IN THE SUPREME COURT OF THE UNITED STATES

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY, Petitioners	:	
v.	:	No. 77-1686
UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR AND DIRECTOR, BUREAU OF LAND MANAGEMENT Respondents	:	

Tuesday, January 16, 1979
Washington, D.C.

The above-entitled matter was resumed for argument at 10:14 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Leo Sheep Company against the United States.

Mrs. Beale.

ORAL ARGUMENT OF MRS. SARA S. BEALE

ON BEHALF OF RESPONDENTS

MRS. BEALE: Mr. Chief Justice and may it please the Court:

When Congress made the Railroad Land Grant it reserved a total of approximately 100 million acres of public lands that were interspersed checkerboard fashion with the lands that it had granted to the railroads. The railroads received the odd-numbered sections that completely surrounded each of the retained public sections.

It was not possible to either enter or leave any of the retained public sections without passing over some portion of the lands that were granted to the railroads. The question before this Court is whether Congress reserved a legal, enforceable right to enter and leave those 100 million acres of public lands.

We submit that Congress' intent to reserve a right of access was manifest in the pattern and in the plan of the railroad grants in the same way as the private grantors' intention to reserve a right of access to lands that he retains when he makes a grant may be implicit or manifest in the

pattern of the grant.

It was settled at common law that where a private grantor conveys away lands that completely surround another portion of lands that he retains, he is presumed or assumed to have reserved some right of access so that he can enter and leave the lands that he retained in order to make use of them.

QUESTION: Of course, a private landowner does not have the right of eminent domain, does he?

MRS. BEALE: Well, that is certainly true and one of the suggestions that Petitioners have made here is that perhaps Congress intended to first grant out these 100 million acres of land and then use the power of eminent domain in order to secure access to each of these checkerboard sections, one by one.

And we have suggested in our brief that it is inconceivable that Congress could have purposely intended to set up a pattern or a mechanism that would be that cumbersome and unworkable. It would have completely overpowered the state, territorial and federal courts to have set up that kind of mechanism and moreover, we can see from the history of the use of these grants that the Federal Government did not turn around after making the grants and begin a concerted pattern of condemnation of these rights-of-way.

We think not only was that anunworkable way of gaining access to these lands but we find no evidence that that is what Congress either did intend in the legislative history and

no evidence that in fact is what occurred after the land grants were made so although it is true that Congress does -- that the United States retained a right to use the power of eminent domain when necessary, that that really does not provide the key to interpreting what Congress' intent was when it made the checkerboard pattern of land grants.

QUESTION: Mrs. Beale, I suppose it is well-established that the question of the construction of a federal grant is a federal question but what body of law does one turn to in deciding that federal question? Is it general, common-law or real property?

MRS. BEALE: Well, I think that that may provide some kind of basis for interpreting what Congress' intent is. Of course, the general cases teaching you how to interpret the act of Congress would look to the legislative intent. We would look to the administrative construction and we might also look to the context in which the grants were made, the historical context and we might also look to the -- in doing that we might look to the common law basis for land grants to see how one might interpret intent of Congress so I think all of those would provide a guide.

QUESTION: Do you see any difference in the common law between an implied easement and an easement of necessity?

MRS. BEALE: Well, one can imply a distinction. I should make our point here. We are not claiming that there was

a common law easement of necessity created when Congress made these grants. What we are saying, and this goes back to my prior answer to you, is that the assumption that underlies the common law rule about easements of necessity and that also plays a part in other kinds of implied easements about attempting to construe the intent of the parties and about what the grantors' intent must have been in this kind of circumstance is the guide here so we are not claiming a common law easement by necessity.

What we are seeking to do is to ascertain the intent of Congress by looking to rules about common law easements by necessity and there are broader rules about easements by implication so there is some difference.

QUESTION: You are claiming a reservation, are you not? Not an easement by necessity, because --

MRS. BEALE: That is exactly right, a reserved easement and then prior --

QUESTION: It seems to me a grantee with a power of eminent domain can never show an easement by necessity because there is no necessity. It can always condemn.

MRS. BEALE: Well, one can certainly make that argument and some of the state courts have certainly suggested that under state law no easement by necessity can be --

QUESTION: You are claiming a reservation.

MRS. BEALE: That is correct and we are using it --

QUESTION: And to follow up my brother Rehnquist's

question, are we here in the area of real property law or are we in the area of central legislative construction?

MRS. BEALE: Legally, this is primarily a question of legislative construction but we think in trying to interpret what it was that Congress was doing that not only may Congress' intent be judged by what its assumptions were about property law but also that there is an underlying logic to the common law dealing with easements by necessity which is that a grantor must have intended to reserve a right to make use of the property that he retained, that that is manifest in the pattern of his grant and that is what we really want to point --

QUESTION: And it also follows that in the grant to the railroad was also a grant of an easement over the retained property of the government, was it not?

MRS. BEALE: Well, we think not and again, by looking to the circumstances of --

QUESTION: The same circumstances applied. Each one is landlocked, so to speak, is it not?

MRS. BEALE: Well, that is not quite true in the sense that for many, many years, before the land grants were made, the Federal Government had developed a well-established policy of allowing the locations of roadways all across the public domain. Now, that was not established by statute until 1866 but this Court has clearly in the Alemeda County case, which we cite in our brief, interpreted that 1866 Act as a

recognition of a preexisting right that was barter, then, really, anything that would be needed to gain access to the checkerboard land grants, and it is different in kind from simple right of access back and forth from one checker to another so we think that the context of the most logical assumption is that Congress knew that it had a policy of allowing roadways to be located across the public domain, otherwise, they never could have been settled anywhere and that that provides one part of the context for this Act but the other part of the context is that when it left 100 million acres landlocked in a checkerboard fashion, that it must have intended to have reserved a legal right to get in and out, ingress and egress for those sections, not a right dependent upon the fact that no one would challenge them.

It did not intend that all federal officers, agents and grantees should be trespassers who could be thrown off.

QUESTION: Mrs. Beale, to go back to the Alameda County and the custom that was established, would the roads established pursuant to that custom, or the trails, survive a patent of the government's sections to a land owner?

MRS. BEALE: Yes, the patents were taken subject to the roadways that were established and I think that there is a good body of case law to that effect.

QUESTION: How about roadways that were not actually established?

MRS. BEALE: If no roadway had ever been established?

QUESTION: Yes, by the time of the patent.

MRS. BEALE: No, the custom that was established pursuant or that was recognized in that statute would not have affected those. They would be like any other private property and presumably one would go to another area if the owner at that point took his land and had built an improvement or whatever.

QUESTION: Since 1862 countless roads have been constructed through these areas, have they not, by state and local government, by the power of eminent domain.

MRS. BEALE: Well, certainly the power of eminent domain has been used. A variety of different methods were used to locate these roads.

Pursuant to the statute that I just described, the states followed varying methods. One of the states at least and perhaps others passed a statute that dedicated all of the section lines as public roads so that as settlers came in, those were recognized as public roads. Other states relied more upon proscription and in some places counties, territorial governments set up roads and a variety of methods were used to locate those roads.

QUESTION: In any event, in the last 116 years, many, many new roads have been constructed through these areas, have they not?

MRS. BEALE: Yes and --

QUESTION: Often through the exercise of eminent domain by state and local governments. Is that not true?

MRS. BEALE: Well, first of all, I would like to be clear on when we are saying "these areas." I mean, the areas where the checkerboard grants were located?

QUESTION: Yes, the general areas where we have the checkerboard system as the result of the 1862 statute.

MRS. BEALE: Well, and that would include both lands granted to the railroads --

QUESTION: Exactly.

MRS. BEALE: As well as to the public.

QUESTION: Exactly.

MRS. BEALE: And I guess my clearest answer would be that the record here is not precise as to what was done in each locality and as to who owned the land when a particular road was located, either on land granted to the railroad, land granted to the United States and to a private party, whether the land was owned by the Federal Government and the county decided it needed more than an easement and it decided to locate a road.

In any event, the current authority for locating easements or whatever across federal land is, as we have mentioned, the 1976 statute adopted by Congress as part of the Federal Land policy and Management Act and is a private owner

of a railroad, land that was originally patented to the railroad, needed to locate an easement to get in and out of his checker.

Now, that is not the case here because, of course, the Leo Sheep Company and Palm Livestock Company have Taylor Grazing Act permits and they do not require, they do not have any problem with access but if they did, they could apply to the Secretary of the Interior and get an easement in and out, if need be so there is a mechanism and the particular statute passed in 1866 is no longer in force but there is a mechanism.

And I would emphasize to the Court that we did not go into, in great length, the reasons why we believe that no reciprocal easement was created across the federal lands, for one reason because it is so clear that in this particular case no such easement was required or claimed and indeed, we think that that was -- is, as a general matter quite true that the federal statutory provisions, the policies, the new provisions, are quite adequate and have been quite adequate to ensure that the grantees of the railroad have had access and that that is really not a problem.

QUESTION: The question arose yesterday as to why this basic question had not arisen before in 116 years and it occurred to me the reason is that it as a practical matter does not often arise because there are roads through this area. There is access by public roadway.

MRS. BEALE:Well, assuming there are not any roadways. We have cited in our brief some of the early cases which do in fact recognize the theory that we put forth here, that there is an implied reservation so that the grantees of the United States and the federal agencies and so forth can go in and out. It is another answer to why this was not a problem and we should emphasize that the right that we claim here is in essence only going to have important applications in areas like this where there are not a pattern of roadways already built up.

We claim only the necessary access in and out, ingress and egress and in developed areas that is simply not a problem.

QUESTION: But not for the government, for the public.

MRS. BEALE: Well, for governmental purposes, which would include --

QUESTION: Visits by the public to this lake or reservoir.

MRS. BEALE: Certainly it would include that and would also --

QUESTION: It is a public roadway, is it not?

MRS. BEALE: Yes, it is. It is a one-lane --

QUESTION: Not just for federal use.

MRS. BEALE: Well, perhaps it is not in that sense. It is limited to the use of federal officers and agents but it is a --

QUESTION: It is not.

MRS. BEALE: -- federally-built.

That is correct but it is a federally-constructed reservoir and it a federal-use access.

QUESTION: It is access for the general public.

MRS. BEALE: That is correct. That is correct.

QUESTION: To this recreational area.

MRS.BEALE: That is correct. It is a one-lane dirt road --

QUESTION: Which would ordinarily be served by a public road.

MRS. BEALE: That is correct. In that sense. So I would emphasize, as I say, that the right that we claim here is a narrow one that we find to be implicit in the pattern of the grant and not a common law easement by necessity and we think, really, the burden of Petitioner's argument is to establish that there is another reasonable alternative.

Congress must have intended that there could be use made of these retained or 100 million acres and the question is really whether there is any reasonable alternative to the construction that we have put forth.

I have already suggested that we believe the use of eminent domain to secure a right of access to each of these sections would have been totally unworkable and moreover, there is no suggestion -- and it is clear from the history that that method was not used and we think likewise the suggestion that

Congress provided only that the settlers should work it out among themselves, that perhaps state and local laws of eminent domain would be used, that perhaps people would not object to the passage of government settlers and so forth is really not one that can be implied as what Congress intended.

The grants here were made to several large railroad corporations and -- yes?

QUESTION: Mrs. Beale, may I stop you there a minute? Who would determine the location of these reserved rights-of-way? Specifically, where would they go and who would decide it?

MRS. BEALE: Well, we think the principle that would be applied here is the general property law principle that applies to other kinds of easements by implication where there is no instrument that fixes the location and the general rule which we think is applicable here is that they must be located in a matter that provides a minimal intrusion on the land that the easement crosses.

We think in many cases, as here, the location would be across the corner. In the first instance there would be an attempt to reach an agreement between the two parties, the Government or the Government's grantee and the grantee of the railroad and if that were not possible -- which was the case here -- the Government or its grantee would have a choice of locating the easement where it was least intrusive so that in this case it was almost precisely on the corners except in one

case there was a gate of some sort, a little down from the corner and the Government used that.

QUESTION: Did you say if there were no agreement that the government would then determine where it should be located? Or would you --

MRS. BEALE: Well, assuming that it would be subject to, you know, judicial proceedings to determine whether the Government choice was reasonable but in the first instance the Government would need to try to satisfy the grantor and if the grantor was not the grantor of the railroad.

The grantor of the railroad would not agree and would not say where he wanted it and the Government would have to try to determine what would be reasonable and I suppose either in this case -- either of two methods could be used. In this case we located it where we felt certain was the least intrusive spot and the grantor brought an action against us, the railroad's grantor. I suppose we could also, perhaps, bring a suit to determine a declaratory judgment where it should be located.

QUESTION: And this is a permanent road. The owner would never have any more use of that corner.

MRS. BEALE: Well, in this particular case, for example, it is a dirt road. I suppose if the owner needed to have it moved, that might, that might -- to make use of his property there might be some negotiations. All we have is the

right of access.

QUESTION: Well, while the Federal Government was using, the public was using it, he could not use it.

MRS. BEALE: Well --

QUESTION: Rather, the sheep could not use it.

MRS. BEALE: I think it is cattle in this case, despite the name of the company, but --

QUESTION: Sheep, cattle, bulldogs or whatever.

MRS. BEALE: Right.

QUESTION: They could not use it.

MRS. BEALE: Right.

QUESTION: The land is gone so far as the private owner is concerned.

MRS. BEALE: That is right in the sense that he could not stop the public use.

QUESTION: Does he pay taxes on it?

MRS. BEALE: I think less the value of the easement.

QUESTION: Hmn?

MRS. BEALE: His taxes would be reduced in the sense that his property would be valued by --

QUESTION: I hope so.

MRS. BEALE: It would be less than the value of the, you know, subtract the value of the easement.

QUESTION: This is more than just an easement. If, as we agree, it is for the public use as a public road, it is

more than an easement for just access, ingress or egress over a piece of property which the fee title owner retains title to, as suggested by my brother Marshall. This is a road, generally. The title goes to the governmental body that owns and operates the road.

MRS. BEALE: Well, I am not certain what the most usual --

QUESTION: Well, in other words, there could not be grazing or anything else on this road if it is a road and if you are right, it is more than just an easement of once a day or once a week the adjacent owner going over it.

MRS. BEALE: Well, I think it is equally -- in the case of, let's go back to our paradigm case of the private grantor who would perhaps make a grant of this same size piece of property, two adjacent pieces and need to reserve a right of access. In some cases -- pardon me?

QUESTION: You are talking about cross easements of adjacent land owners.

MRS. BEALE: Well, if you imagine the doughnut shape which is always the law book example --

QUESTION: Yes.

MRS. BEALE: The grantor reserves the little piece of the doughnut in the center and we refer to his having reserved an easement even though it may be necessary in some case to have a dirt road such as this. He may subdivide that

and put -- I'm sorry --

QUESTION: But it is not public property. The easement belongs to the fee title owner of the center of the doughnut --

MRS. BEALE: The easement belongs to --

QUESTION: -- for his use. It is not for the use of the public.

MRS. BEALE: Well, it is for the uses that he can lawfully --

QUESTION: His use including his visitors.

MRS. BEALE: Well, that is right and I guess I would say that our use can include the visitors to our reservoir.

QUESTION: One more question. For all practical purposes, insofar as the owner of this land is concerned, if you succeed here and use this corner of his land, what is the difference so far as you are concerned in his rights by taking it this way or taking it by eminent domain? Outside of money?

MRS. BEALE: I think the best answer to that is if there is a system of public roads later located in this area, our right of access would no longer be enforceable. In other words, if we can get in and out of our lands otherwise, as soon as an area becomes built up, we no longer have a right --

QUESTION: Would you take the road up and move it?

MRS. BEALE: Well, in this case -- and perhaps this is the easiest example of all -- all we did was come in and

blade off the grass to provide a track to go in and out.

Now, in other cases perhaps it would be necessary for us to put down gravel or whatever and then take it up if we no longer needed that for right of access and this goes back to the point that Mr. Justice Stewart was making also, the railroad grantee does retain the title to that land and if our easement or right of access or way of access in and out is no longer necessary for us to use, then we no longer have a right. We no longer have an enforceable right and that is an important difference than what would happen in the case of eminent domain where we would take full, permanent title to that land.

QUESTION: Well, that was going to be my question. Ordinarily, when the Federal Government wants to build a public road and proceeds to acquire the property by condemnation proceedings, does it try to acquire just an easement or does it try to acquire the fee?

MRS. BEALE: Well, Mr. Martz may have some comment on this. It is my understanding that very often we acquire only an easement. Now, that may not be the case in the case of an eight-lane super highway.

QUESTION: I know.

MRS. BEALE: When the project is so large fee title is taken but in many cases only an easement is taken and I am not certain where the dividing line is. There may be discretion.

QUESTION: Mrs. Beale, I was going to ask you about

the eight-lane super-highway. As Justice Stewart has suggested you can have anything from a footpath to a swimming hole to perhaps the eight-lane super-highway.

If there is no definition of the reservation for which you argue, would it be permissible under your theory of the case for the Government to say, what we really need is the super-highway?

MRS. BEALE: No, sir.

QUESTION: Why not?

MRS. BEALE: We believe that all that was implicitly reserved here is the reasonable right of ingress and egress to make use of these properties.

Now, certainly, the problem is more difficult here than if the grant had spelled out by the metes and bounds or whatever what that would entail but there is a whole body of common law which has developed to meet the problem of trying to define what is reserved when there is an implied easement and we think that that body of law would be looked to here to determine the extent and in essence what we are saying is, what Congress could have reasonably seen as a need to get in and out to make uses of sections would govern.

Certainly what we have here I think is within what Congress would have intended. Congress believed that these sections, as Mr. Martz described yesterday, would in fact-- the retained government sections -- would be subject to

homesteading and development. Congress thought that putting the railroads out through the west would bring people from the east and allow them to settle and develop that land.

QUESTION: Well, then, you would measure reasonableness as of 1862 rather than as of today. Is that not right?

MRS. BEALE: Well, only in the sense of what Congress could have comprehended and Congress did clearly comprehend development of their sections. It is something perhaps like the process that the Court goes through in the case of implied water reservations where the notion is that at the time the conveyance or the grant or whatever was made -- or the reservation was made, what Congress foresaw as the present and the foreseeable future needs is the guide and that is the same guide that is used in the case of the private grantor and we would say, clearly, the roadway here is within that contemplation.

QUESTION: Would your position be the same, assuming that within two or three years after the transfer to the railroad, the government had sold all of sections 16, 22 and 14 to a private owner, would that private owner have precisely the same claim the Government is now asserting? And then the private owner developed the reservoir?

MRS. BEALE: It is not clear to me why there would be any difference. We do think that the right that Congress reserved was for the benefit of those pieces or parcels of

land so that they could be used and in that sense, the benefit would be conveyed with the parcels of land. In other words, it would do no good if we only had the right to use it but as soon as we conveyed it to the settlers that we expected --

QUESTION: You do not rely at all on the fact that it is the United States Government or the sovereign or anything like that? It would be --

MRS. BEALE: Not in that sense, no.

QUESTION: -- precisely the same claim could be made by an asignee of the Government's interest.

MRS. BEALE: Yes and we think that is so precisely because of our understanding of what Congress was trying to do here, which was to grant the odd-numbered sections to the railroads to encourage them to build this rail line keeping these retained sections, knowing that they would be enhanced in value, that they would be available for settlement and planning to sell those off at double the normal price, recouping the investment that it had made to the railroad and allowing settlement to progress out west and only by reserving a right to get in and out and for its grantees and these settlers and so forth to have an right to get in and out of those sections could that plan really have been accomplished and that is the problem, of course, with the Petitioners' argument.

Even if Congress had assumed that in many cases no one would have objected, the plan for the development of the

rail lines and the settlement of these sections was dependent upon a right of these settlers to get in and make use of this land that would not be subject to veto power, in essence, by several large railroad corporations who owned the sections completely surrounding each one of the retained public sections.

QUESTION: May I make sure I did not misunderstand something earlier? You said you do not take the position, however, that the railroad had a corresponding right as against the reserved land.

MRS. BEALE: That is correct and we believe that is so because, again, look at --

QUESTION: Why would they -- they were going to sell to people who would be neighbors. Why would that be different? I need some help on that.

MRS. BEALE: Well, because when the railroad settlers, grantees, whatever, came in, they had the right under the 1866 Act, to locate their roads across the public domain and we believe that was the mechanism that was used. Now, we do not disagree for a moment that by and large most of these problems were worked out by agreement among the parties because everyone needed to get in and out but in the sense of the necessity for reserving a legal right of access --

QUESTION: I am sorry, I am perhaps not grasping the full idea. You say the grantees from the railroad had a right to locate roads over the the reserved public lands. What if

the public lands had been sold in the meantime?

MRS. BEALE: Well, in essence, at some point one gets back to the same problem that took place under the Homestead Act and under the other locations, under the Preemption Act and so forth, which is that some grantee may have wanted to locate a road across somebody else's --

QUESTION: Well, am I correct? Let me just stick with this to be sure. Am I correct in assuming that at least it was theoretically possible, if all the land was sold, that the people in the odd-numbered sections would not have the rights you say the people in the even-numbered sections would have?

MRS. BEALE: Yes, if it had all happened in one fell swoop, suddenly, without any --

QUESTION: Is it reasonable that Congress so intended?

MRS. BEALE: Well, we believe not only that it is reasonable, that the plan shows that and that what has happened in the intervening years makes that clear, too. There are virtually no instances of the railroad grantees, who in fact had the problem that you described. The 1866 Act was used extensively. The Title V provisions are used now and the problem that we have that we do see occasionally cropping up is the railroads and their grantees blocking access.

One of the answers, of course, to this, is that the only large block conveyance was to the railroads. The only

single party who could have blocked access is -- in any one area -- is the railroad who received all of these grants.

In the case of grants to small parties, homesteaders --

QUESTION: But they received it on the understanding that they would resell, was it not? Was that not the idea?

MRS. BEALE: I'm sorry. The railroads received the land --

QUESTION: On the understanding they would be financing and therefore they -- they were expected to resell, I know they were.

QUESTION: They had to sell or else they would be subject to homesteading after three years.

MRS. BEALE: They had to sell or dispose.

QUESTION: Yes.

QUESTION : Exactly.

MRS. BEALE: Which meant -- and there was no requirement that the railroad land be sold off to small landowners and in fact that did not happen in many areas. The Government lands were to be disposed of in essentially 160-acre parcels, single little parties scattered all over the west.

The only large block grants, the only party who could have frustrated the development of the whole area was the railroads who received --

QUESTION: Well, that is true but they were expected to develop the land and thereby enhance the value of the

retained Government lands.

MRS. BEALE: Well, that is right in the sense that -- and it is perhaps maybe a little more complicated than that in the sense that the Platt case recognized that all the railroads had to do was to make some use of this land to finance the construction of the railroads within a certain point after the railroads were constructed. They were able to and they did in many cases convey large land holdings to a subsidiary, to a mortgagor and that party, just as much as the railroad, could have blocked the development and settlement of Government sections.

No grantee of the Government would have had that kind of power. It was not possible for any single grantee of the Government in these 160-acre parcels to frustrate the development of the land granted to the railroad and it did not happen and I would emphasize again that we did not develop all of the reasons in our brief of why we believe that there is no retained or there was no grant of an easement across the Government lands because that question is not in the case.

The Petitioners here have the Taylor Grazing Act permits and they use all of our lands where, as Mr. Justice Blackmun pointed out yesterday, what we want to do is use a corner of their lands.

I see my time is up, unless you have further questions.

QUESTION: Mrs. Beale, I do have one further question.

Your answers to the questions posed by some of my colleagues on the opposite side of the Bench indicate that the parties would be entitled to litigate in Court over the reasonableness of the easement which the Government designated across the property. Does that not undercut to a certain extent your original argument that Congress could not have intended a system whereby the Government had to go in and condemn these by eminent domain because the courts just could not have handled it?

MRS. BEALE: Well, I guess that I would say, not in the sense that in most cases, particularly before the land was developed to any great extent. The obvious reasonable place would be the corner and there would be no point to the private grantee of the railroad going to court to challenge that. He would get nothing out of it. That would clearly be the least intrusive.

QUESTION: That is true and eminent domain too, though, is it not? I mean, in many eminent domain cases the private owner welcomes the Government putting in a road and simply agrees not to seek any condemnation expenses or value in exchange for the value to him of the road.

MRS. BEALE: Well, that may be true and I guess our point is really that if Congress had thought that no one could enter these sections except as trespassors until it went out section by section and determined did it have to bring an

eminent domain proceeding and to bring those in cases where that was necessary, that would be a substantially more difficult process that what we suggest happened, which is that there was a right to locate upon what appeared to be or to cross to be at the reasonable and least-intrusive spot and if a dispute developed, then the parties would try and work it out. If not, the landowner could go to court and say, "Wait a minute, you should use my gate down here and not go across the corner." Or "Wait a minute, I want to locate a house on the corner and you should go further down" and that is different, if only those disputed cases are subject to litigation, we would think.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Martz, do you have anything further?

REBUTTAL ARGUMENT OF CLYDE O. MARTZ, ESQ.

MR. MARTZ: Mr. Chief Justice and may it please the Court:

I would like to make a couple of comments and then see if the Court has any questions of me.

I thought that Counselor's analysis of the relationship between the odd and even-numbered sections provided an answer to the question Mr. Justice Blackmun put to me yesterday which is really, what is at stake in this controversy?

Counselor says that if the successors and interests to the odd-numbered sections want access across the alternate,

even-numbered sections, if still in public ownership, they may seek a permit from the Secretary of Interior. There is nothing in the law that says that permit has to be granted or that it would be granted free of terms and conditions and restrictions.

If those lands have passed to private ownership by homesteading, Counselor made it very clear that the homesteader took a free title without any encumbrance upon it for the benefit of the alternate odd-numbered sections but if the United States, either for access to the alternate, even-numbered sections or for public access to a development such as Seminoe Reservoir wants to use the private lands of successors and interests of the railroad, they can take that road without compensation, determine the size of the burden, where the road will be located with the right in the landowner to either negotiate or some alternative or to go to court and seek a determination that the easement is excessive.

The landowner may have paid taxes upon the land subject to the taking of a road for an easement.

I think if the Court would look at United States against Rindge in the Southern District of California, cited on page 19 of our brief, we see the burden that is put on the ranching landowner of the Government exercising these rights of driving roadways or highways willy-nilly across ranch lands, breaking it up into parcels and destroying the utility of the land now in the hands of purchasers for value based upon clear

patents and a clear record title by examination.

If the Government has to go by the condemnation route it will have to pay not just for the small bits of land on corner crossings but it is going to have to address the impairment of value to the residual lands caused by the opening of unfenced public access routes across consolidated ranch areas.

This Court has said many times, as cited on page 24 of Petitioner's brief, that a construction that alters title securities should be limited to cases where there is a compelling need and that litigation should be avoided as a consequence of a construction.

Here we have a case where we have had a uniform administrative construction for 116 years now. It is apparent that if the Court of Appeals decision is sustained, we are going to impose an encumbrance upon some 131,000 acres that have been patented under language like Section III in this and other acts.

It is not illogically that we are also going to cloud 100 million acres of title in these reserved even-numbered sections and as the Government has pointed out in argument, we are going to have litigation over the size and burden of these rights-of-way.

QUESTION: That might be more complex than the kind of litigation we traditionally have over a condemnation, would it not?

MR. MARTZ: Much more so, particularly when the values that Counselor describes are not significant unless there is an impairment of beneficial use of the adjoining lands. It would not likely go to condemnation because the values are not significantly enough for that purpose.

QUESTION: Normally, when the sovereign is going to condemn land for a road or for any other purpose, the sovereign says "It shall be here."

MR. MARTZ: Yes.

QUESTION: And then the valuation is determined --

MR. MARTZ: Yes, that is right.

QUESTION: -- after the fact.

MR. MARTZ: Correct.

QUESTION: There is the question, does the court ordinarily, in a condemnation, get into the question of where the road shall be?

MR. MARTZ: No, sir, it does not. The United States --

QUESTION: The road is -- the passageway is determined according to need and presumably the engineers take into account the most economical way to put the road in.

MR. MARTZ: Well, the United States can take the road any point it thinks is in the best interest of the project and then damages are computed on the basis of the burden resulting to the private lands.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

[Whereupon, at 10:52 o'clock a.m., the case was submitted.]