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# Does a Property Owner Qualify for an Easement by Necessity if the Only Available Access is through Jurisdictional (404) Wetlands?: Arkansas Court of Appeals Opinion

## Arkansas Environmental, Energy, and Water Law Blog

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The Arkansas Court of Appeals (“Court”) in a December 2<sup>nd</sup> opinion addressed whether a property owner qualified for an easement by necessity if the only available access was through Section 404 Clean Water Act jurisdictional wetlands. See *Young v. Robertson*, 2015 Ark. App. 681 (2015).

The Court upheld a Lonoke County Circuit Court decision which found such an easement was not necessary because of the need to obtain a permit from the Army Corps of Engineers to construct a road.

The opinion states that Teresa Young and James Caron (collectively “Young”) filed a Complaint in Lonoke County Circuit Court to establish an easement by prescription, necessity, or an adverse use over land owned by Elmer Robertson, Jack Burgess and Autumn Burgess (collectively “Burgess”). Young alleged that they were “landlocked” and that there was no direct access and reasonable means to access their property without the use of an existing ingress-and-egress easement.

Young was stated to have established two of the three elements for an easement by necessity which include:

1. That, at one time, one person held titled to the tracts in question
2. That unity of title was severed by conveyance of one of the tracts

Therefore, the sole issue was whether Young satisfied the third element which requires that the easement be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time the easement is exercised.

The Court cited testimony from Young in regards to the 404 issue:

Young was recalled to testify regarding a letter she had received from Roger Allen at the Army Corps of Engineers. She said that Allen had been contacted by Robertson about a possible violation for Young’s building a levee on the wetlands. Young testified that she was told that the Corps had made “a preliminary jurisdictional determination” that a portion of her land “may be considered ... wetlands” and that she should contact the Corps before doing any work. Young said that she concurred with the Corps’s

determination, so she did not respond to the letter. She did, however, speak with an employee at the Corps who advised her that she could apply for a permit but that it would likely be denied. Young stated, "I have not applied and am not going to."

The Court determined that Young's property does not fit within the term "landlocked". Such term applies to a piece of land belonging to one person and surrounded by land belonging to other persons, so that it cannot be approached except over their land. It noted that Young's property had over 1,142 feet of land adjacent to a public road.

Neither the Corps nor the National Flood Insurance Programs regulations were stated to prohibit the building of a road. However, Young's expert stated that a road could not be built in a floodway. The Court stated that it was the trial court's duty to determine credibility and weigh conflicting testimony. It concluded:

Giving due deference to the trial court's superior position to make credibility determinations and weigh the evidence, we cannot say the trial court clearly erred in determining that an easement was not necessary under these circumstances.

[Click here to download a copy of the opinion.](#)