantor. Any agreement to indemnify or "save and hold harmless" the grantor is also unacceptable for this reason. The only "save harmless" agreement permissible is one between the grantor and a licensee, but even this provision should not be included in the easement itself.

   Another form of agreement to pay which is unacceptable is one in which BLM agrees to compensate the grantor for property damage and damage to crops resulting from BLM's use of the right-of-way. Again, this is a commitment of funds not appropriated. These types of damages should be reflected in the appraisal and compensated for by payment of consideration, so that further payments are unnecessary. Easements which require periodic payment of a fee should not be accepted, since a commitment to pay the fee is a commitment of funds not appropriated. Since the easement is lost if the fee is not paid, this type of clause can also be considered to be a reverter clause, and therefore unacceptable.

6. A final problem may arise in the timing of payment of consideration. 2132.33B and C (1976) notes that the recorded easement

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[7] *See* 31 U.S.C. § 628 (1970), 41 U.S.C. § 12 (1970).

or deed must be submitted to the state office for final title opinion before payment is made. When the state office receives the recorded document, the check for payment of consideration is ordered. Established BLM procedure, therefore, is that consideration is not paid until after the easement is recorded. This permits the Solicitor to determine whether the United States has acquired satisfactory title.

Many states, on the other hand, require that consideration be paid before the easement is issued. This problem can be resolved by obtaining authorization from the Solicitor for payment of consideration before the easement is recorded and submitted for final title opinion. Or, the state may be willing to except the United States from its requirement and issue the easement before consideration is paid.

This summary represents an overview of the rights which BLM must acquire in an easement, and of those clauses which should not be accepted. The following section discusses, on a state-by-state basis, the inadequacies and deficiencies in easements which have been acquired from states in the past. The final section recommends ways in which these deficiencies can be remedied by the appropriate BLM state office.

Illustration 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Tract No.

EXCLUSIVE ROAD EASEMENT

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of $,

hereinafter called Grantor, whether one or more, does hereby grant to the UNITED STATES OF AMERICA, and its assigns, a perpetual exclusive easement to locate, construct, use, control, maintain, improve, relocate, and repair a road over and across the following-described real property situated in the County of , State of , to wit:

The parcel of land to which the above description applies contains acres, more or less.

A plat showing the easement described above is attached hereto as Exhibit A and made a part hereof.

The easement herein granted is for the full use of the above described property as a road by the UNITED STATES OF AMERICA, its licensees and permittees, including the right of access for the people of the United States generally to lands owned, administered, or controlled by the UNITED STATES OF AMERICA for all lawful and proper purposes subject to reasonable rules and regulations of the Secretary of the Interior. Grantor reserves the right of ingress and egress over and across the road for all lawful purposes: *Provided*, That such use shall not interfere with the easement granted herein: *Provided, further*, That the use of the road by Grantor for the transportation of forest or mineral products shall be subject to the regulations contained in 43 CFR Subparts 2800 through 2812.

The grant of easement herein made is subject to the effect of reservations and leases, if any, of oil, gas, and minerals in and under said land.

TO HAVE AND TO HOLD said easement unto the UNITED STATES OF AMERICA and its assigns forever.

Grantor covenants and warrants that he is lawfully seized and possessed of the land aforesaid and has the full right, power and authority to execute this conveyance, and that said land is free and clear of liens, claims or encumbrances, except as shown above, and that he will defend the title to the easement conveyed herein and quiet enjoyment thereof against the lawful claims and demands of all persons.

Accepted subject to approval of title by the Department of Justice:

Dated this day of , 19

(Signature of Authorized Officer)

(Title)

(Acknowledgment on reverse)

Form 2130–4 (April 1971)

SECTION 2 - STATE ANALYSES

ALASKA

The Director of the Division of Lands, State of Alaska, is authorized to issue rights-of-way or easements over state land.[8]

The Division of Lands has issued no rules or regulations concerning the granting of road easements over state lands. Therefore, the only sources available for use in determining the adequacy of easements issued by the Division of Lands are state statutes, and the Division's application form[9] and standard right-of-way permit.[10] The analysis which follows parallels the comments on the rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of pertinent provisions and why the indicated rights must be acquired.

1. It is unclear from the application form or permit whether the Division will issue the permit to "the United States of America and its assigns." Assignability is not mentioned in the permit. Should an access easement be desired from the Division of Lands, care should be taken that the easement be acquired in the name indicated above.

2. It is unclear whether the Division would be willing to include a reference to the acquiring agency in the easement, and exclude the reference from the granting, habendum and warranty clauses. Again, should an easement be acquired from the Division, care should be taken that this Department of Justice standard is met.

3. The standard Division permit grants only the right to locate, construct, operate and maintain the right-of-way. As discussed in Section 1, these rights are inadequate. Furthermore,

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[8]ALA. STAT. § 38.05.330 (1962).

[9]Application for Right-of-Way Permit, Form No. 10-112(75) (10/64), State of Alaska, Dept. of Natural Resources, Division of Lands.

[10]Right-of-Way Permit, Form No. 10-119(72) (Rev. 6/69), State of Alaska, Dept. of Natural Resources, Division of Lands.

the permit explicitly states that the only purpose for which the right-of-way may be used is for the location, construction, operation and maintenance of the right-of-way. Given the explicitness of this limitation, it is very unlikely that other rights which BLM needs to acquire would be implied in this permit. The most serious deficiency is the lack of exclusivity and control.

4. The standard Division permit contains several provisions which render the easement defeasible. The grant is effective only until no longer used for the purpose for which it is granted. The permit could be terminated when the necessity for the right-of-way no longer exists, or upon abandonment or failure to use the right-of-way. Since the procedure is not set forth for determining whether any of the conditions which may result in termination of the permit have occurred, BLM may have no protection against a determination by the Division that, for example, the necessity for the right-of-way has ceased when the BLM in fact does not believe the necessity has ended. BLM could, in effect, lose the easement and its investment in the right-of-way. This potential loss is underscored by an agreement in the permit that the state is absolved from any liability or damage to the permittee resulting from cancellation, termination or forfeiture of the permit.

5. The Division's standard permit and application form contain two provisions which may constitute a commitment of funds not appropriated. The first is an agreement that, upon termination, abandonment, revocation, relocation or cancellation, the permittee will within 90 days remove or relocate all structures and improvements and restore the area to the same or similar condition as it was upon issuance of the permit. The second provision is an agreement that, if the state land over which the right-of-way is acquired is leased, the permittee will reimburse the lessee for all damages to crops and improvements which result from the construction of the right-of-way. This provision is part of the application form. Again, this may constitute a commitment of unappropriated funds; also, this type of damages compensation should be reflected in the appraisal and included as part of the payment of consideration (see Section 1, page 4).

6. Consideration is mentioned neither in the application nor in the permit. Whether the timing of the payment of consideration would raise any problems, therefore, is unknown.

7. A final problem is raised by Ala. Stat. § 38.05.335 (1962), which authorizes the Director of the Division of Lands to require an applicant to deposit an amount covering the estimated cost of an appraisal, survey and necessary advertising. This may result in a

duplication of the appraisal and survey, since BLM normally surveys and makes an appraisal in the process of acquiring an easement. The effect could be not only a duplication of work, but also a duplication of costs, since both appraisals and surveys would be paid for by BLM. However, it is unclear whether the Division of Lands would require BLM to make the deposit authorized by the statutory provision.

ARIZONA

The State Land Commissioner, State Land Department is authorized to convey interests in state land with the conditions and covenants which he deems to be in the best interest of the State of Arizona.[11]

The sources drawn upon for this analysis of the adequacy of easements issued by the State Land Commissioner are state statutes,[12] regulations issued by the State Land Department,[13] and a representative easement which has been acquired on the Department's standard form.[14] The analysis which follows parallels the comments on the rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of pertinent provisions and why the indicated rights must be acquired.

1. The easement is granted to "The United States Government - Bureau of Land Management" rather than to "The United States of America and its assigns." The Department's regulations restrict the assignability of an easement by requiring that assignments be

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[11]ARIZ. REV. STAT. § 37-132 (1974), and generally, § 37-461 *et seq.*

[12]ARIZ. REV. STAT. § 37-461 *et seq.*

[13]Art. VIII, Subchapter B, Ch. 2, Rules and Regulations Governing Rights of Way, State Land Dept., State of Arizona (1952, *as amended* 1967) (hereinafter cited as Rules and Regulations).

[14]BLM easement no. RE-A4-106; State Land Dept. Lease No. 5166, recorded September 6, 1973.

approved by the Commissioner.[15] This does not adequately meet either BLM policy or Department of Justice standards (see Section 1, page 1).

2. A reference to BLM is made in the clause which identifies the grantee and grantor. This is not an acceptable method of identifying the acquiring agency (see Section 1, page 3).

3. The Department's standard document grants only the right to construct, operate and maintain the right-of-way. The easement is explicitly not exclusive, because the grantor reserves the right to grant easements to others across the same land. Further, the grantee agrees not to exclude the State of Arizona or its lessees or grantees from the right-of-way. It is unclear whether "the State of Arizona" means state officials only or all citizens of the state, but at any rate BLM probably could not close the right-of-way -- for example, to aid in fire control -- without risking a violation of the agreement, which could result in loss of the easement. Thus, BLM has no effective control of the right-of-way. The duration of the easement is not specified (but see the discussion below of reversion provisions). The right to improve the right-of-way, normally acquired by BLM, is restricted by Department regulations in that written approval from the Commissioner must be secured before any improvement may be placed on the right-of-way.[16] The most serious deficiency in terms of rights granted is the lack of exclusivity and control.

4. The standard easement form contains two provisions which may constitute unacceptable reverter clauses. First, if the necessity for the right-of-way no longer exists, or if it is abandoned or not used, the right-of-way reverts to the State. Second, the grantee agrees that the right-of-way shall be used for no purpose other than the location, construction and maintenance of the road. Although this second provision is phrased as a condition precedent rather than a reverter clause, the legal effect could be that of reversion if the Commissioner determined that the right-of-way had been used for a purpose other than that for which it was

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[15]Rules and Regulations D(305).

[16]Rules and Regulations E(401).

granted. Because of these two provisions, the easement is defeasible, and BLM could lose the easement and its investment in the right-of-way.[17]

5. The Rules and Regulations of the Department require the right-of-way contract to provide that the grantee will indemnify the grantor "against all loss, damage, liability, expenses, costs and charges incident to or resulting in any way from the use, condition or occupation of the land."[18] In the right-of-way document for RE-A4-106, this has been modified to read, "To the extent legally permissible, the United States agrees to indemnify the State of Arizona for claims for damages arising out of the exercise by the United States of the rights granted herein." Either provision may constitute a commitment of funds not appropriated, although the effect of the words "to the extent legally permissible" is not clear.

6. The habendum clause of the easement form indicates that consideration is to be paid upon execution of the right-of-way. The Rules and Regulations provide that the Commissioner may cancel the right-of-way if the document is not executed and returned with full payment of consideration within 60 days from the date of mailing by the Department. Given BLM's need to obtain final title approval from the Solicitor, and the amount of time it may take to obtain the check for payment of consideration, there could be some problems in this regard.

7. An additional question for concern is payment of the $150 appraisal fee required by the Department.[19] This may result in a duplication of work and costs, since BLM normally makes an appraisal in the process of acquiring an easement. Thus, BLM would have to pay twice for appraisal of a single right-of-way acquisition from the State of Arizona.

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[17]ARIZ. REV. STAT. § 37-132(A)(4) (1974) requires that sales to governmental agencies without public auction be made on condition of reversion to the State when the lands cease to be put to the purpose for which they have been sold.

[18]Rules and Regulations 304(A)(5).

[19]ARIZ. REV. STAT. § 37-108(20) (1974).

CALIFORNIA

Rights-of-way across state-owned land in California are variously granted by the State Lands Commission, the Department of General Services, the Department of Parks and Recreation, the Department of Agriculture, the Reclamation Board, and the Department of Water Resources. The agency which grants a particular right-of-way depends not only on which agency controls the land to be crossed, but on a number of special stipulations. The State Lands Commission grants all rights-of-way across lands under its control. With regard to all other state agencies, in most instances, the Department of General Services grants easements with approval of the state agency concerned. One exception[19] to this general procedure concerns the Department of Parks and Recreation, which grants those easements which are entered into on its standard form, and for which renumeration is less than $5,000. In all other cases, easements across Department of Parks and Recreation land are granted by the Department of General Services with the approval of the Department of Parks and Recreation.

The following analysis considers separately the adequacy of easements granted by the State Lands Commission, the Department of General Services, and the Department of Parks and Recreation.

A. The State Lands Commission

Under the terms of the regulations established by the State Lands Commission,[20] the only easement which the Commission grants is essentially a non-exclusive lease for a term not to exceed 49 years. For reasons noted in the introduction, this type of easement is unacceptable in almost all instances when BLM needs to acquire access. However, the BLM California State Office has, in the past, acquired the needed land by patent rather than by easement. This procedure results in an acquisition which does not contain the objectionable provisions found in a standard Commission easement, and the United States gains control of the right-of-way in perpetuity. As long as this procedure remains acceptable to the Commission, there

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[19] Other specific exceptions exist, but are not considered here. See Real Estate Services Division Manual, Chapter X, Department of General Services, State of California.

[20] Cal. Administrative Code tit. 2, Div. 3, Art. 1 and 2 (revised May 1969).

need be no concern about using the Commission's easement-granting provisions, or about the deficiencies in those provisions.

B. The Department of General Services

The Department of General Services has, in the past, granted easements to BLM on a modified version of the standard BLM form.[21] The analysis which follows parallels the comments on the rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of pertinent provisions and why BLM must acquire the indicated rights.

1. The easement is granted to the United States of America and its assigns.

2. The sole reference to the acquiring agency is made at the top of the easement document, outside of the granting, habendum and warranty clauses.

3. The document grants a perpetual easement to locate, construct, use, maintain, improve, relocate, and repair a road. Although the easement is not explicitly exclusive, and does not explicitly grant control of the right-of-way, BLM does acquire many rights implied by those terms, including the right to issue permits. The Department of Social Services, however, reserves the right to issue additional permits over the right-of-way, subject to and subordinate to the rights granted to the United States.

4. The easement contains no reverter clause.

5. The easement contains no clause which constitutes a commitment of funds not appropriated.[22]

6. From an examination of the easement document, there does not appear to be a problem in the timing of payment of consideration.

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[21] *See, e.g.*, BLM RE-U-56.

[22] RE-U-56 does contain a "hold harmless" provision, but it is limited to "[so far] as the United States is legally authorized to do so," and the provision is further modified by the following sentence: "Nor is this article intended to confer any liability upon the United States not presently existing under Federal law."

C. The Department of Parks and Recreation

As noted above, the Department of Parks and Recreation grants easements over land under its control in those instances when their standard form is used and when the consideration paid for the easement is less than $5,000. The analysis below of the Department's standard form[23] parallels the comments on the rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of pertinent provisions and why BLM must acquire the indicated rights.

1. The easement is granted to the United States of America and its assigns.

2. Reference to the acquiring agency is made in a paragraph which provides that the State Director of BLM will furnish the grantor a recordable document reconveying any rights no longer needed by the United States. Although this serves to identify the acquiring agency, it might be a minor problem should the easement be assigned by BLM to another agency. Would this duty to reconvey unneeded rights remain with BLM rather than transfer to the assignee?

3. The standard Department document grants "an easement for trail and roadway." No specific rights are enumerated. An exclusive easement would not be available unless the Department had special statutory authority to grant it. The easement is, however, perpetual, unless the State Director of BLM chooses to reconvey the rights obtained from the Department.

4. The easement contains no reverter clause.

5. The easement contains no provision constituting a commitment of funds not appropriated.

6. There does not appear to be a problem in the timing of payment of consideration.

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[23] *See, e.g.*, RE-FOL-22.

COLORADO

The greater part of lands owned by the State of Colorado (approximately three million acres) are controlled by the State Board of Land Commissioners. Approximately 0.25 million acres are controlled by other agencies, including the Division of Wildlife, Division of Parks and Outdoor Recreation, Department of Institutions, State Board of Agriculture, State Historical Society, and State Highway Commission. The State Department of Planning and Budget, however, formulates rules and regulations for the granting of rights-of-way for all state agencies except the State Board of Land Commissioners and the State Highway Commission.[24] The following comments analyze separately the policies of the State Board of Land Commissioners and the State Department of Planning and Budget.

A. The State Board of Land Commissioners

The following analysis is based on the regulations published by the State Board of Land Commissioners,[25] the Board's standard easement form, and a revised form used by the Board in granting an easement to BLM in at least one instance in the past.[26]

The analysis which follows parallels the comments on rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of why BLM must acquire the indicated rights.

1. The revised easement identifies the grantee as the "United States of America, Bureau of Land Management", but the easement is granted to "the party of the second part, its successors and assigns" (emphasis added).

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[24]The State Highway Commission has published no regulations concerning the granting of rights-of-way. Because BLM has never applied, to the writer's knowledge, for an easement from the State Highway Commission, that agency is not discussed in this note.

[25]Department of Natural Resources, State Board of Land Commissioners, Rights Of Way On and Across Colorado School Lands (revised July 1, 1971).

[26]*See* RE-01-9.

2. As noted above, the first paragraph of the revised form identifies "The United States of America, Bureau of Land Management" as the party of the second part. The granting clause grants the easement to the party of the second part. Reference is made, therefore, by incorporation, to the acquiring agency in the granting clause.

3. The standard form grants the right to construct, reconstruct, operate, and maintain a road. The revised form grants the right-of-way "for the purpose of construction, reconstruction, use, repair ..." Neither easement is exclusive; control of the right-of-way is not granted. Both easements appear to be perpetual, subject to several reverter clauses (see part 4 below).

4. The standard form contains three provisions which may be reverter clauses; the revised form contains two. Both provide that the easement may be cancelled at the option of the grantor if construction is not completed within two years. Both also provide that the easement will revert to the grantor if the grantee attempts to use the right-of-way for any purpose other than those set forth in the easement document. In addition, the standard form provides that the easement automatically and without notice terminates if the right-of-way has been abandoned for 12 months. The revised form alters this by adding that abandonment shall not be construed to have occurred until the grantee notifies the grantor in writing that the easement has been abandoned. That alteration eliminates any possibility of reversion without the consent of the United States, and is therefore acceptable.

5. There are three provisions in the standard form and four in the revised form which may constitute a commitment of funds not appropriated. The standard form provides that, should the construction period exceed two years, the grantor may fix additional consideration, based on a reappraisal of the right-of-way at the time construction is completed.

The standard easement provides that the grantee will restore fences, bars, or gates which are damaged or disturbed. It also provides that the grantee will compensate the grantor for damages to its property rights, franchises or privileges, including legal liabilities and damage to crops of lessees. The revised form provides that the grantor will pay for damage to fences, crops, trees, vines, seedlings, and improvements within the right-of-way, and will restore damaged or disturbed fences, bars, or gates. These types of damages should be included in the appraisal and compensated for by payment of consideration.

The standard form provides that the grantee will assume all liability arising from the exercise of the right-of-way and will indemnify and save harmless the grantor from liability.

The revised form provides that nothing in the easement shall be construed as obligating the United States to expend money in excess of appropriations or unauthorized by law. It is unclear what effect this provision would have on the clauses mentioned earlier in this part.

6. Although both easements include an "in hand paid" provision, indicating that consideration must be paid before the right-of-way will issue, the State Board of Land Commissioners has waived this requirement in the past (*e.g.* with respect to RE-01-9).

B. The State Department of Planning and Budget

The following analysis is based on the regulations published by the Division of Public Works,[27] and on the standard form used by the Department.[28]

The analysis which follows parallels the comments on rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of why BLM must acquire the indicated rights.

1. It is unclear from the regulations or the standard form whether an easement could be acquired in the name of "The United States of America and its assigns." Care should be taken that easements are so acquired.

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[27]A 1976 reorganization abolished the Division of Public Works, and its responsibilities transferred to the Department of Planning and Budget. It is not anticipated that the reorganization will substantially affect the regulations and procedures for acquiring rights-of-way which had been established by the Division of Public Works.

[28]In several instances in the past, the Division of Public Works granted easements to BLM on BLM's standard form. *See, e.g.*, RE-3-48 and RE-01-07. The Division has indicated, however, that it probably would not be willing to grant future easements on BLM's form (telephone conversation between Betty Wheeler and Duane Teale of the Division, July 1, 1975).

2. It is also unclear from the standard form whether the Department would be willing to refer to the acquiring agency only following the description of the land. Again, care should be taken that easements are so acquired.

3. The standard form grants only the rights of construction and maintenance. Control is not granted, and the easement is not exclusive. Further, there is a ten-year limitation on the easement.[29]

4. The easement contains two reverter clauses. The first provides for reversion upon abandonment of the right-of-way. The second provides for reversion if the right-of-way is used for any purpose other than those granted.

5. The easement contains an agreement to indemnify the grantor, which is unacceptable because it may constitute a commitment of funds not appropriated.

6. The easement provides for payment of consideration upon execution of the easement. This may cause a problem in timing of payment (*see* Section 1, part 6).

IDAHO

Under the terms of a Cooperative Right-of-Way Agreement with the State of Idaho dated August 13, 1964, the United States secured a basic grant of right-of-way from the state which satisfies the requirements noted in Section 1 when new construction is required. Generally speaking, the provisions of the agreement are also satisfactory for the use of existing roads owned or controlled by the state. However, the Agreement makes no provision for BLM to acquire the "rights needed" on existing roads. This poses a problem where a major improvement or renovation is required on an existing road. In that situation, the United States would not have adequate rights to protect its investment. If the Cooperative Agreement is terminated under Article I, 1.06 (see the text of the Agreement), the rights of

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[29]The Department apparently revised its regulation limiting easements to ten-year periods to permit the granting of perpetual easements. This revision was made by a verbal Departmental executive order.

the United States and its licensee would continue only for the life of the contract between the State and the licensee.

It is specifically recommended that Article V, 5.02 and 5.03 of the Agreement be amended to make the Right-of-Way Permit (Exhibit B of the Agreement) applicable to existing roads owned or controlled by the state as well as to new construction on state-owned land.

MONTANA

The following analysis is based on the Montana Board of Land Commissioners' "Application for Right of Way Easement In State Lands" and standard forms (the Board has two standard forms: one applicable to grazing lands, the other to timber land).[30] The Board has published no regulations governing the granting of easements over state lands.

The analysis which follows parallels the comments on rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of why BLM must acquire the indicated rights.

1. The easement for grazing lands is granted to "The United States of America--Bureau of Land Management." The easement for timber lands is granted to "The United States of America and its assigns--Bureau of Land Management." The former language does not make the easement assignable, and both easements are unacceptable for reasons given in part 2 below.

2. Both easements refer to the acquiring agency in the granting clause. This is unacceptable (see Section 1, part 2).

3. The granting clause of both easements is as follows. "[T]he State of Montana ... grants ... a right of way for an access road upon and across state lands ..." None of the rights needed by BLM are explicitly granted. The most serious deficiency is the lack of control and exclusivity. The easements appear to be perpetual, subject to the reverter clause discussed below in part 4.

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[30] The timber land easement referred to here is No. D-6351, signed on July 9, 1974. The grazing land easement is No. D-6395, signed February 6, 1975.

4. Both easements provide for reversion when the lands cease to be used for the purpose granted. This reverter clause is a statutory provision. *See* REV. CODE MONT. § 81-804 (Supp. 1974).

5. There appears to be no clause in either of the standard forms which constitutes a commitment of funds not appropriated.

6. Both easements read, "... in consideration of the sum of_____ Dollars now paid ..." This may cause a problem in the timing of payment of consideration (see Section 1, part 6).

NEVADA

Pursuant to Nev. Rev. Stat. Section 328.2091, para. 2 (1973), consent of the State of Nevada is given for the acquisition by the United States by purchase, gift, exchange or otherwise of such easements and right-of-way within the State of Nevada as in the opinion of the Secretary of the Interior of the United States, or his authorized representative, may be needed for the protection of natural resources or to promote the efficiency and economy of administration of the public lands administered by the Department of the Interior for the United States.

The United States, when acquiring an easement from the state, should submit standard form 2130-4 with a cover letter stating that the easement is being acquired pursuant to and in accordance with Nev. Rev. Stat. Section 328.2091, para. 2 (1973).

NEW MEXICO

The following analysis is based on the New Mexico State Land Office's "Permit for Right-of-Way Easement"[31] and regulations promulgated by the Commissioner of Public Lands.[32] The comments

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[31]Permit No. RW-17977, issued August 10, 1972, on the Land Office's standard permit form.

[32]"Rules and Regulations Relating to Easements and Rights-of-Way," posted November 22, 1971.

below parallel the comments on rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of why BLM must acquire the indicated rights.

1. The permit is granted to "U.S.A., Bureau of Land Management, P. O. Box 1456, Socorro, New Mexico 87081" rather than to "The United States of America and its assigns," which is the necessary wording. The permit further provides that there must be permission from the Commissioner and payment of a $10 fee before the easement can be assigned.

2. As noted above in part 1, the easement refers to the acquiring agency in the granting clause. This is unacceptable.

3. The granting clause specifically grants only the rights to construct, operate, and maintain an access road. The most significant omission is the right to control. Although the easement is not exclusive, the regulations and the easement itself do provide that the Commissioner will not issue another easement along the same right-of-way without the consent of the first easement holder.

The easement appears to be perpetual, subject, however, to the reverter provisions discussed below in part 4.

4. The easement provides that the easement is granted for so long as the right-of-way is used for the purposes granted. If the grantee ceases to use the right-of-way for one year, the easement "ipso facto" reverts to the grantor. Further, the regulations provide that the Commissioner may cancel an easement for breach or violation of the terms thereof after 30 days' notice. These provisions constitute unacceptable reverter clauses.

5. The easement contains an agreement to pay reasonable and just damages for injury or destruction to improvements or livestock, lawfully upon the premises, arising from the construction and maintenance of the road. This may constitute a commitment of funds not appropriated. In addition, these types of damages should be included in the payment of consideration for the easement.

6. The easement has an "in hand paid" provision regarding payment of consideration, which may cause a problem in the timing of payment (see Section 1, part 6).

OREGON

In the State of Oregon, BLM deals in its acquisition program primarily with the State Board of Forestry and the State Land Board. These two agencies administer the bulk of state-owned lands. There may be isolated instances where BLM will need to acquire an easement from another state agency such as the State Highway, which controls all state park lands. This note analyzes separately the acquisition of easements from the State Board of Forestry, the State Land Board, and the State Highway Commission.

The State Board of Forestry

In a cooperative right-of-way agreement with the State Board of Forestry dated April 19, 1960, BLM secured a basic grant of right-of-way for new road construction. This basic grant covers the Elliott State Forest and all Common School Forest Lands, and provides for the inclusion of all rights needed by BLM as outlined in Section 1, supra. The agreement, however, does not provide for the acquisition of similar rights on existing roads owned or controlled by the state. The provisions of the agreement regarding the use of existing state-owned or -controlled roads are satisfactory except where major improvements must be made to the road. In such a case, BLM receives only written consent for the road improvement, which may be terminated pursuant to article 8.02 of the agreement, thereby causing the United States to lose its investment in the road. If the agreement is terminated, the rights of the United States and its licensee continue only for the life of the existing contract as spelled out in the license agreement.

It is specifically recommended that the agreement be amended to make the Right-of-Way Permit (Exhibit B of the agreement) applicable to existing roads owned by the state as well as to new construction on state-owned land.

The State Land Board

BLM apparently has never acquired a road or trail easement across Common School Grazing Land in the State of Oregon. It is unclear, therefore, what rights could be acquired with respect to a road or trail easement.

The State Land Board has granted BLM a "Grant of Easement and Right-of-Way" which follows form 2130-5 very closely. This may indicate that the Board would accept BLM's standard exclusive road easement form with some changes. However, an opinion of the

Attorney General of the State of Oregon dated October 19, 1936 makes clear that ORE. REV. STAT. § 271.310 limited the period of easement granted by the Board to no more than 99 years.

State Highway Commission

The following evaluation derives from RE-S-479, an easement over an existing road acquired by BLM from the State Highway Commission on October 8, 1969. This analysis parallels the comments on rights needed by BLM which appear in Section 1, and reference should be made to that section for a full discussion of why BLM must acquire the indicated rights.

1. The easement is granted to "the United States of America and its assigns". This is the correct language.

2. There is no reference to the acquiring agency other than the reference code at the top: "BLM R.E. S-479." Although this is certainly preferable to a reference in the wrong place, it might be clearer to add a reference at the end of the land description.

3. The easement is explicitly non-exclusive and is granted for the purpose of using, maintaining, repairing or relocating the specified existing road. The easement is perpetual subject to the reverter clause discussed below in part 4.

4. On 90 days' notice, the grantor may terminate the easement if the property is needed for highway, park, or other public purposes. Although the grantor agrees to furnish the grantee with substitute access, BLM's investment in the road would be lost. While this may not be a problem over an existing road, it would be unacceptable where any significant investment is to be made.

5. There is no provision in the easement constituting a commitment of funds not appropriated.

6. There is no problem in this instance in timing of payment of consideration since payment to the State's licensee for use of the road and bridge is based on timber removed and is paid as the timber is removed.

UTAH

The following analysis is based on regulations of the State Land Board[33] and two easements from the Division of State Lands,[34] and parallels the comments in Section 1. Reference should be made to that section for a full discussion of rights needed by BLM.

1. The donation easement is granted to the Bureau of Land Management. The standard form, however, grants to _____ of _____ and its assigns, so that if the blanks are filled in to read "The United States of America and its assigns," the proper language can be obtained. Note, however, that the regulations limit assignability to assignment of the entire right-of-way with approval of the Division and upon payment of a $5 fee.

2. The donation easement contains a reference to the acquiring agency in the granting clause. Since the standard form is blank, it is unclear whether any undesirable reference would be made in it to the acquiring agency.

3. The right granted by the donation easement is merely the right to construct the proposed road. The standard form grants a right of way to be located, constructed, operated, and maintained for the purpose of allowing the grantee to gain access, and for such uses as necessary in connection therewith. The biggest deficiency in both of these is the lack of control and exclusivity. Both appear to be perpetual, subject, however, to the reverter clauses discussed below in part 4.

4. Both easements contain abandonment clauses: the donation easement without a specified time of non-use, the standard form with a five-year non-use provision. These provisions are unacceptable reverter clauses.

5. There appears to be no commitment of funds yet unappropriated in the donation easement. The standard form provides for a $10 filing fee to be paid every third year.

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[33]"State of Utah Rules and Regulations Governing Rights-of-Way on State Lands," March 19, 1975.

[34]One is a donation easement, Right of Way No. 1165, signed March 4, 1969. The other is the Division's standard easement form (blank).

6. Neither easement form indicates any problem in regard to the timing of payment of consideration.

WASHINGTON

Agencies of the State of Washington which BLM may deal with in its acquisition include the Department of Natural Resources and the State Highway Commission. These two agencies are treated separately below.

Department of Natural Resources

A cooperative right-of-way agreement between BLM and the Department of Natural Resources provides for acquisition by BLM of perpetual, non-exclusive right-of-way permits for construction of new roads or use of existing roads over lands controlled by the Department. This agreement, like the Oregon agreement, appears to be satisfactory in all respects except one: Where substantial improvements are made on existing roads, there may not be adequate protection of the investment made in the road. This problem would be taken care of if Exhibit B of the agreement were used for existing roads as well as for new ones.

Department of Highways

The Department of Highways has a standard permit[35] which it uses for road approaches to state highways. The comments which follow parallel the comments in Section 1, and reference should be made to that section for a full discussion of rights needed by BLM.

1. It is unclear from the permit form whether the Department would be willing to grant the permit to "The United States of America and its assigns."

2. It is similarly unclear whether the permit would make an acceptable reference to the acquiring agency.

3. The permit is explicitly non-exclusive. It reserves the right to the State to grant other permits and to control the road. The permit is also non-perpetual, since the Highway Commission may revoke the permit after 30 days' notice to the permittee.

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[35]Form 224-650 (H.I. 1203) revised March 1971 (S.F. 2004).

4. As noted above in part 3, the State retains the right to revoke; this is a reverter clause. In addition, the permit becomes void if construction is not completed by a designated time.

5. The permit contains three provisions which could constitute a commitment of funds yet unappropriated. The first is an agreement to protect and hold harmless the State from all claims, actions or damages related to the installation, maintenance and operation of the road. The second is an agreement to relocate or remove the structure at the grantee's expense, should the Highway Commission order the relocation or removal. The third provision is a requirement that bond be posted to protect the state.

6. The permit apparently does not provide for payment of consideration, so there is apparently no problem in timing of payment.

WYOMING

On February 5, 1976, the Board of Land Commissioners of the State of Wyoming agreed to modify its standard easement form for road easements granted to BLM. All rights noted in Section 1 of this note as those which BLM must acquire are granted in this modified easement. So long as care is taken that the acquiring agency is not mentioned in the granting or habendum clauses, this easement is acceptable.

The first proviso following the habendum clause differs from a similar clause in BLM's standard road easement form (see Illustration 1) in that it applies to future mineral leases as well as leases in existence at the time the easement is acquired. On balance, the risk to the easement resulting from this provision is not great enough to warrant the additional expense and complications involved in acquiring mineral rights.

The sole problem which may remain in acquiring road easements from the Board involves proof of construction. The Board's regulations[36] indicate that proof of construction must be submitted before the final easement document is issued. Rather than following this regulation, the Board has added to some easements obtained by BLM a

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[36]"Manual of Regulations and Instructions for Filing Applications for Rights-of-Way" (January 1, 1974).

provision requiring proof of construction to be filed within two years. If such proof is not submitted, the easement becomes null and void. Either type of proof of construction is unacceptable; The former because payment cannot be made by the United States, either for consideration or for road construction, until satisfactory title is vested in the United States; the latter because it constitutes a reverter clause, and can serve to defeat the easement regardless of the grant in perpetuity. The proof of construction problem, of course, does not arise where BLM acquires an easement over and across an existing road.

SECTION 3: RECOMMENDATIONS

Listed below, in order of priority, are recommendations of procedures and alternative actions to secure for BLM all rights needed in easements acquired from the states.

1. Negotiations. BLM should first attempt to achieve desired revisions through negotiations with the appropriate state agency before pursuing other courses of action. It is also strongly recommended that revisions be formalized in writing, for example, by a cooperative agreement or memorandum of understanding, rather than handled on a case-by-case basis. This method worked very effectively in Wyoming, and promises to be successful in several other states also.

2. State Legislation. Should certain desired revisions be rejected by the pertinent state agency because it contends it does not have sufficient authority to make such a revision, it is suggested that the State Director or his designate contact state legislators concerning legislation to confer the necessary authority on the agency.

3. Federal Legislation. In certain instances, federal legislation requires that state, county, or municipal governmental agencies supply matching funds, comprehensive plans, or meet certain standards as a prerequisite to receiving the federal aid granted in the legislation.[37] Therefore, an alternative way of acquiring satisfactory rights would be to amend the Federal-Aid Highway Act to require the appropriate governmental agency to agree to grant Federal agencies perpetual exclusive easements or rights-of-way for roads and trails, upon payment of fair market value, as necessary for the proper management of Federally-controlled lands. Failure to do so would result in the withholding of funds.

4. Purchase of Right-of-Way in Fee. Acquisition of a right-of-way in fee simple is a viable alternative.

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[37] See e.g., 23 U.S.C. § 131 (1965) (requires states to provide for effective control of outdoor advertising adjacent to the Interstate System); 23 U.S.C. § 135 (1965) (development of highway safety program required); 23 U.S.C. § 136 (1965) (requires states to provide for control of outdoor junkyards along the Interstate System).

5. Eminent Domain. The least desirable alternative for acquiring necessary rights is to condemn. However, in the absence of success in negotiations as discussed above, and if for some reason purchase in fee simple is not possible, condemnation may be the only appropriate action that can be taken in instances where BLM must obtain rights which the agency is unwilling or unable to grant.