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Access to Public Lands Across Intervening Private Lands

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COMMENT

ACCESS TO PUBLIC LANDS ACROSS INTERVENING PRIVATE LANDS

INTRODUCTION

An increased population[1] and a rise in disposable income[2] have combined to create a dramatic increase in outdoor recreation since the end of World War II.[3] In addition to increased participation in activities commonly engaged in prior to 1945, the post-war period has seen the growth of a plethora of activities rarely practiced or completely nonexistent in preceding years. The hunter and fisherman now finds that he must compete with the snowmobiler, backpacker, mountain climber, and cross-country skier for recreational space.

Vast amounts of public lands,[4] primarily in the western states,[5] exist to satisfy the demand for a place in which to conduct these activities. As a matter of public policy, over 90% of the public domain is open to recreational use.[6] However, large areas are not open, in fact.[7] In a number of instances public lands are unavailable to recreationalists be-

1. In 1945 the population of the United States was 140,468,000; in 1970 it was 204,800,000. U.S. DEP'T OF COMMERCE, 1971 STATISTICAL ABSTRACT OF THE UNITED STATES 5 (92nd annual ed.).
2. Disposable personal income has risen from $206.9 billion in 1950 to $684.8 billion in 1970. *Id.* at 310.
3. The following figures serve to emphasize the increase in outdoor recreation. In 1920 visits to national parks totaled 1 million, in 1964 102 million; visits to state parks increased from 69 million to 285 million between 1942 and 1962, CLAWSON & KNETSCH, ECONOMICS OF OUTDOOR RECREATION 6 (1966).
4. Of the 2,271,343,000 acres comprising the United States 761,301,000 acres, or 33.5%, are federally owned. U.S. DEP'T OF COMMERCE, *supra* note 1, at 189.
5. About one half of the public lands are in Alaska. Ninety percent of the remaining one half are in the 11 western states. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 22 (1970).
6. *Id.* at 214.
7. *Id.* The following figures may give some appreciation of the magnitude of the problem. A 1959 Colorado study concluded that 1.5 million acres of public land, including 1 million acres of National Forest lands, were blocked to free public access. A 1959 Oregon study concluded 500,000 acres of valuable hunting and fishing lands were inaccessible in Oregon. In the same year the Bureau of Land Management estimated that 12.4 million acres of BLM land lacked physical access (could not be easily reached by existing roads and trails) and 5.4 million acres were closed off by private lands. U.S. DEP'T OF AGRICULTURE, PUBLIC ACCESS TO PUBLIC DOMAIN LANDS 5 (Economic Research Service Miscellaneous Publication No. 1122 1968).

cause the only practical access route transverses privately owned land, and permission to cross this land is denied. As a number of recent magazine articles[8] attest, this problem is by no means minor.

The purpose of this comment is to examine the legal rights of one facing this problem. In short, the question to be examined is: Does a member of the public have a legal right to cross private land in order to reach the public domain? In seeking an answer to this question, no attempt to examine the equities of the public and the land owner will be made. Rather this article will confine itself to an examination of statutory and common law remedies to determine if such a right presently exists.

The roots of this problem can be found in earlier attitudes of the United States with respect to its lands. Until the latter part of the 19th Century disposal of public lands was the prevailing policy.[9] Disposal was accomplished through various programs including pre-emption acts, homestead acts and grants to railroads and states.[10] Since no retention of land was envisioned it was unnecessary to provide in these programs for access to the remaining public lands.

In 1872 the first major deviation from the disposal philosophy was manifested by the creation of Yellowstone National Park.[11] In 1891 Congress gave the President the power to reserve forest lands[12] and substantial amounts of land were set aside under this authority.[13] By 1934 land acquisitions by private persons had dwindled significantly,[14] there being little suitable land left to take. In that year the Taylor Grazing Act[15] was passed, providing for the management of the remain-

8. *E.g.*, Frome, *The Big Lockout*, Field and Stream, Oct. 1971, at 58; O'Hearne, *An Iron Curtain Across the West*, Sports Illustrated, Nov. 6, 1961, at 66.
9. *See* CLAWSON & HELD, THE FEDERAL LANDS 17-36 (1957). A graph showing the highlights of public land law can be found in THE PUBLIC LANDS 484 (Carstensen ed. 1963).
10. A good discussion of the various land disposal laws can be found in GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT chs. 6-18 (1968).
11. Act of Mar. 1, 1872, ch. 24, 17 Stat. 32-33.
12. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103.
13. *See* GATES, *supra* note 10, at 567, 579-580; CLAWSON & HELD, *supra* note 9, at 28.
14. CLAWSON & HELD, *supra* note 9, at 33.
15. Act of June 28, 1934, ch. 865, 48 Stat. 1269-75.

ing public lands by the Department of Interior. Executive Order 6910 of November 26, 1934 and Executive Order 6964 of February 5, 1935 withdrew all unappropriated public lands, except those in Alaska, pending classification by the Secretary of the Interior. Since that time disposal has been discretionary with the Secretary.[16] These Orders ended, for practical purposes, the disposal of public lands and fixed the basic public-private ownership pattern.

Most of the disposal programs left selection of the land to the individual. The obvious result was that the most desirable lands were selected, leaving the less desirable lands untaken. Ultimately the untaken lands were withdrawn by the United States, becoming what is presently the public domain. Since Mother Nature has not seen fit to arrange desirable and undesirable lands in any rational pattern it was inevitable that certain public lands would be left with no means of access. Furthermore, even those programs which gave the grantee little choice, such as the railroad grants, were not designed with access to the remaining public lands in mind. The access problem is one of the many legacies of these haphazard programs of disposal and withdrawal.

Before proceeding it might be useful to clarify the physical situations of primary concern. The most obvious situation is that in which public lands are completely surrounded by private lands, across which there is no public road. In a less extreme situation one or more public roads may reach the public lands, but a portion of it may remain inaccessible as a practical matter because of remoteness or physical barriers. In such a situation it may be desirable to cross private land if the otherwise inaccessible portion can be more easily reached by so doing. In a somewhat distinct category are checkerboard lands. This pattern of ownership is a result of grants to railroads of all the odd-numbered sections within a given distance of the railroad right-of-way as incentive and reward for the construction of the lines. The problems associated with these lands will become evident during the course of this comment. It is worthy of note that the Bureau of Land Management

16. Taylor Grazing Act, § 7, ch. 865, § 7, 48 Stat. 1272 (1934), *as amended* 43 U.S.C. § 315f (1970). *See* 43 C.F.R. § 2400.0-3 (1972).

has concluded that as a practical matter nearly all checkerboard lands are closed to the public.[17]

THE UNLAWFUL ENCLOSURE OF PUBLIC LANDS ACT

The problem of access to public land is not a new one. By 1885 western cattle barons had succeeded in enclosing millions of acres of public domain.[18] To remedy this evil Congress enacted legislation known popularly as the "Unlawful Enclosure of Public Lands Act"[19] (hereinafter referred to as the Act).

The four sections of the Act which are of primary interest to this discussion are digested below.

Section one[20] provides that all enclosures of public lands by any person having no claim or color of title are unlawful, and maintenance, construction, or control of such an enclosure is likewise unlawful. This section also prohibits the assertion of the right of exclusive use without claim or color of title.

Section two[21] charges the United States Attorney for the proper district with the responsibility of bringing a civil suit upon the filing of an affidavit by a citizen. The United States District Courts are given jurisdiction, are ordered to give preference to the case over all other civil cases, to restrain violations by injunctions, and to order the destruction of enclosures not removed within five days.

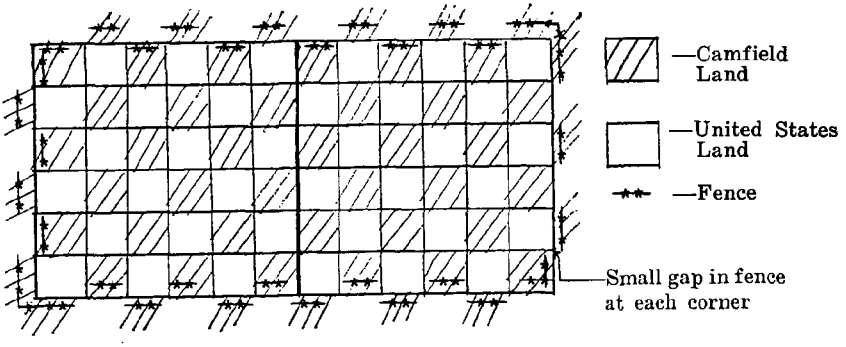
Section three[22] makes it illegal by force, threat, intimidation, fencing, or otherlawful means, to prevent or obstruct a person from peaceably entering upon public land. It also prevents the obstruction of free passage over public lands.

Section four[23] makes it a misdemeanor to violate the Act with a maximum penalty of a $1,000.00 fine, one year imprisonment, or both.

17. U.S. DEP'T OF AGRICULTURE, *supra* note 7.
18. One Senator estimated 15,000,000 acres were illegally fenced. 15 CONG. REC. 4771 (1884) (remarks of Senator Payson).
19. Act of Feb. 25, 1885, ch. 149, 23 Stat. 321-22, *as amended* 43 U.S.C. §§ 1061-66 (1970).
20. 43 U.S.C. § 1061 (1970).
21. *Id.* § 1062.
22. *Id.* § 1063.
23. *Id.* § 1064.

The question of significance here is whether the Act requires that a private land owner grant the public the right to cross his land to reach the public domain. Any attempt to answer this question requires an examination of *Camfield v. United States.*[24]

Like many cases concerning the Act, *Camfield* involved checkerboard lands. The defendant was the owner of all the odd-numbered sections in two contiguous townships. In addition, he owned all the odd-numbered sections immediately adjacent to the boundary of these townships. By an ingenious method, illustrated below, the defendant was able to completely fence off the two townships without placing any fence on the publicly owned even-numbered sections, thus, giving himself exclusive control of his own land plus some 36 sections of public land.



24. 167 U.S. 518 (1897).

The defendant asserted that the Act did not apply to fences built on private land. He further contended that if it did apply it was unconstitutional. In rejecting the first contention the United States Supreme Court said:

> If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for trespass. It is only by treating it as prohibiting all "enclosures" of public lands, by whatever means, that the act becomes of any avail.[25]

The Court answered the constitutional question by typifying the fence as a nuisance which Congress had the power to abate.

Subsequent decisions by lower courts have applied the Act to fences erected on private lands where the enclosure itself was not complete, but was joined with natural barriers so that access was prohibited as a practical matter;[26] where openings were left but the court did not feel they were adequate;[27] and where the fence was joined with those of another person to complete the enclosure.[28] However, the Act has been held to be inapplicable when only one person was denied access because the fence separates his land from the public domain.[29]

The *Camfield* opinion is ambiguous as to whether intent to enclose public land is an element of the offense and has been

25. *Id.* at 525. The Supreme Court was in error both as to the reason for the Act and the need for it. The following remark is typical of much of the debate concerning the Act.
> "The letter which has been read at the Clerk's desk shows, as well as numerous documents and letters in the papers which I hold in my hand and to which I have referred, that so soon as these gentlemen fenced in these lands they proceed at once to destroy the evidence of the survey. Government monuments are leveled to the ground; Government stakes are pulled up, and after an enclosure is fenced I am satisfied at the Interior Department there is no evidence the land was ever surveyed. And, therefore, as lawyers within the sound of my voice will appreciate, it is impossible to describe upon paper the precise tract of land which is included. The *locus* cannot be described and therefore the United States is without remedy."

15 CONG. REC. 4772 (1884) (remarks of Senator Payson).

26. Stoddard v. United States, 214 F. 566 (8th Cir. 1914); Golconda Cattle Co. v. United States, 201 F. 281 (9th Cir. 1912); *Rev'd on other grounds on rehearing*, 214 F. 903 (9th Cir. 1914); Thomas v. United States, 136 F. 159 (9th Cir. 1905).

27. Golconda Cattle Co. v. United States, 201 F. 281 (9th Cir. 1912).

28. Thomas v. United States, *supra* note 26.

29. Callison v. Ronstadt, 188 P. 266 (Ariz. 1920); Anthony Wilkinson Livestock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364 (1905).

cited as authority for both sides of the proposition. The 8th Circuit, relying on the language previously quoted from *Camfield,* has taken the position that any enclosure which causes a practical denial of access is unlawful regardless of the intent of the builder.[30] A similar conclusion was reached by the Supreme Court of Utah in a decision handed down 5 years before the *Camfield* decision.[31]

On the other hand, the Court conceded in *Camfield* that the defendant could lawfully have enclosed each odd-numbered section separately, thereby excluding the public from the even-numbered sections. The Court then stated:

> "[B]ut when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, ..."[32]

This language led the 9th Circuit to conclude that intent is a necessary element of the offense.[33]

One opinion appears to resolve the issue in the following manner: If the fence is ineffectual for enclosing one's own land intent is conclusively presumed, but where the fence is effective for that purpose such a fence is lawful unless built solely with the intent of preventing access to public lands.[34] It is doubtful that this analysis reconciles all the cases, but perhaps it resolves the inconsistencies within the *Camfield* opinion.

The Supreme Court did not even discuss whether the Act conferred any right to cross private lands in the *Camfield* decision. While this may seem somewhat surprising at first glance, it is less startling when one realizes that the desired solution to the case did not require a resolution of that issue. The case arose in Colorado which had a statute requiring a landowner to have a legal fence before he could recover for

30. Homer v. United States, 185 F. 741 (8th Cir. 1911).
31. United States v. Buford, 8 Utah 178, 30 P. 433 (1892).
32. Camfield v. United States, *supra* note 24, at 528.
33. Golconda Cattle Co. v. United States, 214 F. 903 (9th Cir. 1914); Lillis v. United States, 190 F. 530 (9th Cir. 1911); Potts v. United States, 114 F. 52 (9th Cir. 1902).
34. United States v. Rindge, 208 F. 611, 623-24 (S.D. Cal. 1913).

trespass of another person's cattle. Thus, by removing the fence the Supreme Court also eliminated a basic element of any legal action to prevent the public from using the land for the only purpose desired: pasturing cattle.

Two state courts had occasion to consider the problem prior to the *Camfield* decision. The Supreme Court of Wyoming in considering the constitutionality of the Act as it related to fences on private lands made a very cogent appraisal of the real problem.

> Is it the law or the fence which secures to the owner of property its exclusive enjoyment? The fence is made for beasts; the law is made for man. . . . The fence destroyed, what greater facility of access to the retained sections will the public then have than if the fence had remained? . . . When reduced to its last and true legal analysis, the point in controversy is, shall the United States have a way over the defendant's land?[35]

Concluding that no such way existed the court held the Act unconstitutional to the extent it applied to fences on private land. The Supreme Court of Utah, on the other hand, justified the constitutionality of the Act on the basis that the United States had retained an implied easement to reach remaining lands when it made the private grants.[36] While they reached opposite conclusions both courts recognized what seems to be the essential problem of applying the Act to fences on private lands.

In *Mackay v. Uinta Development Co.*[37] the 8th Circuit found that the Act conferred the right in question. The plaintiff was the owner of all the odd-numbered sections in an unenclosed strip of land separating the defendant's summer and winter ranges. When the defendant drove his sheep across this strip in transferring them from one range to the other the plaintiff had him arrested for trespass and brought an action for damages. The court held the Act could be raised by an individual as a defense in a trespass action and concluded:

35. United States v. Douglas-Willan Sartoris Co., 3 Wyo. 287, 22 P. 92, 97 (1889).
36. United States v. Buford, *supra* note 31.
37. 219 F. 116 (8th Cir. 1914).

> This statute has been construed to prohibit every method that works a practical denial of access to and passage over public lands . . . .[38]
>
> . . . .
>
> . . . The question here, which we think should be answered in the affirmative, is whether Mackey [the defendant] was entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass.[39]

Subsequent decisions by the 8th Circuit have reaffirmed this position.[40] Relying on the interpretation given the Act by the 8th Circuit the Supreme Court of New Mexico reached a similar conclusion.[41] Interestingly, these decisions all avoid discussing the constitutional basis for such a construction.

Also without discussing any constitutional questions one United States District Court concluded the Act provides no way over private lands. Its rationale was that if Congress had intended that result it would have expressly indicated its intent.[42]

One can only speculate as to how the United States Supreme Court would rule if faced squarely with a determination of whether the Act confers a right of way across private lands when necessary to reach the public domain. The *Camfield* Court carefully avoided any discussion of this problem or the use of any legal theories which would have demanded a later holding that the right exists. By relying on nuisance principles, and admitting the defendant could have excluded the public if his fences had been effective for enclosing his own land the Court seemed to suggest that no such right was granted by the Act.

The element of intent seems completely incompatible with the right to cross private land. If the Act confers the right then it is equally denied whether or not the intervening owner builds a fence with intention to deny it. Thus, if *Camfield* is

38. *Id.* at 119.
39. *Id.* at 120.
40. Western Wyoming Land and Live Stock Co. v. Bagley, 279 F. 632 (8th Cir. 1922); Mumford v. Rock Springs Grazing Assn., 261 F. 842 (8th Cir. 1919).
41. Jastro v. Francis, 172 P. 1139, 1142 (N.M. 1918).
42. United States v. Rindge, *supra* note 34.

read as prohibiting only those fences built on private lands with the intent to enclose public lands, it necessarily follows that the Court did not interpret the Act as conferring the right to cross private land. Significantly, those courts which have found in favor of such a right have also found that any device which is effective for denying access is unlawful, regardless of the intent with which it is built.

On the other hand, *Camfield* contains no statement which absolutely precludes a finding that the right exists. If one adopts the position that the destruction of the fence without the attendant right to cross the private land is meaningless, then *Camfield* must confer that right. In the final analysis, it seems the Court purposely made its decisions somewhat ambiguous, thereby giving it complete freedom to rule either for or against the right to cross private land where a later case required that decision.

Perhaps it should be noted that all those decisions which expressly found that the Act conferred a right to cross private land involved checkerboard lands. In such a situation for either party to reach his lands necessitates crossing at least some small portion of the other's land. As the court in *Mackay v. Uinta Development Co.*[43] noted, a private owner who demands that the public not cross any of his lands is attempting to cast all of the disadvantages of the interlocking pattern of ownership on the government. In requiring that he grant the public the same rights he enjoys, the courts are merely demanding equitable treatment. It seems likely that these courts ignored constitutional considerations to reach what they considered to be a just result. Whatever their basis, they do represent a persuasive case for the right to cross the privately owned sections of checkerboard lands in order to reach the public sections. Their persuasiveness in noncheckerboard situations is not so great.

The Act should not be forgotten even if one concludes that it confers no right to cross private land under any circumstance. There are various situations in which a person

43. *Supra* note 37.

may be excluded from entering public lands where the difficulty is not with intervening private lands. In addition to the instance where an individual makes a naked claim on public lands, difficulties can arise under the regulations of the various land administering agencies. For example, both the Forest Service and the Bureau of Land Management allow grazing permitees to construct fences and other range improvements on public lands.[44] However, these improvements do not convey the right to exclusive use of the land influenced,[45] nor can the permitee interfere with the use of the land by hunters, fisherman and others who have a right to use it.[46] Thus, it is entirely possible to have a situation where a permitee is authorized to build a fence on public lands, and the public is authorized to enter upon and use the same lands. When a member of the public is unlawfully excluded from such lands by locked gates, no trespassing signs, or intimidation the Act provides an obviously desirable remedy. All a citizen need do is file an affidavit with the appropriate United States Attorney, the expense of investigation and litigation then falling on the Government. The Act is designed to provide for a prompt hearing of the case and the penalties are sufficient to discourage further violations. While there are apparently no reported decisions in which the Act was used in these circumstances, there are no apparent reasons why it could not be.

EASEMENTS BY NECESSITY

The most promising of common law theories on which to base a right to cross private land to reach public land would appear to be that of an easement by necessity. The typical easement arises when a person conveys a portion of his land in such a manner that it is impossible to reach the portion conveyed without crossing the part retained, or vice versa. Since it would be impossible to use the land conveyed (or retained)

44. 43 C.F.R. 4125.1-4 (1972) and 36 C.F.R. 231.9(a) (1972) authorize the making of range improvements. 43 C.F.R. 4112.3-1(c) (1972) and 36 C.F.R. 261.11(b) (1972) prohibit such structures except when authorized.

45. 36 C.F.R. 231.9(b)(4) (1972).

46. 43 C.F.R. 4125.1-1(i)(10) (1972); 43 C.F.R. 4112.3-1(g) (1972).

the law finds an easement based on the presumed or implied intent of the parties to the conveyance.[47]

Whether an easement by necessity can exist where public lands are involved is a subject of controversy. In 1848 the Supreme Court of Missouri found that the easement could exist. It stated:

> The United States being the proprietor of a section of land, entirely surrounded by other sections, sells the land so surrounded; the purchaser acquires by common law, a right of way to the land he has bought, as necessary incident of the grant. The case is not altered by selling the surrounding land to different individuals. The purchasers take it subject to the burden imposed on it whilst it belonged to the government, the original proprietor.[48]

Since the court indicated that ways of necessity could be applied in favor of the grantor as well as the grantee, there would appear to be no reason why the result would not have been the same if it had been the United States seeking an easement to sections of land which it had retained.

Several decisions involving the checkerboard design have reached similar conclusions. In *United States v. Buford*[49] the Supreme Court of Utah stated that even had there been no Unlawful Enclosure of Public Lands Act[50] the landowner of the odd-numbered sections could not have fenced the land so as to exclude the public from the even-numbered sections. The court held that in making the grants to the railroads Congress had, by implication, reserved the right of free access to the public sections. A Montana Court[51] concluded that the easement existed not only in favor of the Government, but also in

47. RESTATEMENT OF PROPERTY § 476, comment *g* (1944).

48. Snyder v. Warford & Thomas, 11 Mo. 513, 514 (1848). A similar expression was made by a dissenting judge in Crear v. Crossly, 40 Ill. 175, 178 (1868). Both cases involved the constitutionality of statutes providing for the establishment of private rights of way by condemnation. The *Snyder* court and the dissenting judge in the *Crear* case justified the statutes on the bases that such rights already existed and the statutes merely regulated the method of their exercise.

49. *Supra* note 31, at 434.

50. Act of Feb. 25, 1885, ch. 149, 23 Stat. 321-22, *as amended* 43 U.S.C. §§ 1061-66 (1970).

51. Herrin v. Sieben, 46 Mont. 226, 127 P. 323, 328 (1912). *See also* Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925).

favor of private citizens who wished to enter for lawful purposes. Although finding against the defendant because his sheep had completely depastured the plaintiff's land, one federal court nevertheless concluded that an easement to reach the even-numbered sections existed in favor of the public.[52]

Pearne v. Coal Creek Mining and Manufacturing Co.[53] is the leading case adopting the opposite view. That court refused to find an easement of necessity where state land grants were concerned primarily because it felt that such a finding required the conclusion that every grantee from the state would have a right of way over all surrounding lands held by junior grantees to the limits of the state. While this probably overstates the practical effect of such a doctrine, it is precisely this sort of reasoning which has led other courts to refuse to apply the doctrine where unity of title can be found only in the sovereign.[54]

Those cases allowing the easement are primarily cases dealing with checkerboard lands. This suggests that perhaps the difference in result can be explained by the difference in the physical situation. A deeper examination of the doctrine of easements by necessity lends further strength to this suggestion.

As was discussed previously, an easement by necessity is a form of implied easement. Implied easements arise out of the intent inferred by the circumstance of the conveyance, rather than the language used.[55] This may result in ascribing an intention to the parties which they did not have, but would have had had they foreseen the problem.[56] In effect the search is for objective intent; that is, the presumed intent of a reasonable grantee and grantor in similar circumstances. The reason for the inference in the case of "necessity" is obvious: If one of the parties to a conveyance can reach his land only by crossing the other party's land, the parties probably intended

52. Northern Pac. Ry. Co. v. Cunningham, 89 F. 594, 595 (D. Wash. 1898).
53. 90 Tenn. 669, 18 S.W. 402, 404 (1891).
54. United States v. Rindge, *supra* note 34, at 619; State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 219 (1927). *See also* Seaway Co. v. Attorney General, 375 S.W.2d 923, 929 (Tex. 1964).
55. RESTATEMENT OF PROPERTY § 476, comment *a* (1944).
56. *Id.*; 2 AMERICAN LAW OF PROPERTY § 8.33 (Casner ed. 1952).

for him to have that right. Obviously the necessity must exist at the time of the conveyance.[57] If it arises later it is certainly not useful in inferring the intent of the parties at the time of conveyance.

In the case of the checkerboard pattern it is apparent that the grantor (United States) and grantee must cross each others land to reach their own. Furthermore, the need to do so clearly arose at the time of the conveyance. Thus, it does not seem unreasonable to conclude that their objective intent was for the United States to retain an easement to cross the private sections in order to reach the public sections.

Easements to reach noncheckerboard lands present a more difficult problem. Since the grants leading to the problem were made on an individual basis it is difficult to demonstrate any "objective intent" or "necessity" to retain an easement to reach the remaining public lands. Certainly when the first patent was issued in a sea of public domain no necessity to cross that tract to reach the remaining public land existed. These requirements can perhaps be satisfied with respect to the grant which completed an enclosure, but limiting the application of the doctrine to that grant greatly diminishes its usefulness.

While the case law in favor of easement by necessity to reach checkerboard lands is substantial, there are cases which would appear to favor an opposite result. Although it did not expressly overrule them, the Supreme Court of Wyoming obviously disfavored them in *United States v. Douglas-Willan Sartoris Co.*[58] It did so on the basis of the legal adage that a grant is to be construed strictly against the grantor. Congress, being the grantor, should have expressly reserved easements to reach the even-numbered sections if it desired to have access to them. Futhermore, the United States Supreme Court refused to use the opportunity presented by *Camfield v. United States*[59] to declare that such an easement existed.

57. United States v. Rindge, *supra* note 34, at 622.
58. *Supra* note 35, at 297, 22 P. at 96.
59. *Supra* note 24.

There are several other problems worthy of brief consideration. In *United States v. Rindge*[60] the United States was not permitted to establish an easement by necessity for public use, partly on the basis that such ways are strictly private and cannot be exercised in favor of the general public. This conclusion limits easements of necessity to reach public lands to those which run in favor of the government in a strictly proprietary sense. In other words, if such an easement exists, it exists only in favor of one who enters as an agent of the United States. In contradiction to this attitude, several of the checkerboard opinions held that the easement exised in favor of every member of the public and could be raised as a defense to a trespass action.[61]

State v. Black Brothers[62] demonstrates a further problem whenever the state or federal government attempts to establish an easement by necessity. The Texas court ruled that since the state could always acquire an easement by eminent domain there could be no necessity from which to presume the reservation of an easement.

In conclusion, it appears that a respectable, although not overwhelming, case can be made for easements of necessity in the checkerboard situation. In other situations the case is a good deal less sound.

PUBLIC USER

Another category of common law remedies which may be useful in gaining access to enclosed public lands are rights acquired by public user.[63] There are several different concepts involved here but, as the title implies, the common characteristic is previous use by the public. Specifically the concepts are custom, prescription, and implied dedication. Because all these concepts rely on prior use by the public, their utility may be limited. Nevertheless, there may be situations where they are applicable. Furthermore, recent cases involving

60. *Supra* note 34, at 618-19.
61. Herrin v. Sieben, *supra* note 51; Herrin v. Sutherland, *supra* note 51; Northern Pac. Ry. Co. v. Cunningham, *supra* note 52.
62. *Supra* note 54, at 218.
63. For another discussion of this topic see Comment, *The Acquisition of Easements by the Public Through Use*, 16 SO. DAK. L. REV. 150 (1971).

custom and implied dedication are worth examining for the insight they provide to the reaction of courts confronted with the exploding demand for recreational space.

Custom

Custom is defined as:

> A usage or practice of the people, which, by common adoption and acquiescence and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates.[64]

Blackstone listed seven requirements necessary to give rise to a customary right.[65] As applied to land, the concept is that persons of a certain locality or class have, by immemorial custom, a right to use the lands of a private person.[66] Custom has received little acceptance in the United States, and until recently only New Hampshire had ever utilized it.[67]

In 1969 the Supreme Court of Oregon made use of the doctrine in *State ex rel Thornton v. Hay*[68] to insure that the dry sand area[69] of Oregon's beaches would remain open to the public. The state brought an action to enjoin the defendants from building a fence across the dry sand area. The trial

64. BLACK'S LAW DICTIONARY 461 (rev. 4th ed. 1968).
65. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 76-78. (5th ed. 1773). The following is a paraphrase of the requirements:
    1. The custom must have been in existence so long that the memory of man runneth not to the contrary.
    2. The custom must have continued without interruption. This does not require continuous exercise of the customs, but does require that the custom itself has not been interrupted.
    3. The custom must have been peaceful and not subject to dispute.
    4. The custom must be reasonable.
    5. The custom ought to be certain.
    6. The custom, though consentual, must be obligatory and not left to the option of each person.
    7. The custom must be consistent with other customs.
66. 3 TIFFANY, REAL PROPERTY § 934 (3rd ed. 1939).
67. 2 THOMPSON, REAL PROPERTY § 369, at 463 (repl. ed. 1961); *see* Perley v. Langley, 7 N.H. 233 (1834); Knowles v. Dow, 22 N.H. 387 (1851). Hawaii has also used customs but its land laws are based on ancient tradition, customs, practice, and usage. Application of Ashford, 50 Hawaii 314, 440 P.2d 76, 77 (1968).
68. 254 Ore. 584, 462 P.2d 671 (1969).
69. The dry-sand area is generally described as that portion of the beach between the line of mean high tide and the visible vegetation line. *Id.* at 672, 673. There was no dispute in *Thornton* as to the area between mean high tide and extreme low tide as that area was, by statute, designated as a state recreation area. ORE. REV. STAT. 390.615 (1971). For a more thorough discussion of the problems of seaward boundaries of littoral lands see Borox Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935).

court granted the injunction basing its decision on implied dedication and prescription. The Supreme Court affirmed but preferred to rely on custom. A decision based on dedication or prescription could only be applied to the lands presently before the court, whereas "[a]n established custom, on the other hand, can be proven with reference to a larger region. Ocean-front land from the northern to the southern boundary of the state ought to be treated uniformly."[70]

The court compared Blackstone's requirements to the present situation and found them satisfied in all regards. Two objections had been raised to the use of custom. The first was that there was little precedent for its use in the United States and none in Oregon. The second was that the brevity of Oregon's political history made it impossible to satisfy the requirement of an ancient use. In answer to the first objection, the court cited the New Hampshire case of *Perley v. Langley*[71] and added that precedent was not necessary anyway. The second objection was countered by saying that brevity should not militate against custom when custom did in fact exist. Furthermore the court said, "[I]f antiquity were the sole test of the validity of custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry sand area as public land."[72]

Custom probably has little value in most situations where public access is a problem. However, the *Thornton* decision is an excellent example of the adroitness of a court in molding an existing remedy to include a new situation when it feels this is desirable. In addition to circumventing the requirement of an ancient use, on which most American courts had stumbled, the Oregon court greatly expanded the physical limits usually associated with customary rights; that is, limitation to either the inhabitants of a specific village or locality, or to a particular class of people.[73] For all practical purposes the court opened Oregon's beaches to the entire world. Fur-

70. *Supra* note 68, at 676.
71. 7 N.H. 233 (1834).
72. *Supra* note 68, at 678.
73. Post v. Pearsall, 22 Wend. 425, 431 (N.Y. Ct. Err. 1839); GRAY, THE RULE AGAINST PERPETUITIES §§ 573, 577 (4th ed. 1942); 6 POWELL, REAL PROPERTY ¶ 934 n.5 (1971); 3 TIFFANY, REAL PROPERTY § 935 (3rd ed. 1939).

thermore, the court ignored the effect of a 1935 United States Supreme Court decision[74] which held that a federal patent conveys title to the mean high tide line. Regardless of the rhetoric used, the decision amounted to a declaration that lands which the United States Supreme Court had previously said were private property were now to be considered public property. It is apparent that the Oregon court was breaking new ground in its application of custom to this situation. Its willingness to do so is perhaps a bellweather.

It should be noted that the decision did not completely solve the problem of making Oregon's beaches available for public use. While the decision prevents the construction of obstacles to lateral travel along a beach, it has no application when seeking a route across intervening private land. However, the court did not reject implied dedication or public easements by prescription and, in fact, indicated that both doctrines have sound judicial and statutory support in Oregon. Having demonstrated that it believes public policy requires free use of Oregon's beaches by the public, it seems possible that the court would not hesitate to apply these doctrines to secure access to its beaches.

Prescription and Implied Dedication

Dedication of land to a public use can be implied by circumstances other than use by the public. However, it is this type of circumstance that is most likely to be useful in gaining access to public land. Therefore, this discussion will be limited to that manner of dedication. When so limited, implied dedication is very similar to the creation of public easements by prescription. For this reason the two concepts will be considered together.

In theory the function performed by the public use in each concept is somewhat different. Prescription, as applied by most American jurisdictions, is highly analogous to adverse possession.[75] The effect of this analogy is to make the intent

74. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 23 (1935).

75. 2 AMERICAN LAW OF PROPERTY § 8.52 (Casner ed. 1952); 2 THOMPSON, REAL PROPERTY § 337, at 180 (repl. ed. 1961).

of the owner of the land immaterial. If he allows another to use his land in a particular way[76] for a sufficient time,[77] he loses the right to demand otherwise. Where dedication is concerned, use by the public can perform two functions: to show the intent of the owner to appropriate the land to a public use[78] or to demonstrate acceptance of the dedication by the public.[79]

Because of the different functions performed by the public user, it is possible to have dedication without prescription or vice versa. However, the courts have often confused the two concepts, and it is difficult to find any significant differences in certain situations. The California decisions are a good example. In that state adverse use of private land by the public for five years or more gives rise to a conclusive presumption of intent to dedicate.[80] Evidence of the owner's actual intent is no longer relevant. Differences between this form of dedication and prescription are not apparent. In fact, dedication implied by adverse user has been justified by analogizing it to prescription.[81] The aversion of California courts to the term prescription where the public is involved was explained by an early court as follows:

> "Prescription" is not a term strictly applicable to a right acquired by the public by the use of a way for any period of time. The law allows prescription only to supply the place of *grants,* and, inasmuch as the public cannot take by grant, the term "prescription," in its strict sense, has no application to highways. The true doctrine would seem to be that immemorial use by the public is evidence of a *dedication,* just as such use by an individual is evidence of a grant to him.[82]

76. It is generally said that the use must be adverse, continuous, and uninterrupted. RESTATEMENT OF PROPERTY § 457 (1944).
77. Because of the analogy to adverse possession the required period of use is usually the same as that required by the states on adverse possession. 2 AMERICAN LAW OF PROPERTY § 8.52 (Casner ed. 1952); RESTATEMENT OF PROPERTY § 460, comment (*a*) (1944); 4 TIFFANY, REAL PROPERTY § 1191, at 545-46 (3rd ed. 1939).
78. Seaway Co. v. Attorney General, *supra* note 54, at 936. Diamond Match Co. v. Savercool, 218 Cal. 665, 24 P.2d 783, 784 (1933).
79. Collins v. Zander, 61 So. 2d 897, 899 (La. 1952); Wolfe v. Kemler, 228 Ia. 733, 293 N.W. 322, 324 (1940).
80. Union Transp. Co. v. Sacramento County, 42 Cal. 2d 443, 267 P.2d 10, 13 (1954); Schwerdtle v. Placer County, 108 Cal. 589, 41 P.448, 449 (1895).
81. Schwerdtle v. Placer County, *supra* note 80.
82. Bolger v. Foss, 65 Cal. 250, 3 P.871, 871 (1884).

California recognizes that lesser degrees of use may, when coupled with other appropriate facts, result in implied dedication. Thus, what California has essentially done is to include prescriptive easements by public user within the doctrine of dedication. California is not alone in its dislike of the word prescription where public ways are involved and, like California, most states which have rejected the concept have achieved the same result by dedication.[83]

A more detailed discussion of these doctrines will not be undertaken for several reasons. Both are relatively well established, and numerous discussions can be found elsewhere.[84] Although well established, many local nuances exist and the decisions of a particular jurisdiction must be consulted to arrive at any accurate conclusions. Furthermore, with the two exceptions discussed below, there is nothing unusual about the application of these concepts to gain access to public lands.

The first difficulty a private citizen may encounter in seeking to enforce a public easement is a lack of standing to maintain the suit. Essentially, such a person is seeking to abate a public nuisance. The nuisance to be abated is an obstruction of a public way, an essential element of the case being proof that the way is in fact public.[85]

Whether or not they talk in terms of a public nuisance, it is clear that most courts regard the right as a public one which can be enforced by a private citizen only if he can show a special injury.[86] A special injury is one which differs in kind, rather than degree, from that experienced by other mem-

83. 2 AMERICAN LAW OF PROPERTY § 9.50 (Casner ed. 1952).

84. Discussions of the creations of public ways by prescription can be found in: 2 AMERICAN LAW OF PROPERTY § 9.50(*c*) (Casner ed. 1952); 2 THOMPSON, REAL PROPERTY § 342 (repl. ed. 1961); 4 TIFFANY, REAL PROPERTY §§ 1211-1218 (3rd ed. 1939). Discussions on implied dedications can be found in: 3 AMERICAN LAW OF PROPERTY §§ 12.132-34 (Casner ed. 1952); 4 TIFFANY, REAL PROPERTY §§ 1098-1113 (3rd ed. 1939); 6 POWELL, REAL PROPERTY §§ 934-36 (1971); 23 AM. JUR. 2d *Dedication* §§ 28-31 (1965); 26 C.J.S. *Dedication* §§ 15-25 (1956).

85. *See* Irwin v. Dixin, 18 U.S. (9 How.) 6 (1849).

86. Halpenny v. City of San Antonio, 351 S.W.2d 939 (Tex. 1961); 23 AM. JUR. 2d *Dedication* § 70 (1965); 39 AM. JUR. 2d *Highways, Street, and Bridges* § 311 (1968).

bers of the public.[87] The problem of special injury becomes especially acute where public lands are concerned as is demonstrated by *Anthony Wilkinson Live Stock Co. v. McIlquam*.[88] The plaintiff alleged the defendant was attempting to assert exclusive possession over public lands. The court in denying the ability of the plaintiff to enjoin the defendants conduct said:

> But the injury or damage, if any, resulting to the plaintiff from the unauthorized or illegal assertion of the right to the exclusive possession of the public lands on the part of the defendant would be suffered, not alone by the plaintiff, but by all alike whose livestock graze in that locality, or who seek to enjoy the pasturage afforded by the grasses upon such public lands. The injury, in other words, would be an injury to the public, and, if a nuisance at all, a public nuisance, somewhat like the obstruction of a highway or the interference with the public travel theron. And it is an elementary principle that private persons, seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to themselves, aside from and independent of the general injury to the public.[89]

The plight of a sportsman seeking to object to the barricading of a road leading to public lands is much the same. If he were owner of the land he seeks to reach, he could show injuries peculiar to himself and maintain the suit.[90] Since the land is public, his right to use it for recreational purposes, like the right of the plaintiff to graze cattle in the *McIlquam* case, is no different from that of any member of the public. Consequently, his injury is not peculiar to himself when that right is abridged.

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87. PROSSER, TORTS, § 88, at 586-87 (4th ed. 1971). For a general discussion of this problem of private remedies for public nuisances see: Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966). For a discussion of the problems of showing a special injury when obstruction of a public road is involved see: Smith, *Private Action for Obstruction of Public Right of Passage* (pts. 1 & 2), 15 COLUM. L. REV. 1, 142 (1915).

88. 14 Wyo. 209, 83 P. 364 (1905).

89. *Id.* at 370-71.

90. Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 60 (1919); Morgan County v. Goans, 138 Tenn. 381, 198 S.W. 69, 70 (1917); PROSSER, *supra*, note 87, at 589.

The area of standing is presently undergoing considerable change. However, one should not be lulled into a false sense of optimism by cases like *Scenic Hudson Preservation Conference v. FPC*.[91] This case and others like it have relied on statutory authority in finding a private person had the right to sue. Several states have also enacted statutes which give a citizen the right to bring suit to abate a public nuisance. Professor Prosser states that absent such authority there are no cases which have held a private citizen had standing to abate a public nuisance without a showing of special damages.[92] Of course a public official can always bring the suit, but this is a dubious remedy at best.

The fact that an easement is to be used to reach public lands may have a significant effect on the attitude with which a court approaches the problem. If there is a strong policy that public lands are to remain accessible to the public the court may require only a minimal showing to find the existence of an easement.

The influence of public policy was clearly evident in a 1970 California decision.[93] The opinion was the consolidation of two cases, *Gion v. City of Santa Cruz* and *Dietz v. King,* both involving the use of privately owned beaches, and the approaches thereto, by the public for a considerable time. The Court did not deny that its finding of dedication in both cases was an extension of California law in at least one respect: the application of implied dedication to open areas such as beaches. In support of its conclusion, the court cited Article XV, Section 2 of the California Constitution, which provides that no person shall be permitted to exclude the right of way

91. 354 F.2d 608 (2nd Cir. 1965).
92. PROSSER, *supra* note 87, at 587 n.68.
93. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). For articles written specifically on this decision see: 7 CALIF. W. L. REV. 259 (1970); 7 SAN DIEGO L. REV. 605 (1970); 11 SANTA CLARA LAW. 327 (1971); 44 S. CAL. L. REV. 1092 (1971); 18 U.C.L.A. L. REV. 795 (1971). It is interesting to note that the *Dietz* case was an action brought by the plaintiffs as representatives for the public. The action was brought under Section 382 of the California Code of Civil Procedure which is a provision dealing with joinder and representative actions similar to Rule 23 of the Federal Rules of Civil Procedure. A brief search reveals no other case where this section has been used to confer standing to represent the public in general. Strangely this issue was not discussed in the principal opinions nor in the opinion of the intermediate court. Dietz v. King, 80 Cal. Rptr. 234 (1969). It seems that this is one case where a private person succeeded in abating a public nuisance without showing special injury.

to any navigable waters when it is needed for a public purpose; Section 830 of the California Civil Code which has been interpreted to state a presumption in favor of public ownership of land between high and low tide; and six other statutes it felt indicated a strong public policy in favor of public access to the coast.[94] In conclusion the court stated:

> This court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than when well-defined roadways were at issue. . . . (Citations omitted) With the increased urbanization of the state, however, beach areas are now as well defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads us to the conclusion that courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways . . . . (Citations omitted)[95]

This decision and the Oregon decision on custom demonstrate the problems which coastal states are encountering with respect to their beaches. Similar problems will no doubt be encountered with other public lands. When public pressure becomes sufficiently great, it is likely that other extensions of the law will occur.

CONCLUSION

It is obvious that the statutes and common law theories examined provide no general right to cross private lands to reach the public domain. However, when one considers the California and Oregon beach experiences, it is not inconceivable that the existence of such a right could be declared at some time in the future. At the very least, the concepts examined should provide useful remedies in particular situations. Certainly the Unlawful Enclosure of Public Lands Act ought to be useful if one is excluded fom accessible public lands by unlawful means. Likewise, the concepts of dedication and

94. Gion v. City of Santa Cruz, *supra* note 93, at 59.

95. *Id.*

prescription are viable remedies when the necessary factual situation presents itself.

As was stated in the introduction the purpose of this comment is not to determine if a right of way across private land to reach public land ought to exist, but rather to determine if it does exist. No detailed examination of the desirability of the right will be made here. However, a few observations seem appropriate.

A court desiring to provide for access should be extremely careful of the method by which it reaches its result. For example, the *Gion-Dietz* decision has been counterproductive. Beaches that were previously open to the public have now been closed out of fear that continued use will lead to a declaration that they are public beaches.[96] It is doubtful that the owners can now terminate the public's right if adverse public use previously existed for more than five years. However, it will take litigation in each case to reopen the beaches. In the meantime they remain closed. Furthermore, since the opinion was unclear as to how a landowner can allow the public to use his beach and yet avoid dedication, it seems likely that those persons who might otherwise allow public use will be hesitant to do so.

On a gut level both prescription and implied-dedication seem somewhat unfair. In effect they penalize the generous landowner and reward the niggardly one. In terms of result and, possibly in terms of fairness the Oregon approach is preferable to that of California. On the other hand, the Oregon approach ignores the effect on those who have already erected substantial obstacles, such as buildings, on the dry sand area.

It is questionable whether the courts are the proper body to resolve this problem. As the volume of reports generated by the Public Land Law Review Commission attests, access is only one of many problems associated with the public domain. These problems are interrelated and a proper resolution requires that many diverse interests be considered. Courts are

96. 44 S. CAL L. REV. 1092, 1094-95 (1971).

not particularly well suited to this type of examination, and often lack the power or means to effectively resolve the problem even when the solution is clear. The problem is one that should be resolved by the legislative branch, where conflicting considerations of public policy can be properly weighed.

The Public Land Law Review Commission has proposed such state and federal governmental action as increased budgetary support for the acquisition of rights of way and the requirement of reciprocal rights of way where the private landowner holds privileges to use public lands.[97] There is one essential to this approach: money. The Bureau of Land Management estimates that it would need $1.6 billion to complete an adequate system of roads and trails. At present the average annual expenditure is $1 million for this purpose.[98] At this rate, the solution is only 1,600 years away! In the meantime the courts will have to struggle with the problem.

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97. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 5, at 214. A discussion of the laws and regulation which the federal land administering agencies presently follow with regard to access can be found in 1 HERMAN D. RUTH & ASSOCIATES, OUTDOOR RECREATION USE OF THE PUBLIC LANDS II-142 to 156 (Public Land Law Review Commission Report 1969).

98. U.S. DEP'T OF AGRICULTURE, PUBLIC ACCESS TO PUBLIC DOMAIN LANDS 7 (Economic Research Service Miscellaneous Publication No. 1122 1968). Admittedly this figure also includes the costs of development of roads and trails on the public domain as well as the cost of adequate access roads to it.