Patented Land Easements + Right-of-way W-1

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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February 25, 1991

To: AFOs

From: Director

Subject: Easements Reserved in Small Tract Act Leases and Patents

The issue of reserved rights-of-way (or easements) on Small Tract Act leases or patents has been the subject of debate for a number of years. There have been numerous Solicitor's Opinions on the subject as well as court decisions. This memorandum is an attempt to consolidate previously issued guidance and to provide policy and procedure when Small Tract Act rights-of-ways are encountered.

BACKGROUND

The Small Tract Act, passed June 1, 1938, and amended June 8, 1954, did not establish or reserve rights-of-way along the boundaries of leases or patents. The rights-of-way first appeared in the small tract lease form around 1945 and were intended to provide a corridor for access and utilities to small tracts. The lease form was amended in 1949 to specifically provide for maximum 33-foot rights-of-way. In 1950, the right-of-way was first codified in 43 CFR 257 as 33 feet (later changed to 50 feet) unless otherwise provided in the classification order.

Many times the classification order was silent on the issue of rights-of-way while at other times it created the opportunity for a public dedication of a right-of-way. However, there was no consistent use of the classification procedure. Therefore, small tract rights-of-way may or may not be identified in a classification order and may be encountered only as a lease provision or patent covenant.

DEDICATIONS

It is generally accepted that small tract rights-of-way are common law dedications to the public to provide ingress and egress to the lessees or patentees and to provide access for utility services. Confusion arises as to when the rights-of-way attach to the land, the status of the rights-of-way following termination of a lease or a classification order, and the uses which are allowed within the rights-of-way under the authority of the Small Tract Act.

1. Between 1938 and 1949 when the lease form was changed to specifically provide for rights-of-way, there were no common law dedications associated with the Small Tract Act. Reservations of rights-of-way in tracts subsequently patented are addressed the same as other patent reservations.

2. From 1949 until the Small Tract Act was repealed in 1976, a right-of-way along the borders of each tract was available for public use as provided in the terms on the lease form, the classification order, or through the regulation requirements.1/ The right-of-way remained available as long as the lands were classified for small tract use. These rights-of-way were determined to be common law dedications and had the effect of a public easement. However, until acceptance by use of the easement made the dedication complete, the United States could revoke or modify the offer to dedicate in whole or in part. Said another way, unless the common law rights-of-way were actually used for a road or public utilities to serve a small tract, the dedication disappeared with the termination of the classification. To the extent that the common law dedications were accepted through use by appropriate parties prior to revocation of the classification, those rights are protected by the provisions of 43 U.S.C. 1701(a) and 43 U.S.C. 1769.

CLASSIFICATION TERMINATION

1(a). When small tract classifications are terminated, the common law right-of-way dedication disappears to the extent that it was not accepted by actual use. Those rights-of-way on public lands within the classification boundaries and along designated tract borders which have been used for road or utilities purposes remain under the authority of the Small Tract Act. Referring to Illustration 1, lots 7, 8, 10, and 14 were patented under the Small Tract Act and following termination of the classification, lot 12 was patented under FLPMA. The remaining lots were not patented and remain public lands. Prior to termination of the classification, access roads were built along the borders of lots 7 & 8, 13 & 14, 19 & 20, and along the borders of lots 3 & 4, 9 & 10, 8 & 14, 9 & 15, and 10 & 16 as indicated. The construction of the roads dedicated the rights-of-way to public use. Within the rights-of-way is a waterline that serves the patented lands. Upon termination of the classification, the road and waterline remain authorized under the authority of the Small Tract Act.

(b). After termination of the classification, additional rights-of-way uses may be made within the borders of the existing rights-of-way for roads and utilities that serve the small tract patents without additional authorization from the United States. Referring to Illustration 1, a future sewerline that will serve the patented tracts may be constructed within the existing rights-of-way without additional authorization or stipulations from the United States.

1/ 43 CFR 2730, Small Tract, was removed from the CFR in 1980. Prior to 1980, 43 CFR 2731.6-2, Rights-of-way, read "The classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. If the classification order does not so provide, the right-of-way will be 50 feet along the boundaries of the tract."

2. Referring to Illustration 1, after termination of the classification, lot 12 is patented under FLPMA authority. The road into lot 10 is proposed to be extended to provide access to lot 12. A Title V right-of-way is required for the portion of the new road on public land crossing lots 11, 16, 17, and 18, because the right to construct within the small tract easement terminated upon the termination of the small tract classification. Authorization for the new road where it crosses lot 10 must be secured from the private landowner.

RIGHT-OF-WAY MANAGEMENT

1. The intent of the Small Tract Act easements was to provide access and utility accessibility to the affected tracts. No apparent "public" purpose or governmental use was contemplated except to carry out the purposes of the Small Tract Act to provide for intensive utilization of the public lands. There was no intent to reserve rights to the United States to collect revenue for the roads and utilities constructed. Therefore, rights-of-way authorized under the Small Tract Act are rental free.

2. Roads or utilities that cross public lands outside the tract borders (regardless of whether the rights-of-way serve the small tracts) or other facilities constructed within the rights-of-way borders that do not serve the small tracts require a separate rights-of-way authorization. Referring to Illustration 1, the powerline that crosses lots 13 and 19 was authorized under separate authority because it is outside the tract borders. In addition, a proposal to construct a crude oil pipeline within the rights-of-way is not authorized under the Small Tract Act and a separate authorization is required where the pipeline crosses lots 13, 19, and 20.

3. Upon issuance of a small tract patent, the Secretary is deprived of all rights to the lands except those specifically reserved to the United States. Under a common law dedication, fee title lies with the owner of the land subject to the easement of the public for the use of the land. The government transfers all its interest in and jurisdiction over the lands as completely as if the patent had been made subject to a right-of-way in favor of a named holder of such right-of-way. The government has no legal power, except under eminent domain proceedings for some governmental purpose, to eliminate this restriction from the patent.

4. Rights-of-way in connection with classified but unpatented small tracts may be used for the construction of roads and utilities to serve patented small tracts without the necessity of a formal grant from the United States.

5. Once rights-of-way become dedicated public easements through use by the public, the dedication may be abandoned only by proper authority pursuant to due course of law. In most cases, the proper authority is the county or the city government. If it becomes desirable to abandon an existing small tract easement on public lands, contact the appropriate local government for assistance. Using Illustration 1, a road was constructed along the borders of lots 3 & 4 and 9 & 10 to provide access to a small tract lease in lot 4. Although the lease was abandoned, the construction of the road prior to termination of the classification dedicated the road as a public easement. Unless the road is needed for public access, the local government should be contacted for abandonment of the public easement.

Because of the confusion created by small tract easements, field offices should encourage existing small tract rights-of-way users and those that would construct future Small Tract Act authorized facilities on public land to apply for authorization under FLPMA and to make every effort to get existing Small Tract Act rights-of way platted to the public land records.

Questions should be directed to Jim Paugh at FTS 268-4200.

Michael J. Penfold
Assistant Director for Land and Renewable Resources

1 Attachment
1 Illustration (1 p)

DATE March 13, 1991 PHONE 5481

FROM CHARLES S. SCOLASTICO
Deputy County Counsel

TO LARRY COTTON
County Surveyor

County of San Bernardino

SUBJECT RESERVATIONS FOR RIGHT-OF-WAY IN U.S. LAND PATENTS

This memo is in response to a request for our opinion on the issue of whether the County can accept rights-of-way reserved in U.S. land patents for public use or legal access. Accompanying said memo were several examples of U.S. land patents which reserved rights-of-way for roadway and public utility purposes.

In reviewing the U.S. land patents, they all appeared to be created under the authority of the Small Tract Act adopted by Congress June 1, 1938 (subsequently amended) and eventually repealed in 1976. Accordingly, this opinion is limited only to those reservations and land patents granted under the authority of the Small Tract Act.

Research on this matter indicated that there are no California cases which discuss the nature of rights-of-way reserved under the Small Tract Act. However, we found at least two Arizona cases which appear to be persuasive on the issue and upon which we base our opinion. These out-of-state cases analyze the issue in part on federal statutes, federal case law and federal regulations, and in part on Arizona statutes and common law in relation to real property and deeds. Where the cases rely on state law, we find that such law is consistent with California law in the nature of real property and deeds in general. For your convenience, I am attaching copies of these cases.

Based upon our research, it is our opinion that rights-of-way for public road and utility purposes reserved in land patents authorized under the Small Tract Act constitute legal rights-of-way for those entitled to use them, i.e., the public and utility companies. Moreover, since they are reservations rather than offers of dedications or something similar, there is no requirement of acceptance by the public or by a governmental agency.

In reviewing reservations in land patents, keep in mind that not all reservation may be effective. Only those reservations which the government is authorized to make will be upheld by the courts. More particularly, in respect to the Small Tract Act, the Secretary of Interior has promulgated rules and regulations concerning the extent of reservations that can be made in land

patents. Typically land patents which reserve between 33 and 50 feet along the boundaries of a tract of land are authorized by the Secretary. There have been instances in the State of Alaska where reservations other than these have been imposed upon land patents which were held ineffective by the courts.

Therefore, we need to analyze each U.S. patent to ensure:

1. That the patent was authorized by the Small Tract Act, and

2. The rights of way in question are between 33 and 50 feet in width along the boundaries of the tract.

Should you have any questions, please do not hesitate to contact the undersigned.

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Enclosures