Wyoming Law Review

Volume 14 | Number 1 Article 2

January 2014

No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way over Abutting Private Land

Shelby D. Green

WYOMING LAW REVIEW

VOLUME 14 *2014* NUMBER 1

NO ENTRY TO THE PUBLIC LANDS: TOWARDS A THEORY OF A PUBLIC TRUST SERVITUDE FOR A WAY OVER ABUTTING PRIVATE LAND

*Shelby D. Green**

Property confers and rests upon power.[1]

I. INTRODUCTION

When Congress established Yellowstone National Park in 1872, the policy animating national land use underwent a dramatic shift. The Yellowstone Act directed the Secretary of the Interior to adopt rules and regulations to "provide for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or *wonders* within said park, and their retention in their natural condition."[2] Protection and preservation thus became the guiding principles. This was not, however, the government's original conception of the public lands. In fact, during the first hundred years of our nation, the policy had been one of disposal. And, if there is any truth to the quote above, then the United States government is all powerful, inasmuch as it owns more than a third of all land in the country.[3] Most of the government-owned lands are classified as "public

* Associate Professor of Law, Pace University School of Law, J.D. Georgetown University Law Center, B.S., Towson State College.

[1] *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture,* 66 N.Y.U. L. REV. 273, 277 (1991).

[2] Yellowstone Act of 1872, ch. 24, 17 Stat. 32, § 2 (codified at 16 U.S.C. § 22 (2012)) (emphasis added).

[3] BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977); U.S. PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND 19 (1970). The Bureau of Land Management (BLM) is an agency within the United States Department of the Interior, charged with administering America's public lands. *See* 43 U.S.C. § 1731 (2012). The federal government owns approximately 761 million acres of land, of which almost 725 million acres are commonly

domain," that is, open to settlement, public sale, or other disposition under the federal public land laws, and which are not exclusively dedicated to any specific governmental or public purpose. Other lands are "reserved," that is, set aside for some specific public purpose, such as wilderness areas or national parks, and exempt from the public land laws.

What does it mean that the government owns the public lands? "Ownership," in the sense of having an indisputable right of access and to enjoy for all manner of purposes, is a fluid concept. While most public land is theoretically open to the public for recreation, mining, and living—in the case of homesteads established in the nineteenth century, access to them by the public is not always assured. Despite what the term "public" in "public lands" suggests it has not been interpreted as vesting ownership rights or an unfettered right to access in the public. The government has often placed restrictions on access to public lands for various reasons, including conservation and protection of habitats. In recent decades, private abutting landowners have put up fences, technically on their own land, but with the decided purpose of controlling access to the national land—some even charging fees for access.[4]

These private landowners not only restrict public access, but have left the regulating agencies with inadequate access. The General Accounting Office has defined "inadequate access" to mean that the federal government does not have the "permanent, legal right for the public to enter federal land at the point(s) needed to use the land as intended by the managing agency."[5] In 1982, the Bureau of Land Management estimated that it (and the public) had access to only forty-two

---

thought of as public lands. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977). Approximately 470 million acres are under the jurisdiction of the BLM, an agency within the Department of the Interior; approximately 192 million acres are national forests under the jurisdiction of the Department of Agriculture; the Fish and Wildlife Service has jurisdiction over approximately 85 million acres; the National Park Service manages approximately 72 million acres; the Department of the Army manages approximately ten million acres; and the Army Corps of Engineers manages approximately eight million acres. *Id.* These "public" lands include those acquired by treaty from other nations, including Indian Tribal lands, and lands ceded to the federal government by the thirteen original colonies. *See* Marla Mansfield, *Symposium: A New Era for the Western Public Lands: When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193, 195 (1994).

[4] *See* Jim Robbins, *Rich Newcomers Closing the Wilds of Montana,* N.Y. TIMES, Monday, April 26, 1999 at A14, *available at* http://www.nytimes.com/1999/04/26/us/rich-newcomers-closing-the-wilds-of-montana.html.

[5] U.S. GEN. ACCOUNTING OFFICE, RCED-92-116BR, FEDERAL LANDS: REASONS FOR AND EFFECTS OF INADEQUATE PUBLIC ACCESS 1 (April 14, 1992).

percent, or 198 million of the 470 million acres, of public lands it managed.[6] The remaining 270 million acres were, or could be, blocked to public access by virtue of adjacent private land. In 1986 the amount of the inaccessible areas was given a new estimate—twenty-five million acres.[7] However, that number was revised up in 1993, after directed programs, including purchase of easements and fee simple interests, and condemnation, to thirty-two million acres of BLM land.[8] At the same time, 17.3 million acres, or approximately nine percent of the 191 million acres managed by the National Forest Service, did not have adequate access.[9] In 2008, nearly twenty million acres of BLM land had inadequate access.[10]

Achieving access for the agencies, as well as for the public, seems a Herculean task. In 1993, the National Forest Service determined that to provide adequate access to these lands, approximately 28,000 easements, involving an estimated 7,500 miles of rights of way, were needed.[11] Despite the BLM's successful efforts to acquire legal access to about 4.5 million acres of federal land, it would still need to acquire an estimated 13,000 easements to eliminate the backlog of access problems.[12]

Current federal management policies necessitate consistent public access to public lands, particularly as in recent decades, management of public lands has shifted away from exploiting the extractive value, through mining and timber, and towards increasing use for recreational activities, such as hiking, biking, camping, hunting, fishing, and photography. Recreational usage requires largely

---

[6] Statement of Calvin Ragsdale, *Access to Public and Private Lands before: Hearing Before the Subcomm. on Public Lands, Reserved Water and Res. Conservation of the S. Comm. on Energy and Natural Res.*, 99th Cong. 49, 53 (March 15, 1986); *see also* Adela Backiel, *Access to Public and Private Lands before: Hearing Before the Subcomm. on Public Lands, Reserved Water and Res. Conservation of the S. Comm. on Energy and Natural Res.*, 99th Cong. 184–185, 198, 205 (March 15, 1986).

[7] *Id.*

[8] *Public Lands and National Forests Lookout: Obstacles to Adequate Public Access, Oversight Hearing before the Subcomm. on National Parks, Forests & Public Lands, of the H. Comm. on Natural Res.*, 103d Cong. (1993) (testimony of Michael J. Penfold, Assistant Director, Land and Renewable Resources, Bureau of Land Management) [hereinafter *Penfold*]. *See also* U.S. GEN. ACCOUNTING OFFICE, RCED-92-116BR, FEDERAL LANDS: REASONS FOR AND EFFECTS OF INADEQUATE PUBLIC ACCESS 1 (April 14, 1992) (estimating 50.4 million acres with inadequate access).

[9] *Obstacles to Adequate Public Access: Hearings before the House Subcommittee on National Parks, Forest and Public Lands, of the H. Comm. on Natural Res.*, 103d Cong. (1993) (testimony of James Overbay, Deputy Chief, Forest Service); *see also* U.S. GEN. ACCOUNTING OFFICE, T-RCED-94-72, FEDERAL LANDS: PUBLIC LAND ACCESS, (November 9, 1993).

[10] U.S. DEPT OF THE INTERIOR BUREAU OF LAND MGMT., Instruction Memorandum No. 2008-092 (Mar. 28, 2008).

[11] *Id.*

[12] *Id.*

unimpeded public access,[13] as "[i]nadequate access reduces opportunities for the public to use what it owns. It may [also] hinder proper management of public land by the BLM under multiple use principles."[14]

This article explores the problem of inadequate access and why owners of private property abutting public lands cannot fence out the public if their sole or primary purpose is to deny access to public land. The reasons why such landowners should not be allowed to put up fences, even on their own land, if the effect is to hinder the public's access to public land are several. First, it is opportunistic and unjustly interferes with citizens' ability to enjoy the interest they hold in public lands. Second, it denies citizens access rights rooted in the common law. Third, and perhaps most compelling, because of general notions of property ownership and the evolving public trust doctrine, the right to exclude the public to the extent of access to public lands never inhered in the adjoining private land title.

This article begins with a general discussion of what it means to own land privately in our property regime. The second section discusses the United States' landholdings in the country, the differences in ownership rights from that of private ownership, and the obligations imposed upon the federal government as sovereign and as proprietor of public lands. After that discussion, the article examines the historical causes for the lack of access, along with the federal government's responses. This leads into a discussion of some of the legal theories available for assuring access. Finally, the argument presented is that, notwithstanding the Supreme Court's attempt to close the door to implied easements in favor of the government,[15] the expanded concept of public trust may still provide a path through.

---

[13] *Penfold*, *supra* note 8. After peaking some years ago, recreational visitation to the national parks has, at the very best, plateaued. *Visitation Trends in National Parks*: *Hearing before the Subcomm. on National Parks, Recreation and Public Lands of the H. Res. Comm.*, 109th Cong. (2006) (testimony by John Schoppmann, Executive Vice President, Forever Resorts). Although the visitation from year to year varies, the trend in recreational visits is generally declining. *Id.* This decline comes despite an increase in park units and an ever-increasing National Park Service budget. *Id.* The decline in park usages has been attributed to the effects of drought conditions reducing the ability to engage in watercraft activities, high gasoline prices making travel more expensive, high access fees, a decline in the number of international visitors, changing lifestyles (people becoming more sedentary), and the existence of other recreational choices (casinos, water parks, etc.). *Id.* Moreover, some assert that the Park Service, through rulemaking or management policies, restricts access to thousands of park visitors who traditionally used the parks for recreational pursuits. *Id.* Take, for example, the Park Service's attempt to limit or eliminate traditional motorized recreational pursuits. *Id.*

[14] *Penfold*, *supra* note 8.

[15] *See* Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

II. THE PROPERTY CONSTRUCT

Blackstone described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[16] No doubt, property confers and rests upon power, since it bestows on owners a kind of sovereignty because the state stands behind the owners' assertions of right.[17] Morris Cohen long observed:

> The recognition of private property as a form of sovereignty is not itself an argument against it [for] some form of government we must always have . . . . While, however, government is a necessity, not all forms of it are of equal value. At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.[18]

At the same time, property vests upon its owner a measure of autonomy, a private sphere beyond which the government may not intrude without permission. Of the rights said to inhere in property, i.e., to possess, use, enjoy fruits and profits, destroy, alienate, the right to exclude is often identified as the most important,[19] for it is this power that enables all the others. Possessory interests in property (fee simples, life estates) confer upon their owners the right to exclude. Non-possessory interests (easements, real covenants) confer upon their beneficiaries the power to preclude possessory interest holders from excluding them. In either case, this right exists because of the state's willingness to back up the landowner in his enjoyment. Thus, this means that upon an unauthorized entry of his property, the landowner can seek the aid of the state to enjoin the intrusion.[20]

---

[16] 2 WILLIAM BLACKSTONE, COMMENTARIES *1. The eighteenth century Blackstonian conception of property as absolute rights in things has long since given way to the idea of property involving relations between persons with respect to things. *See* Antonio Gambaro, *Property Rights in Comparative Perspective: Why Property is So Ancient and Durable,* 26 TUL. EUR. & CIV. L.F. 205, 225–26 (2011). In this latter conception, an owner is said to possess a bundle of rights: to possess, to use, to enjoy the fruits and profits of, to destroy, to alienate, and to exclude. *See* Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings* 88 COLUM. L. REV. 1667, 1668 (1988). None of the sticks in the bundle can be said to be absolute, because the state may, for the larger societal interest, limit or otherwise regulate enjoyment of these rights. For example, a landowner may be forbidden from possessing property for which a certificate of occupancy has not been issued; to use a structure in a residential zone for industrial purposes, *Village of Euclid v. Ambler Realty Co.*, 271 U.S. 365 (1926); to tear down a structure deemed a historical landmark, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); or to exclude tenants based upon race, Fair Housing Act of 1968, 42 U.S.C. § 3601 (2012).

[17] Alexander, *supra* note 1, at 277.

[18] Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 14 (1927).

[19] Kaiser Aetna v. United States, 444 U.S. 164, 176 (2000).

[20] *See, e.g.*, Jacques v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

III. THE FEDERAL GOVERNMENT AS PROPRIETOR

Determining the power to exclude in the context of federal lands requires first the determination of who holds ownership of the lands and the extent of any exclusive possessory interest in that ownership. Whatever interest owners of land abutting public lands hold must be derived from and limited by the interest held by the original transferor, the federal government. The Property Clause of the Constitution provides: "Congress shall have power to . . . make all needful Rules and Regulations respecting . . . Property belonging to the United States . . . ."[21] What does this power insinuate about the government's ownership of lands? According to Professor James Huffman, there are several possible understandings of the legal status of public lands in relation to the government and its citizens—the public lands are:

1. Within the government's sovereign power
2. A commons available to all comers
3. Held by the government as a trustee for all as tenants in common
4. Held by the government as trustee acting for the citizenry
5. Held by the government as a proprietor[22]

Professor Huffman asserts that only the first statement is true without question, explaining that the history of the western expansion of the United States has been described in terms of the gradual acquisition of lands previously owned by other European nations and by the various aboriginal populations.[23] "It is a history of the extension of the sovereignty of the United States in the face of competing claims of sovereignty."[24] The government's goal of expansion though, was twofold: (1) establish an organized system for settlement of the western lands and therefore limit random occupation by squatters, and (2) obtain a return to the treasury through sales of tracts to individuals.[25] This exercise of sovereignty occurred notwithstanding purported guarantees to access in legislation, particularly the Organic Act of 1897,[26] which states: " . . . [n]or shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating and developing

---

[21] U.S. CONST. art. IV, § 3, cl. 2.

[22] James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 255 (1994).

[23] *Id.* at 256.

[24] *Id.*

[25] *Id.* at 257. The other propositions can be dismissed largely because of the power of the government to control access and use of the public lands. *Id.* at 259. Huffman points out, though, that these laws were often not enforced such that unauthorized occupation historically was rampant. *Id.* at 259.

[26] Organic Act of 1897, ch. 2, 30 Stat. 34 (codified at 16 U.S.C. § 473).

the mineral resources thereof . . . ."[27] This language may be interpreted not so much as guaranteeing access as ensuring the public lands are available for all uses. Additionally, as discussed below, the Supreme Court has recognized that Congress holds the public lands in trust for the people of the whole country, but cautioned that it is for Congress to determine how that trust is to be administered.[28]

IV. THE FEDERAL GOVERNMENT AS TRUSTEE

> Congress retains the power and duty to regulate how the lands are to be used.[29]
>
> Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.[30]

Congress' power to direct particular uses of the public lands derives from the Property Clause of the Constitution, under which "Congress exercises the powers both of a proprietor and of legislature over the public domain."[31] The Supreme Court has consistently interpreted Congress' power under the Property Clause to

---

[27] *Id.*

[28] Light v. United States, 220 U.S. 523, 536 (1911) ("[T]he government may deal with such lands precisely as a private individual may deal with his farming property.") (quoting Camfield v. United States, 167 U.S. 518, 524 (1897)). *Camfield* is discussed *infra* at notes 37–38 and accompanying text.

[29] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); *Camfield*, 167 U.S. at 524. This power is manifest from the language appearing in legislation. For example, in the National Park Service Organic Act of 1916, that created the National Park Service, Congress stated a goal to "conserve the scenery and the natural and historic objects and the wildlife therein." Act of 1916, Pub. L. No. 108-352, 118 Stat. 1395, (codified at 16 U.S.C. § 1 (2012)). In subsequent legislation, Congress reiterated these goals and priorities. In the General Authorities Act of 1970, Congress stated the obligation of the government as to national parks and sought to insure that the basis for decision-making concerning the National Park System continued to be the criteria provided by the National Park Service Organic Act (providing that "Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 1(c) of this title, shall be consistent with and founded in the purpose established by section 1 of this title [. . . to the common benefit of all the people of the United States."). 16 U.S.C. § 1a-1 (2012). ("The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.").

[30] Robin W. Winks, *The National Parks Service Act: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 613 (1997).

[31] *Kleppe,* 426 U.S. at 540.

be extremely expansive, repeatedly observing, that "[t]he power over the public land thus entrusted to Congress is without limitations."[32] Yet, these statements cannot be taken at face value since the Supreme Court and lower courts have recognized limitations, although narrow, on the way in which the government deals with public land. Judicial review of Congressional acts as to federal lands has been limited to determining whether there is a rational relationship between Congress' stated ends and its chosen means.[33] Thus, even though the Supreme Court has acknowledged the special status of public lands under the Property Clause, it has not been inclined to set limits on the way in which Congress manages public lands, at least under a broad common law standard.

The Court's general reluctance to intrude into this area is made clear in *Light v. United States*.[34] Light, a rancher, grazed his cattle on a National Forest without authorization and was charged with trespass. His argument that Congress could not constitutionally withdraw large areas of land from settlement without the consent of the state where the land was located was unsuccessful.[35] The Court explained that the Government had the right to deal with federal lands as an ordinary individual; it may sell or withhold them from sale. Further:

> The courts cannot compel it to set aside lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes . . . . These rights are incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.[36]

In *Camfield v. United States*, the Court, in very broad terms, laid out the nature of government ownership of public lands.[37] The government possesses all the "rights of an ordinary proprietor, to maintain possession and to prosecute

---

[32] *Id.* at 539; *see also* United States v. San Francisco, 310 U.S. 16, 28 (1940); Alabama v. Texas, 347 U.S. 272, 273 (1954); United States v. California, 332 U.S. 19, 27 (1987); Gibson v. Chouteau, 80 U.S. 92, 99 (1871); United States v. Gratiot, 39 U.S. 526, 538 (1840).

[33] Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1304 (D.C. Cir. 2004) ("The only limitation on congressional authority [preemptively to regulate private activities under the Commerce Clause] is the requirement that the means selected be reasonably related to the goal of regulating interstate commerce.") (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 291 (1981) (addressing legislative powers under the Commerce Clause)).

[34] 220 U.S. 523 (1911).

[35] It is well-settled that one who, without right, enters public lands of the United States is a trespasser, see Jones v. United States, 195 F.2d 707, 709 (9th Cir. 1952), and that the United States, like any other private landholder, is entitled to protect its property against such trespassers. *See* Camfield v. United States, 167 U.S. 518, 524 (1897); Utah Power and Light Co. v. United States, 243 U.S. 389, 404 (1916); United States v. Gardner, 903 F. Supp. 1394, 1402 (D. Nev. 1995).

[36] *Light*, 220 U.S. at 537.

[37] 167 U.S. 518 (1897).

trespassers . . . [i]t may deal with such lands as a private individual may deal with his farming property; . . . [i]t may sell or withhold them from sale, . . . [i]t may open them to preemption or homestead settlement."[38] This general reluctance to scrutinize the land management decisions of the federal government may be, in large part, in deference to or a consequence of the political nature of these decisions. According to Professor Huffman, "the idea that the government can own lands in the same sense as any private owner is clearly a myth."[39] Primarily, the management decisions of the federal government are always political, whether it is acting in its sovereign or its proprietary capacities.[40] Understanding the legal status of the public lands as the property of the United States requires a consideration of the factors, both pragmatic and political, that influence the decisions of the agencies charged with the management of these lands.

These cases clearly demonstrate the Supreme Court's reluctance to second-guess any management decision by Congress as to its proprietary property. They almost invariably involve challenges to an act of the federal government rather than the failure to act or the failure to satisfy the duties normally associated with trusteeship.[41] Professor Huffman explains that it is also important to understand that "the government acting in its proprietary capacity is different from a private party acting in its proprietary capacity because the government possesses unique coercive powers,"[42] powers which also exist when the government is acting in its sovereign capacity. Like any proprietor, the government has the legal authority to grant or preclude access to, and use of, the public lands. Moreover, "[s]ubject to the minimal limits of the Constitution, the government may exercise these powers so as to grant or deny benefits to or to permit or deny access to whomever

---

[38] *Id.* at 524.

[39] Huffman, *supra* note 22, at 262.

[40] The federal government can also influence land and resource markets in ways not available to private parties through subsidization of the use of publicly owned resources to the competitive disadvantage of private owners, the regulation of private land and resource markets to the advantage of public lands, and the withholding of public resources from the market to the advantage of private owners and to the disadvantage of consumers. Huffman, *supra* note 22, at 267–68.

[41] The latter challenges have been presented to the lower courts with mixed results. *See, e.g.*, Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987) (overturning BLM's revocation of withdrawals under plans adopted prior to the Federal Land Policy Management Act (FLPMA) where the revocations did not satisfy new FLPMA criteria); Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) (refusing to require the Secretary to act to claim reserved water rights noting that while the government holds the land in trust, "it is not for the courts to say how that trust is to be administered." Indeed, here Congress had set out statutory directives for the management and protection of the public lands, and those duties "comprise[d] all the responsibilities which defendants must faithfully discharge.") (citing Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980) (rejecting distinction between "trust" and "statutory" responsibilities in management of national parks system, holding "these highest principles of management found in the statute . . . also intended to serve as the basis for any judicial resolution of competing private and public values and interest in areas of the National Park System," and concluding that the statute, 43 U.S.C. § 1701, 1782(c), embodies the entire duties and responsibilities of the Secretary in managing public lands).

[42] Huffman, *supra* note 22, at 269.

it chooses."[43] Sometimes, the conferral or denial of benefits or access is intentional and based upon various policy objectives. In other ways, the result seems purely accidental or random.

V. REASONS FOR LACK OF ACCESS: PUBLIC LAND POLICIES OVER THE YEARS

Until the last three decades, Congress seemed oblivious to the need to ensure that the wonders of the forests and wilderness areas are accessible to the public. Since the early days of the republic, Congress engaged in acts calculated, if not by design, by ignorance, to cut off the public from vast parts of the wild through aggressive land disposal policies. From 1812 to 1946 alone, the government disposed of more than a billion acres to private ownership, much of it sold at a pittance.[44]

Beginning in the mid-nineteenth century, Congress began land grants to railroads to aid in the establishment of a transcontinental railroad.[45] The land

---

[43] *Id.*

[44] The first public land policy was one of disposal, beginning with the Land Ordinance of 1785 that established the rectangular land survey system and under which public land was sold to reward soldiers and sailors and to raise revenue. *See* Land Ordinance of 1785, ch. 32, 1 Stat. 563 (1785). By 1805, hundreds of thousands of acres had been sold. In 1812, the General Land Office was established to superintend, execute, and perform such acts and things touching on public lands. Steven Martin, *A Long Tradition of Federal Resource Protection,* U.S. Dept. of Interior Bureau of Land Mgmt., http://www.blm.gov/wo/st/en/info/history/sidebars/law_enforcement/a_long_tradition_of.html (last visited Nov. 27, 2013). Tracts of eighty acres sold for $1.25 per acre. *See* Land Act of 1820, ch. 51, 3 Stat. 566. *See generally* George Cameron Coggins & Doris K. Nagel, *"Nothing Beside Remains': The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 480 n.24 (1990). Under the Armed Occupation Act of 1842, 160 acres were awarded to persons willing to fight Indians in Florida, if they occupied and cultivated the land for five years. *See* Armed Occupation Act of 1842, ch. 122, 5 Stat. 502 (1841). In the settlement of Oregon Country in the 1850's, 320 acres were given to individuals, and 640 to couples willing to settle in Oregon Country. *See* Carlos A. Schwantes, *Pacific Northwest: An Interpretive History* 103 (1989). The Timber & Stone Act of 1878 authorized the sale of nontillable public timberland for personal use for $2.50 per acre; 160 acre parcels if the purchaser planted forty acres into trees spaced no farther than twelve feet apart and kept them growing for ten years. *See* Timber and Stone Act of 1878, ch. 151, 20 Stat. 89 (1878) (codified at 43 U.S.C. § 311 (2012)). The Free Timber Act of 1878 gave miners the right to cut timber on public domain mineral claims for mining and domestic purposes. *See* Free Timber Act, ch. 150, 20 Stat. 88 (1878) (codified at 16 U.S.C. § 604 (2012)). The Desert Land Act of 1877 enabled settlers to buy 640 acres of desert land for $1.25 per acre if they constructed irrigation systems. *See* Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (1877) (codified at 43 U.S.C. § 321 (2012)).

[45] The land grants included: the 1862 Pacific Railroad Act, ch. 120, 12 Stat. 489 (1862), the 1864 Northern Pacific Railroad Act, ch. 217, 13 Stat. 365 (1864), and the General Railway Act of 1875, ch. 152, 18 Stat. 482 (1875). There is some confusion among the courts as to exactly what interest, whether a fee interest or merely a right of way, was conveyed to the railroads under this Act. *See* Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1014–15 (S.D. Ind. 2005) (despite instrument's use of term "right of way" for grants to the railroads under the 1862 and 1864 acts, railroads acquired title to the estate, subject to a right of reverter in the federal government; but grants under the 1875 act conveyed only a right of way, leaving title to the estate in the federal government).

grants provided land for every mile of track laid. The land surrounding the railroad right of way was divided into "checkerboard" blocks, the odd-numbered blocks being granted to the railroads, the even-numbered reserved by Congress. It was the belief that these even-numbered blocks would be viewed of such value, as a consequence of railway access, that they could be sold for high sums, thereby making up for the grant to the railroads. However, Congress had difficulty selling the even-numbered tracks and ended up giving them away under the Homestead Act of 1862.[46] Under the railroad and homestead acts, Congress sought to promote the settlement of the West. Up to 160 acres of federal land was given to individuals who agreed to live on the land and make improvements for five years.[47] Although the Homestead Act made no provision for access to and from granted land over the lands retained by the United States, the presumption was that "'an implied license' to use public lands would provide settlers with unimpeded access to their property."[48] However, courts have rejected the argument that the right of access accompanying the grant of an inholding was necessarily a property interest in the nature of an easement.[49] Nevertheless, homesteaders' implied access to cross federal lands remained largely unimpeded until the late nineteenth century when "efforts expanded to protect the nation's natural resources from the results of what was perceived as overly generous land use policies."[50]

---

[46] Pub. L. No. 37-64, (codified at 43 U.S.C. § 161–284 (repealed 1976)). Subsequent enactments increased the amount of acres which could constitute a homestead. *See* Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (1877) (codified at 43 U.S.C. §§ 321–339 (2012)) (allowing larger than 160 acres in dry western areas); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed 1976) (allowing homesteads of 320 acres for dry farming).

[47] Pub. L. No. 37-64, (codified at 43 U.S.C. § 161–284 (repealed 1976)); *see also* Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (1877) (codified at 43 U.S.C. §§ 321–339 (2012)); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed 1976); Homestead Act of 1862, Pub. L. No. 37-64 (1862) (codified at 43 U.S.C. § 161–284 (repealed 1976)). Under both the railroad and homestead grants, those who acquired land chose the best land available for their needs. Perry R. Hagenstein, *The Federal Lands Today: Uses and Limits, in* RETHINKING THE FEDERAL LANDS 74, 82 (Sterling Brubaker, ed., 1984). The land left in federal ownership was the land less suited for private use. *Id.* The current BLM lands are thus what were left over.

[48] United States v. Jenks, 22 F.3d 1513, 1515 (10th Cir. 1994) (quoting Buford v. Houtz, 133 U.S. 320, 326 (1890)).

[49] An inholding is private land located within and surrounded by federal lands. *See* United States v. Jenks, 129 F.3d 1348, 1354 (10th Cir. 1997); *see also* McFarland v. Kempthorne, 545 F.3d 1106 (9th Cir. 2008) ("The Homestead Act did not grant settlers a vested property right of access over public lands to their homesteads, but instead merely sanctioned the longstanding customary use of public lands by a settler.") (quoting Fitzgerald Living Trust v. United States, 460 F. 3d 1259, 1265 (9th Cir. 2006)).

[50] *Jenks*, 22 F.3d at 1515, (quoting Rights-of-Way Across National Forests, 43 Op. Att'y Gen. No. 26243 (1980)).

Yet another law Congress enacted with good intentions, but which proved shortsighted in its consequences, was the Mining Law of 1872.[51] Congress aimed to promote mineral exploration and development on federal lands in the western United States, offering the opportunity to obtain clear title to mines already worked, thereby settling the West.[52] Under the terms of the law, any person could go onto public lands in search of valuable minerals and obtain a patent to the areas mined upon discovery of certain minerals.[53] Prior to patent and during initial exploration of a prospective mining claim, the public retained the right of access across a claim to get to other public lands, so long as recreational usage did not materially interfere with exploration and development of the claim.[54] After patenting the claim, the patent holder obtained the rights of any other private owner and could block entry by the public.[55]

---

[51] General Mining Act of 1872, ch. 152, 17 Stat. 91–96 (1872) (codified at 30 U.S.C. §§ 22–42). *See also* Shelby D. Green, *Reclaiming the Public Domain by Repeal of the Mining Law of 1872*, 6 HOFSTRA PROP. L. J. 85 (1993).

[52] 30 U.S.C. § 23 (2012).

[53] 30 U.S.C. § 22 (2012). The statute requires an annual maintenance work totaling $100, or an equivalent fee in its place. *See* 30 U.S.C. § 28b (2012); 30 U.S.C. § 28f (2012). Upon discovery, the prospector can obtain a patent to the area mined for as little as $2.50 per acre for placer claims and $5.00 per acre for lode claims. 30 U.S.C. § 37 (2012).

[54] *See* United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1286 (9th Cir. 1980) (holding there was no evidence "that the public use of land included within their unpatented mining claim has 'materially interfered' with any mining activity. Absent such evidence, section 612(b) applies in this case to afford the general public a right of free access to the land on which the mining claims have been located for recreational use of the surface resources and for access to adjoining property.").

[55] 30 U.S.C. § 26 (2012). Although an individual may still pursue exploration and development of mining claims on public lands, there has not been a patent issued since 1994 under the Mining Act of 1872. *See* G. Donald Massey, 142 I.B.L.A. 243, 245–46 (1998). Apart from access problems created by granting private property rights amid public lands, the activities involved in mining are threatening the natural environment where they occur in unique natural areas. *See Mining Law Impact in Arizona: Hearing before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.,* 100th Cong. (2007) (testimony of Chuck Huckleberry, Cnty. Admin., Pima Cnty., Ariz.). The scarred landscapes and little or no chance of meaningful reclamation of public lands is the legacy of the 1872 Mining Law. *Id.* Mining impacts on air, water, and soil quality continue to cause public health concerns. *Id.* However, in recent years, the BLM has enacted fairly elaborate regulations aimed at minimizing these impacts. Under these regulations, miners are required to submit Mining Plans of Operations ("MPOs") to the BLM before engaging in mining operations on claims if those operations are greater than a "casual use" that would disturb more than five acres of land. *See* 43 C.F.R. §§ 3809.11, 3809.21 (2012). Similarly, the BLM may have to perform the consultation and compliance required by the Endangered Species Act and/or the Magnuson-Stevens Fishery Conservation and Management Act, 43 C.F.R. § 3809.411(a)(3)(iii) (2012); Native American tribes, 43 C.F.R. § 3809.411(a)(3)(iv) (2012); the federal Clean Water Act, 43 C.F.R. § 3809.411(a)(3)(ix) (2012); NEPA, 43 C.F.R. § 3809.411(a)(3)(ii) (2012) (requiring the preparation of an environmental impact statement before approving an MPO if the approval would constitute a "major Federal action [] significantly affecting the quality of the human environment"); 42 U.S.C. § 4332(2)(C) (2012) (systematic evaluation of environmental impacts); and the Federal Land Policy Management Act ("FLPMA") (requiring the Secretary of Interior to "take any action necessary to prevent unnecessary or undue degradation of the [public]

Even as it seems that in the nineteenth century, the need for public access to public lands or rights-of-ways over private lands did not occur to Congress as it doled out these parcels for railroad construction, for private ownership, or for mineral exploration, later congressional acts and agency policies have continued to exacerbate the problem of access, including temporary closures,[56] rules banning certain types of vehicles,[57] and the imposition of user fees.[58] All the while, the

---

lands." 43 U.S.C. § 1732(b) (2012)). "Unnecessary or undue degradation" [UUD] is defined in the regulations to mean "conditions, activities, or practices" that fail to comply with the "performance standards in [43 C.F.R.] § 3809.420," that fail to comply with "other Federal and state laws related to environmental protection and protection of cultural resources," that are "not 'reasonably incident' to prospecting, mining, or processing operations" as defined in 43 C.F.R. § 3715.0–5, or that "[f]ail to attain a stated level of protection or reclamation required by specific laws" in special status areas. 43 C.F.R. § 3809.5 (2012). FLPMA and its implementing regulations require the Secretary to "take any action necessary" to prevent UUD. 43 U.S.C. § 1732(b) (2012).

[56] FLPMA gives the BLM authority to temporarily close off federal lands: "in the management of lands to protect the public and assure proper resource utilization, conservation, and protection," "public use and travel may be temporarily restricted." 43 C.F.R. § 8364.1 (2012). Areas may be closed to protect health and safety, prevent excessive erosion, prevent unnecessary destruction of plant and wildlife habitat, protect the natural environment, preserve areas having cultural or historical value, protect scientific studies, or preserve scientific values. 43 U.S.C. § 8364.1 (2012); *see also* 43 C.F.R. § 8364.1 (2012).

[57] Under FLPMA, the BLM has the authority to close off the public domain from certain types of vehicles, such as off road vehicles. 43 U.S.C. § 8342.1(2012); *see* Humboldt Cnty. v. United States, 684 F.2d 1276, 1283–84 (9th Cir. 1982) (upholding BLM assertion that it had the authority to temporarily close area it was considering designating as wilderness, although notice to public and hearing were required for designation of land as wilderness, and upholding BLM's power to close areas to off-road vehicles, even when two-wheel drive vehicles allowed). There is a current controversy between various factions and within the federal government as to the use of national parks by all-terrain vehicles and snowmobiles. *Motorized Recreation on Federal Land: Hearing Before the Subcomm. on Forests and Forest Health*, *of the H. Res. Comm.*, 106th Cong. (2005) (testimony of Dan Heinz). The NPS has been exploring the issue of imposing limits on access for use by these vehicles, only to be met with great reaction by these users. *Id.*

[58] *See* 16 U.S.C. § 6801, 6802 (2012). The Federal Lands Recreation Enhancement Act of 2004 authorized the Forest Service and BLM to impose fees for use of certain facilities and for entry into certain governmental lands. *Id.* However, the Act contains a number of provisions designed to protect free access. *Id.* There are prohibitions on charging Standard Amenity or Expanded Amenity fees,

> (A) solely for parking, undesignated parking, or picnicking along roads or trailsides, (B) for general access . . . (C) for dispersed areas with low or no investment . . . (D) for persons who are driving through, walking through, boating through, horseback riding through, or hiking through Federal recreational lands and waters without using the facilities and services, (E) for camping at undeveloped sites that do not provide a minimum number of facilities and services . . . , (F) for use of overlooks or scenic pullouts, (G) for travel by private, noncommercial vehicle over any national parkway or any road or highway established as a part of the Federal-aid system.

Id.; 16 U.S.C. § 6802(d)(1) (2012). It also prohibits the Secretary of the Interior from charging an entrance fee for federal recreational lands and waters managed by the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service. *Id.*; 16 U.S.C. § 6802(e)(2) (2012). The Act further provides that fee day-use "areas" must contain six minimum amenities: designated developed parking, a permanent toilet facility, a permanent trash receptacle, interpretive sign or kiosk, picnic

access issue had been left to the individual parties involved. Congress did not foresee what the maze of legislation on the public lands would portend or how they might complicate the fulfillment of the new policies of preservation and conservation that began with the creation of Yellowstone National Park.[59] The Forest Reserve Act of 1891 followed, empowering the president to create "forest reserves: by withdrawing forest lands from the public domain."[60] In 1897, the Organic Administration Act directed that national forests be managed to improve and protect the forests or "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."[61] While courts have largely deferred to the executive on the management and disposal of federal lands, Congress, through legislation had long imposed specific duties and limitations on its

---

tables, and security services. 16 U.S.C. § 6801; 16 U.S.C. § 6802(f)(4)(D) (2012). There have recently been claims by groups that the imposition of certain user fees exceeded the statutory authority, that they were imposed merely for parking, or where users are merely passing through on a hike or bike ride, in areas called "high impact" areas (although not authorized in the statutes) or engaged in activities called special activities, under a new definition). *Federal Lands Recreation Enhancement Act Oversight, Hearing on H.R. 3283 Before the S. Comm. on Pub. Lands and Forests of the S. Comm. on Energy and Natural Res.*,109th Cong. (2005) (testimony of Kitty Benzar, Co-Founder, Western Slope No-Fee Coalition).

[59] The Yellowstone Park Act had the approval of President Ulysses S. Grant, who signed it into law on March 1, 1872. The text of the Act follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the tract of land in the Territories of Montana and Wyoming lying near the head-waters of the Yellowstone River, and described as follows, . . . is hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers, and removed therefrom.
>
> SEC. 2. That said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation, from injury or spoliation, or all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition. . . . He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit.

Yellowstone Act of 1872, ch. 24, 17 Stat. 32, § 2 (codified at 16 U.S.C. § 22 (2012)).

[60] Forest Reserve Act 1891, ch. 561, § 24, 26 Stat. 1103 (1891) (codified at 16 U.S.C. § 471 (repealed 1976)). *See also* Mont. Wilderness Ass'n v. United States, 496 F. Supp. 880, 888 (D. Mont. 1980), *aff'd on other grounds*, 655 F. 2d 951 (9th Cir. 1981). President Cleveland issued a proclamation reserving approximately twenty million acres as forest lands. Proclamation No. 19, 29 Stat. 893; (Feb. 22, 1897); Proclamation No. 25, 26, 29 Stat. 902. (Feb. 22, 1897).

[61] Organic Act of 1897, ch. 2, 30 Stat. 34 (codified at 16 U.S.C. § 551 (2012)).

agents charged with managing the federal lands.[62] The courts have held the government to the promises of these acts, at first, broadly interpreting the Organic Act as making "resource protection the primary goal," making "resource protection the overarching concern," or as establishing a "primary mission of resource conservation," a "conservation mandate," "an overriding preservation mandate," "an overarching goal of resource protection," or "but a single purpose, namely, conservation."[63]

Continuing this protection policy, Congress adopted a series of Acts throughout the early twentieth century. In 1903, lands were withdrawn from the public domain to create a system of wildlife preserves.[64] In 1906, the National Monument and Antiquities Act was enacted empowering the president to proclaim national monuments on federal lands containing historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.[65] The National Park Service Organic Act of 1916 established the National Park Service, and required the Secretary of the Interior to maintain national parks and provide facilities and services for their public enjoyment through concessionaries or otherwise.[66]

The enactment of the Wilderness Act of 1964[67] brought the clearest recognition of the special values inhering in the natural environment that need protection. The Act mandated the federal agencies manage wilderness areas to

---

[62] *National Park Service Management: Hearing on H.R. 434 and H.R. 8668 Before the Subcomm. on National Parks, Recreation and Public Lands of the H. Res. Comm*, 109th Cong. (2005) (testimony of John Wade, Chair, Coalition of National Park Service Retirees).

[63] *See* Winks, *supra* note 30, at 615. The proposed revisions to the NPS operations manual seemingly purports to lift use to the equivalent value of conservation. *See id.* at 615.

[64] *See* 16 U.S.C. §§ 668dd–668ee (2012). These preserves are now administered by the National Wildlife Refuge System. 16 U.S.C. § 668dd(a)(1) (2012).

[65] 16 U.S.C. § 431 (2012). Congress has limited the power of the President to designate lands as monuments in two states: Wyoming, 16 U.S.C. § 431a (prohibiting further designations without express congressional approval) and Alaska, 16 U.S.C. § 3213(a) (requiring congressional approval for designations exceeding 5,000 acres).

[66] 16 U.S.C. § 1 (2012). The Act seemed to express two arguably conflicting ends: conservation and public enjoyment. Winks, *supra* note 30, at 603. It requires the Secretary of the Interior to maintain national parks and provide facilities and services for their public enjoyment through concessionaries or otherwise. *See* 16 U.S.C. § 1 (2012). The preamble to the Act states the aims as: "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* Winks reconciles the apparent conflict by finding the aim of the Act was to conserve the scenic, natural, and historic resources, and the wildlife found in conjunction with those resources, in such a way as to leave them unimpaired, and that this mission had and has precedence over providing means of access, if those means impair the resources, however much access may add to the enjoyment of future generations. *Id.*; Winks, *supra* note 30, at 613.

[67] 16 U.S.C. §§ 1131–36 (2012).

"leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character;"[68] and that "wilderness areas . . . be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[69]

The current land policy emphasizes management of multiple uses and preservation.[70] In 1976, Congress enacted sweeping legislation with a mandate to the land management agencies for comprehensive land use planning. The Federal Land Management Policy Act of 1976 ("FLPMA") provided the BLM with land management responsibilities, and with permanent, comprehensive guidelines for carrying out its mandate.[71] FLPMA requires land use planning for public lands under BLM's jurisdiction and outlines procedures for the development,

---

[68] 16 U.S.C. § 1131 (2012).

[69] 16 U.S.C. § 1133(b) (2012). *See also* Sierra Club v. Yeutter, 911 F.2d 1405, 1414 (10th Cir. 1990) (acknowledging that the Act placed duties on Secretary of Agriculture to protect wilderness areas, but rejecting argument that fulfillment required particular actions, such as litigation to enforce reserved water rights). National wilderness areas were originally endowed with 9.1 million acres of national forest lands; now there are more than 100 million acres called wilderness. V.V. DONN, PUBLIC LANDS: CURRENT ISSUES AND PERSPECTIVES 140–41 (2003). The Act prohibits commercial recreational activities, motorized access, roads (temporary and permanent), structures, facilities, commercial enterprises, but allows mineral exploration if compatible with preservation of wilderness environment. 16 U.S.C. § 1133(c) (2012). Litigation has all but stalled leasing and mineral exploration. In the last several decades, the land management agencies have adopted policies applicable to other public lands, aimed at conservation, including roadless areas regulations that prohibit road construction and reconstruction in 58.5 million acres of inventoried forest roadless areas and in 20.5 million acres in national forest, prohibiting roads in 42.4 million acres of wilderness/wild/scenic river corridors (although with significant exception); prohibiting timber harvests; and requiring measures to minimize adverse environment impact. *See* 36 C.F.R. § 294 (2001) (Roadless Area Conservation); Holly L. Fretwell, *Public Lands: Is No Use Good Use?* PUBLIC LANDS, 9 (PERC ed., 2001); Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations,* 34 ENVTL. L. 1143, 1146, 1149, 1158 (2004).

[70] *See* 43 U.S.C. § 1712(c) (2012); *see also* Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012) (directing the Forest Service to manage national forests for "multiple use and sustained yield of the several products and services obtained therefrom," 16 U.S.C. § 529 (2012), and placing "outdoor recreation, range, timber, water, and wildlife and fish on an equal footing."). MICHAEL P. DOMBECK, CHRISTOPHER A. WOOD, & JACK E. WILLIAMS, FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 24 (2003)).

[71] 43 U.S.C. §§ 1701–1787 (2012). FLPMA contains specific provisions governing the disposition of classifications and withdrawals in effect at its enactment: they remain in force until modified under the new provisions and direct the BLM to review all existing classifications and withdrawals in the eleven contiguous western states by 1991. *See* 43 U.S.C. §§ 1701(a)(3); 1714(l)(1) (2012). The Department may modify or terminate any existing classification in a manner consistent with a land use plan developed under the Act, 43 U.S.C. § 1712 (d) (2012); and the Department may revoke withdrawals, but only in accordance with the Act, 43 U.S.C. § 1714(a) (2012).

maintenance, and revisions of land use plans.[72] The federal policy stated in FLPMA is that lands should "be retained unless, because of the land use planning procedure provided by the Act, it is determined that disposal of a particular parcel will serve the national interest."[73]

In addition, the Act requires:

> Public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[74]

In carrying out these directives, the BLM is charged with managing the lands in a manner which recognizes the public's need for natural resources,[75] by developing management plans, including a consideration of: "use [of] a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and others sciences . . . , giv[ing] priority to the designation and protection of areas of critical environmental concern . . . , [and] weigh[ing] long-term benefits to the public against short-term benefits."[76]

All of these acts and directives reflect a profound reverence for our nation's natural assets and a commitment to their preservation for an inspired, transcendent existence by the public.

---

[72] 43 U.S.C. §§ 1701(a)(2), 1712 (2012).

[73] 43 U.S.C. § 1701(a)(1) (2012). The Act contains additional policy guidelines for BLM's land use planning, i.e., that management must be "on the basis of multiple use and sustained yield unless otherwise specified by law." 43 U.S.C. § 1701(a)(7).

[74] 43 U.S.C. § 1701(a)(8) (2012).

[75] 43 U.S.C. § 1701(a)(12) (2012). With regard to land classifications performed earlier under the Classification and Multiple Use Act of 1964, Congress provided that existing classifications, withdrawals, and reservations would remain in effect until modified by the BLM and directed the BLM to review all such classifications and withdrawals in the eleven western states by 1991. *See* 43 U.S.C. § 1714(l)(1) (2012). The BLM was also directed to develop a land use plan for all public lands, "regardless of whether such lands previously [had] been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a) (2012). The BLM may modify or terminate any existing classification, and may revoke a withdrawal in a manner consistent with the land use plan developed under the Act. 43 U.S.C. § 1714(a) (2012).

[76] 43 U.S.C. § 1712(c) (2012).

VI. OPPORTUNISM AND INTERFERENCE

A. Access As A Fundamental Public Value

Despite the inherent existential values of the public lands, it can scarcely be argued that access to them by the general public animated early federal land policy. While Congress was not entirely oblivious to the problems of access through abutting private parcels that would arise under the early land disposal policy, perhaps naively, it believed that notions of neighborliness and comity would be sufficient to resolve any access problem that might arise. There was also a fully developed body of common law principles in place that provided for rights of way to landowners needing access across another's land. But before anyone realized it, millions of acres of federal land became essentially landlocked. Congress acted, but only after the knotty system of landholdings became manifest. Beginning in 1891, Congress passed a series of acts giving the president the power to reserve certain public lands from sale, disposition, or settlement. These included the Act of March 3, 1891, under which President Cleveland issued a proclamation reserving approximately twenty million acres as forestlands.[77] Recognizing that the reservations covered by the proclamation could lead to blocked access by existing homesteaders to their holdings, Congress passed the Forest Service Organic Administration Act.[78] The Act ensured access over national forest land to "actual settlers" and "protect[ed] whatever rights and licenses with regard to the public domain existed prior to the reservation."[79] In 1895, to facilitate federal access to public lands, Congress authorized the Secretary of the Interior to enter into reciprocal right of way agreements with private property owners, that is, an exchange of grants between the United States and a private landowner, under which each party could use the other's existing roads and could construct roads over the other's land.[80]

Although FLPMA did not direct the land management agencies to obtain public access, one section provides specific authority to the Secretary of Agriculture and the Secretary of Interior to acquire access over non-federal

---

[77] Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976). *See also* Mont. Wilderness Ass'n v. United States Forest Serv., 496 F. Supp. 880, 888 (D. Mont. 1980), *aff'd on other grounds*, 655 F. 2d 951 (9th Cir. 1981).

[78] Forest Service Organic Administration Act, ch. 2, 30 Stat. 11, 34–35 (1897) (codified at 16 U.S.C. § 473–482 (2012)).

[79] *Montana Wilderness Ass'n*, 496 F. Supp. at 888 (internal citation omitted).

[80] 43 C.F.R. § 2812.0–3, –6 (2013) (explaining current authorization and policy). *See also* Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (validating reciprocal right of way agreement and finding agreement entered into before passage of endangered species act not subject to act's procedural requirements); Adams v. United States, 255 F.3d 787, 793–94 (9th Cir. 2001) (finding inholders in national forests may be required to provide a reciprocal grant of access to the government, as deemed necessary for the management of adjacent federal land).

lands by purchase, exchange,[81] donation, or use of eminent domain or condemnation.[82] In many respects, FLPMA was a "this for that" act, while giving the agencies powers to acquire and transfer rights, it took away the power of local entities to construct roads in public lands.[83] Under FLPMA, Congress

---

[81] The land agencies have often secured access to federal lands through land exchanges. The BLM and the Forest Service have nearly identical purposes and procedures for land exchanges. *Report to the Subcommittee on Interior, Environment & Related Agencies, Committee on Appropriations, House of Representatives*, GAO-09-611 (June 2009); *BLM & the Forest Service Have Improved Oversight of the Land Exchange Process, but Additional Actions Are Needed*, GAO-09-611 (June 2012). Both agencies' regulations specify that exchanges are discretionary, and must be in the public interest. *Id.* at 4; 36 C.F.R. § 254.3(a), (b) (2012). The lands exchanged are usually of equal value, 36 C.F.R. § 254.3(c) (2012), or equalized by payments of up to twenty-five percent of the total value, 36 C.F.R. § 254.12(b) (2012), and must be within the same state, 36 C.F.R. § 254.3(d) (2012). Report to the Subcommittee on Interior, Environment, & Related Agencies *supra* note 81, at 5–6. Newly-acquired federal lands within designated areas are to be included as part of those areas. 36 C.F.R. § 254.3(f) (2012); *Report to the Subcommittee on Interior, Environment, & Related Agencies supra* note 81, at 5. Exchanges cannot be considered if they are not consistent with the land management plans, 36 C.F.R. § 254.3(f) (2012), and each agency is to conduct an environmental analysis, under NEPA, of the proposed exchange. 36 C.F.R. § 254.3(g); Report to the Subcommittee on Interior, Environment, & Related Agencies *supra* note 81, at 5. To further protect the public interest or otherwise restrict nonfederal uses, the agencies can reserve rights on or retain interests in the lands conveyed out of federal ownership. 36 C.F.R. § 254.3(h) (2012). Finally, the Forest Service is required to submit any exchange proposals with more than $150,000 in land acquisition to Congress for oversight review. 36 C.F.R. §§ 254.3(k), 254.11(a)(2) (2012). The BLM is required to coordinate exchange proposals with state and local governments. 36 C.F.R. § 254.8(a) (2012).

[82] 43 U.S.C. § 1715 (2012).

[83] Among other things, FLPMA repealed the RS 2477 program. 43 U.S.C. § 932 *repealed by* Fed. Land Pol'y and Mgmt. Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743 (1976). Notwithstanding the repeal, FLPMA preserved rights of way existing before October 21, 1976. *Id.*; *see also* 43 U.S.C. § 1769(a) (2012) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted;" Pub. L. No. 94-579 at § 701(a) ("Nothing in this Act, or in any amendments made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."); Pub. L. No. 94-579 at § 701(h) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights.").

The RS 2477 program was created in 1866, when Congress enacted legislation granting rights of way for the construction of highways over public lands. 43 U.S.C. § 932 (repealed 1976). RS 2477 has been interpreted by the courts as applying only to lands deemed "public lands," that is, lands subject to sale or other disposal under general law. *See* Bardon v. N. Pacific R.R. Co., 145 U.S. 535, 538 (1892) ("All land, to which any claims or rights of others have attached, does not fall within the designation of 'public land.'"); Barker v. Bd. Of Cnty. Comm'rs of the Cnty. of La Plata, Colo., 24 F. Supp. 2d 1120, 1127 (D. Colo. 1998) (no RS 2477 if land that had been reserved before claim patented); Bd. of Cnty. Comm'rs of Cheyenne Cnty. v. Ritchey, 888 P.2d 298, 300 (Colo. App. 1994) ("Public land, or land on the public domain, is land which is open to sale or other disposition under general laws."); United States v. Jenks, 804 F. Supp. 232, 235–236 (N.M. 1992) (roads created after Presidential Proclamation reserved land as national forest were not public roads under RS 2477). RS 2477 thereby excluded those lands to which any claims or rights of others have attached. Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928) (RS 2477 road perfected before homesteader took title); Greiner v. Bd. of Comm'rs of Park Cnty.,173 P. 719, 720 (Colo. 1918) (RS 2477 right of way perfected before land reserved for school purposes); Sprague v. Stead,

"repealed over thirty statutes granting rights-of-way across federal lands and vested the Secretaries of Agriculture and Interior with authority 'to grant, issue, or renew rights of way over [Forest Service and public lands] for roads, trails [and] highways.'"[84] Congress believed inholders "had the right of access to their

---

139 P. 544, 546 (Colo. 1914) (RS 2477 right of way superior to subsequent entry by homesteaders and other claimants). The Act provided for "highways" only for access to mining claims or to homesteads, but not for purely recreational purposes. Humboldt Cnty. v. United States, 684 F.2d 1276, 1281–82 (9th Cir. 1982) (rejecting argument that right of way was available for recreational purposes and not for economic development). "Virtually all of the existing highways and roads in the West were originally established as RS 2477 rights-of-way." *Hearing on Rights of Way before The House of Representatives Subcommittee on National Parks, Forests, and Lands of the Committee on Resources*, 104th Cong. (1995). "Much of the transportation system in the West is still based on RS 2477 rights." *Id.* Although no new RS 2477 right-of-way can now be created, (since the repeal of the law by FLPMA), "existing RS 2477 roads continue to make possible a variety of activities, such as delivery of goods to market, transportation between communities, tourism and recreational opportunities, provision of access routes for emergency vehicles, mail delivery, law enforcement, and access to lands for business and industrial purposes." *Hearing on RS 2477 Settlement Act before The Senate Energy and Natural Res. Comm.*, at *3 (1996) (testimony prepared by Barbara Hejelle).

FLPMA rights-of-way can be obtained in the place of RS 2477 rights. *See* 43 U.S.C. § 1769 (2012). However, trading an RS 2477 right-of-way for a FLPMA right-of-way would be beneficial for a federal land manager, but unfavorable for the one needing access. *Hearing on RS 2477 Settlement Act before The Senate Energy and Natural Res. Comm.* at *3. There are several reasons why FLPMA rights of way are less advantageous.

> First, FLPMA rights-of-way are issued according to the discretion of the federal land manager. (In the past [sixteen] years, according to the Bureau of Land Management, only [thirty-six] miles of road right-of-way have been issued on public land in Washington County, Utah, which contains 1,550,000 acres, of which about [seventy percent] is federally owned. Washington County holds title to approximately 800 RS 2477 rights-of-way. Given the difficulties associated with obtaining FLPMA rights-of-way, it would take decades to regain even a portion of these public roads through FLPMA procedures.) But, RS 2477 rights-of-way, already vested in the holder, are capable of being utilized immediately, and are subject to constitutional protections. Second, permissible uses of FLPMA rights-of-way may, in some cases, be more limited than are uses of RS 2477 rights-of-way, because these rights pre-exist subsequent withdrawals. (The right to perform safety improvements on an existing road adjacent to a wilderness study area or traversing a national park is of critical importance to the public, which relies upon these rights-of-way for safe travel across the federal domain.) Third, FLPMA permits are more in the nature of a license; they are not perpetual as are RS 2477 rights-of-way. And, lastly, FLPMA rights-of-way must be purchased, whereas RS 2477 rights-of-way are already owned.

Id. at *3–4. For this reason "Congress explicitly forbade Interior from forcing such an exchange." *Id.* at *3. A compelling reason for repealing the RS 2477 law was that pre-existing rights-of-way are vested property rights and no longer part of the federal domain. Thus, to regain ownership of these rights, Congress would have to pay the owners. *Id.* Reading RS 2477 too broadly could lead to unwarranted claims for roads for access across private property, and most concernedly over Indian and Indian and Alaska Native lands.

[84] Fitzgerald v. United States, 932 F. Supp. 1195, 1201 (Ariz. 1996) (citing 43 U.S.C. § 1761(a) (2012)).

[inholdings] subject to reasonable regulation under . . . FLPMA."[85] However, the express terms of FLPMA seemed to preclude the granting of access across public lands subject to wilderness restrictions, which left wilderness inholders, in a rather precarious position.[86] Congress responded with the enactment of Section 3210(a) of the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"),[87] which guarantees to inholders a threshold "right of access to their lands subject to reasonable regulation [under FLPMA] by . . . the Secretary of Agriculture in the case of national forest [lands]."[88]

---

[85] S. Rep. No. 413, 2d Sess., at 310 (1980) *reprinted in* 1980 U.S.C.C.A.N. 5070, 5254 (reviewing access rights of inholders under FLPMA and explaining need for Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §§ 3101–3709 (2012) ("ANILCA")).

[86] 43 U.S.C. § 1761(a) (the "Secretary of Agriculture, with respect to lands within the National Forest System (except . . . land designated as wilderness), [is] authorized to grant . . . rights of way over, upon, under, or through such lands . . . ."); *see also* United States v. Srnsky, 271 F.3d 595, 601 (4th Cir. 2001). While these rights of way, would be created within the limits of the statute, nothing in the Organic Administration Act, FLPMA, or ANILCA, dealt with state common law rules on access. FLPMA authorized the federal government to grant rights-of-way, but does not authorize the regulation of existing easements. 43 U.S.C. §§ 1761(a), 1764(c) (2012). Further, while amendments to the Organic Act provided that if the Secretary wished to impose rules and regulations on any easements reserved to the grantor, they must appear in the instrument, they contained nothing precluding implied reservation. *Srnsky*, 271 F.3d at 601–02 (quoting the Weeks Act, 16 U.S.C. § 518 (2013)). ANILCA merely authorizes the Forest Service to grant rights of way to inholders, but does not purport to affect existing rights under state law. *Id.* In *United States v. Jenks*, the court held that the access guaranteed by the Homestead Act did not create a property interest known as an implied easement. 129 F.3d 1348 (10th Cir. 1997). In *Adams v. United States*, the court held that FLPMA and ANILCA applied, thus preempting state common law. 3 F.3d 1254 (9th Cir. 1993). However, the landowners did not take their interests pursuant to a federal statute, rather they deeded part of their land to the federal government. Thus, state law applies, unless it is "aberrant or hostile" to federal interests. *Srnsky*, 271 F.3d at 604 (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 596 (1973)). The regulations themselves provide specifically that they "do not affect . . . the rights reserved in conveyances to the United States." *Id.* at 604 (citing 36 C.F.R. § 251.110(b) (2012)). Yet, conveyances should be read to include all rights arising whether expressly or by implication. *Srnsky*, 271 F.3d at 604. *But see* McFarland v. Kempthorne, 545 F.3d 1106, 1110–11 (9th Cir. 2008) ("federal law governs a claim of easement over lands owned by the United States;" "strong [public] federal interest in the management of federal lands weighs against the importation of state law.").

[87] 16 U.S.C. §§ 3101–3233 (2012).

[88] ANILCA provides that

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

16 U.S.C. § 3210(a) (2012). The courts have read the legislative history of ANILCA to evince an intent by Congress that "such owners ha[ve] [a] right of access to their lands subject to reasonable regulation by . . . the Secretary of Agriculture in the case of national forests . . . under [FLPMA]." Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993) (quoting 1980 U.S.C.C.A.N. 5070, 5254). Section 1764(c) of FLPMA further provides that,

Pursuant to ANILCA, the Forest Service and BLM have adopted regulations providing property owners with access that is adequate to secure reasonable use and enjoyment of their property.[89] "Adequate access" to an inholding is defined in BLM regulations as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources."[90]

The burden on a private landowner to establish an easement over federal land to get to a private inholding is not an easy one. Indeed, courts have been reluctant to find such easements, although they have recognized a right of access

---

> "[r]ights-of-way shall be granted, issued, or renewed pursuant to . . . such regulations or stipulations, consistent with the provisions of this subchapter or any other applicable law, and shall also be subject to the terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination."

43 U.S.C. § 1764(c) (2012). *See* United States v. Jenks, 129 F.3d 1348, 1351 (10th Cir. 1997) (upholding Department of Agriculture's power to require permit of inholder for use of access road for ingress and egress to land within national forest, but recognizing that inholder might have patent or common law right of access apart from statute). Section 3210(a) of ANILCA applies to all National Forest System lands, not just those in Alaska. *See* Mont. Wilderness Ass'n v. United States, 655 F.2d 951, 957 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also* H.R. Rep No. 1521 (2d Sess. 1980) (implying that 3210(a) applies outside of Alaska by concluding that provision in Colorado Wilderness Act pertaining to access to non-federally owned lands was unnecessary because of Section 3210(a) of ANILCA).

[89] *See* 36 C.F.R. § 251.110(c) (2013); 43 C.F.R. § 2802.10 (2013). The regulations of both agencies authorize terms, conditions, or stipulations for the right-of-way or easement being granted and reflect statutory authority in this regard. The BLM regulations specifically requires: an environmental analysis in accordance with National Environmental Policy Act; a determination that the applicant's proposed plans comply with applicable state and federal law; and consultation with all other Federal, State, and local agencies having an interest, as appropriate. 43 C.F.R. § 2805.12 (2013). The Forest Service regulations governing land use specify that "authority to construct and/or use facilities and structures on National Forest System lands for access to non-Federal lands" requires a special-use permit or road-use permit. 36 C.F.R. § 251.113 (2013). Section 251.114(a) further specifies considerations in such a special-use authorization:

> In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.

36 C.F.R. § 251.114(a) (2013).

[90] 36 C.F.R. §§ 251.111, 251.114(a) (2013).

under various federal statutes.[91] In *Fitzgerald v. United States*, plaintiffs sought to quiet title to an easement across public lands to get to their inholdings within a national forest.[92] The United States had insisted that the plaintiffs apply for and obtain a special use authorization to use a road then located on public land.[93] The court rejected the plaintiffs' claim that they held an easement for ingress and egress to their inholding, ruling that the facts required to establish an easement by necessity were not present.[94] Further, the court held that there was no easement by implication as "nothing passes by implication in a public grant."[95] Nor could the language of the deed be said to create an express easement by the word "appurtenance," because the road claimed as the easement was not shown to have been in existence at the time of the patent.[96] Nonetheless, the court found a number of statutory bases for a right of access to the inholders' land, subject to rules and regulations imposed by the government.[97]

---

[91] Access pursuant to FLPMA and ANILCA precludes claims for common law easements. Adams v. United States, 3 F. 3d 1254, 1259 (9th Cir. 1993) (common law claims are preempted by ANILCA and FLPMA when . . . the United States owns the servient estate for the benefit of the public); Adams v. United States, 255 F.3d 787, 795 (9th Cir. 2001) (while inholders had a right of access under FPLMA and ANILCA, such right was subject to reasonable regulations); McFarland v. Kempthorne, 545 F.3d 1106, 1112 (9th Cir. 2008) (Park Service holds the authority to regulate access).

[92] Fitzgerald v. United States, 932 F. Supp. 1195 (D. Ariz. 1996).

[93] *Id.* at 1199.

[94] *Id.* at 1202.

[95] *Id.* at 1203 (citing Albrecht v. United States, 831 F.2d 196, 198 (10th Cir. 1987)).

[96] *Id.* at 1203.

[97] *Id.* at 1200–03. The statutes considered by the court included the Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161–284 (repealed 1976)) (providing for implied license to use public lands to settlers); The Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (1891) (codified at 16 U.S.C. § 471 (repealed 1976)) (empowering the President to reserve forest lands); the Forest Service Organic Administration Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified at 6 U.S.C. §§ 473–482, 551 (2012)) (authorizing the Secretary of Agriculture "to make rules and regulations for the protection of the national forests," but preserving "the right of access over Forest Service lands to 'actual settlers' residing within the boundaries of the National Forest"); the Black Mesa Forest Reserve, which reserved land for the Black Mesa Forest Reserve, the national forest at issue; the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701–1784 (2012)) (giving the Secretaries of Agriculture and Interior the authority "to grant, issue, or renew rights of way over [Forest Service and public lands] for . . . roads, trails . . . ", and preserving rights of way existing at the time of enactment) (alteration in original); the Alaska National Interest Land Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. § 3210 (2012)) (directing "the Secretary [to provide] such access to non-federally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof; Provided, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System."). In addition, the court found that the regulations promulgated by the Forest Service provided for the issuance of special use permit for access to inholdings to ensure reasonable use and enjoyment of the property, but requiring that the landowner demonstrate "a lack of any existing rights or routes of access available by deed or under State or common law." *Fitzgerald*, 932 F. Supp. at 1202 (referring to 36 C.F.R. § 251.114(f) (2013)).

In recent years, in recognition of past shortsightedness in land disposition, when authorizing land purchases or exchanges, Congress has required as a condition of conveyances, provisions in conveyance instruments guaranteeing public access to federal lands by reservation of easements.[98] Most significantly, the Alaska Native Claims Settlement Act ("ANCSA"),[99] required that when Native Alaskans withdrew tracts of land from the public domain, as reserved for the natives, such selection was subject to the obligation of providing access to the public to adjoining public lands.[100]

B. Unlawful Inclosures

Perhaps Congress' most significant acknowledgement of the pernicious effects of the checkerboard pattern of land disposition was the passage of the Unlawful Inclosures Act.[101] The Act declares enclosures of federal lands to be unlawful and

---

[98] *See, e.g.*, S. 2904, 108th Cong. (2d Sess. 2004) ("A Bill to authorize the exchange of certain land in the State of Colorado."). Section 5 of this Bill is entitled "Exchange Terms and Conditions " and states in part,

> (d)(1) Conditions on conveyance of Crystal River parcel . . . , (i)(I) provide public access to the parcel; and . . . (2) Conditions on conveyance of wild wood parcel . . . (B) Reservation of Easement. –In the deed of conveyance of the parcel described in Section 3(3)(A) to the County, or at request of the County, to the Aspen Valley Land Trust, the Secretary shall, as determined to be appropriate by the Secretary in consultation with the County, reserve to the United States a permanent easement to the parcel for the location, construction, and public use of the East of Aspen Trail.

Id.; *see also* S. 161, 109th Cong. (1st Sess. 2005) ("A Bill to Provide for a land exchange in the State of Arizona between the Secretary of Agriculture and Yavapai Ranch Limited Partnership."). Section 102(f)(2) provides "[u]pon completion of the land exchange under this title, the Secretary and the Yavapai Ranch shall grant each other at no charge reciprocal easements for access and utilities across, over, and through [the lands]."

[99] Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601–1629(e) (2012)).

[100] *Id.* at § 1616(d)(3) (reserving to Secretary the authority to grant rights of way); § 1636(b)(2) (reserving public access in land banking program). *See also* Stratman v. Watt, 656 F.2d 1321, 1324 (9th Cir. 1981) (finding public access under original § 1616(b)).

[101] Section 1 of the Act states that "[a]ll inclosures of any public lands . . . constructed by any person . . . to any of which land included within the inclosure the person . . . had no claim or color of title made or acquired in good faith . . . are hereby declared to be unlawful." 43 U.S.C.

43 U.S.C. § 1061 (2012). Section 3 provides:

> [n]o person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

43 U.S.C. § 1063 (2012).

orders that such enclosures be removed.[102] Two notable Supreme Court cases have examined the Act to determine its purport—one ancient and another very modern. First, in *Camfield v. United States*, a landowner constructed a fence on his odd-numbered lots to enclose twenty thousand acres of public land, thereby appropriating it to the exclusive use of the landowner and his associates.[103] The Court, citing nuisance law, concluded that the Act was an appropriate exercise of the police power in addressing what could be considered a nuisance.[104] The Court explained that while the federal government has the rights of an ordinary proprietor over lands including the power to sell or give away land, "it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market."[105] Building "fences upon public lands with intent to inclose them for private use would be a mere trespass," which the government could abate. But since this right existed without the Act, something more was intended to be addressed by it.[106] Here, the defendant landowner erected the fence near the outside line of the odd-numbered sections, which was unobjectionable, but insofar "as they were erected immediately outside the even-numbered sections, they [were] manifestly intended to inclose the government's lands."[107] The purposes of the structure were obvious and amounted to a nuisance, since the grant of the odd-numbered sections to the railroads was not also a grant of the indefinite exclusive use of the even-numbered sections. Congress intended the public lands to remain open.[108] If the defendants "chose to assume the risk of purchasing the odd-numbered sections . . . without also purchasing, or obtaining the consent of the government to use, the even-numbered sections," thereby deriving no benefit from the odd-numbered ones, it was the result of their own indiscretion.[109]

Yet, the Court affirmed the grantee's right to fence completely his own land.[110] The Court stated:

> So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is

---

[102] *Id.*

[103] Camfield v. United States, 167 U.S. 518, 519 (1897).

[104] *Id.* at 526.

[105] *Id.* at 524.

[106] *Id.*

[107] *Id.* at 526.

[108] *Camfield*, 167 U.S. at 525.

[109] *Camfield*, 167 U.S. at 527 ("the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers finally became so great that congress passed the act . . . forbidding all enclosures of public lands, and authorizing the abatement of the fences"). *Id.* at 524–25.

[110] *Id.* at 528.

> entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large.[111]

The Court noted that obviously, if odd-numbered lots are individually fenced, the access to even-numbered lots is obstructed.[112]

Nearly a century later, the Court was once again called upon to interpret the Act. In *Leo Sheep Co. v. United States*,[113] the Court rejected the assertion that there was a violation of the Act by a landowner who refused to allow the government to build an access road across its property allowing the public to reach a reservoir on public land.[114] The Court began by instructing that the Act was enacted in "response to the 'range wars,' the legendary struggle between cattlemen and farmers during the last half of the nineteenth century" by which cattlemen, "[b]y placing fences near the borders of their parts of the checkerboard [pattern of railroad grants], could fence in thousands of acres of public lands."[115] The prohibitions under the Act, however, did not cover the landowner's objection to a public road over its land.[116] The Court went on to distinguish *Camfield*, which was relied upon by the Government. It found that *Camfield* expressed the view that the authority of a landowner to completely fence in his lot "was of little practical significance 'since a separate enclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section.'"[117] But, upon whose land could roads

---

[111] *Id.* at 528.

[112] *Id.* at 527–28.

[113] Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

[114] *Id.* at 685–86. Because of the checkerboard configuration of the lots it was physically impossible to enter the Seminoe Reservoir sector without some minimum physical intrusion upon private land. *Id.* at 678.

[115] *Id.* at 684–85. When Congress began conveying land to the railroads for the construction of a transcontinental line, it granted to railroads either odd-numbered or even-numbered lots, which adjoined each other. As a consequence, the owner of an odd-numbered section could not go from one of its tracks to another without committing a trespass over an even-numbered lot owned by another. The purpose of this scheme was to help fund the construction of the railroad through free grants to the railroad of odd-numbered lots. *Id.* at 672–73. At first extending ten miles, then later expanding to twenty miles along the railway right-of-way for each mile of track constructed, reserving and then selling to the public even-numbered lots at prices as high as would have been generated by a sale of the whole area. *Id.* at 676–77.

[116] *Id.* at 684.

[117] *Id.* at 686. (quoting *Camfield*, 167 U.S. at 528).

be built if there were no express reservations in the conveyances? What if the adjoining landowners could not reach an agreement on the price of a right of way? Would these not frustrate settlement?

In *Bergen v. Lawrence*,[118] the Tenth Circuit interpreted the Unlawful Inclosures Act, finding that while it declares an enclosure of public land a nuisance, it does not create an easement for either wildlife or humans.[119] There, a landowner constructed a fence twenty-eight miles long that, because of the checkerboard pattern of land grants, enclosed approximately 9,600 acres of public land, in addition to his own land.[120] The fence prevented access by antelope and, during the winter, a number of antelope starved to death because they could not gain access to the public grazing land.[121] The government sought an order compelling removal of the fence.[122] The court ruled that a landowner was not free to do as he wished on his own land at the expense of the public if that meant enclosing federal lands. Instead, if the Act were so construed as applying only to fences actually erected upon public lands, it would be "manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass."[123] "It is only by treating it as prohibiting all 'enclosures' of public lands, by whatever means, that the act becomes of any avail."[124] At the same time, the order that the fence be removed did not impose a "servitude" on the private land, but rather abated a nuisance.[125] The court pointed out that the landowner "retain[ed] the right to exclude the antelope at [any] time because the district court did not find any implied easement for antelope."[126] If the landowner attempted such exclusion, "an action might be brought claiming such an easement or servitude."[127] The two positions cannot be reconciled: having to take down the fence that blocked access to public lands does not create a servitude over private land; yet, the antelope will have to cross private land to get to the public land on which the private land borders?

Bergen relied upon *Camfield*'s[128] caution that although an individual proprietor may confine his enclosure to his own land, leaving the government with no right

---

[118] United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502 (10th Cir. 1988).

[119] *Id.* at 1505.

[120] *Id.* at 1504.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1505 (quoting *Camfield*, 167 U.S. at 525).

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1507 n.7.

[127] *Id.*

[128] *Id.* at 1508.

to complain, he may not "build[] a fence which is useless for that purpose, and can only have been intended to enclose the lands of the government."[129]

C. Fencing Out Interferes With Common Law Accommodation Regimes

Even if the Unlawful Inclosures Act cannot entirely prevent abutting owners from putting up fences that block access, evolving conceptions of property rights as relational and contingent might provide an opening. Blacksone's conception of property ownership as "sole and despotic dominion" is a myth.[130] Property is community and the law of property has developed many ways to accommodate the often antagonistic interests of neighbors, to enable productive uses of land. While nuisance has long operated to curtail the conduct of a landowner, even on his own land, the common law also long-supported and enforced voluntary arrangements—either based upon expressed acts or implied intentions. Adjoining landowners have long perceived that their mutual economic or aesthetic interests can be well-served by agreements—either to allow the other use of his land or to restrict use of his land. An easement is such an agreement: a non-possessory interest in the land of another, giving the right to use or limit the owner from acts that might interfere with that use.[131] An easement often grants a right to cross the land of another to get to some public thoroughfare. However, in many transactions, because these mutual interests are perhaps obvious, the one party (either the transferor or transferee), simply assumes her rights over the other's lands will continue without the need for a specific grant or reservation of this right at the time of the transaction or purchase. In these instances, the common law operated to give effect to the parties' presumed intentions and implied such a right to use.[132] "[T]he parties are presumed to contract in reference to the condition of the property at the time of the sale and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."[133]

There are several theories for the creation of easements by implication, of these, prior use, also referred to as quasi-easement, and necessity are most common. An easement arising by prior use requires a showing that: (1) at one

---

[129] *Camfield*, 167 U.S. at 528.

[130] JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP 18 (Oxford U. Press 1994). Indeed, recently, one writer has challenged this notion. *See* David B. Schorr, HOW BLACKSTONE BECAME A BLACKSTONIAN,107-114, 123-126 (Berkeley Electronic Press, 2008) (demonstrating all the ways that property was not absolute during and after Blackstone's time).

[131] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (2000); LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS: IN CONTINUATION OF THE AUTHOR'S TREATISE ON THE LAW OF REAL PROPERTY § 1 (Baker et al. 1898); 4 POWELL ON REAL PROPERTY, § 34.01 (2013).

[132] Manitowoc Remanufacturing, Inc. v. Vocque, 819 S.W.2d 275, 278 (Ark. 1991); Murphy v. Burch, 205 P.3d 289, 293 (Ca. 2009).

[133] *Manitowoc Remanufacturing, Inc.*, 819 S.W.2d at 278 (internal citation omitted).

point the putative servient and dominant tenements were owned by the same person; (2) the prior owner used one part to benefit the other; (3) the use was necessary; and (4) it was open, apparent, and visible.[134] An easement arising by necessity requires a showing that: (1) at one point, the two parcels were under common ownership, and (2) at the time of severance, there was a necessity by one to use the other; most typically that the putative dominant estate is landlocked, having no way out to a public road.[135] This theory is usually invoked in favor of a grantee of landlocked property, but has been held to apply where one sells lands surrounding other lands belonging to him, cutting off access to his remaining lands except over the land granted.[136] This easement arises even though there is no such provision in his deed reserving rights over the lands conveyed and he conveys with covenants of warranty. In the latter case, the rule of strict necessity applies because the grantor is claiming something in derogation of the deed and the title that he has conveyed.[137] The principle is if he intended to reserve any greater right over the land granted, it was his duty to expressly provide for the grant.[138] Therefore, early courts required necessity to be strict, by a showing that the dominant owner would be landlocked without the easement; the public policy favoring productive uses of the land overcoming the grantor's neglect.[139] The scope of that usage under an easement by necessity will have reference to those uses existing at the time the easement arose, but may be allowed to expand so that the easement holder can obtain reasonable use and enjoyment from her estate.[140]

At the time the government began doling out public land, not expressly reserving a right of access, these principles were well established in the English common law and under state private property law. However, the federal government is not like any other private landowner. If nothing else, the Supreme Court has been evenhanded on the issue of the creation of easements where the federal government has been concerned, by requiring a clear expression of intent.

---

[134] 4 POWELL ON REAL PROPERTY § 34.08. *See* Schwab v. Timmons, 589 N.W. 2d 1, 6 n.4 (Wis. 1999) (citing 7 THOMPSON, REAL PROPERTY § 60.03(b)(4)(i) (1994)); JONES *supra* note 131, at § 126.

[135] *Schwab*, 589 N.W. 2d at 7. The courts have stated that mere geographical barriers obstructing access to a parcel, alone, does not establish the necessity required for an easement under this theory. 4 POWELL ON REAL PROPERTY §34.07; JONES *supra* note 131, at §315.

[136] *Schwab*, 589 N.W. 2d at 8.

[137] JONES *supra* note 131, at §305–06; Bennett v. Evans, 74 N.W.2d 728, 816 (Neb. 1956); Adams v. Cullen, 268 P.2d 451, 508 (Wash. 1954).

[138] JONES *supra* note 131, at §304.

[139] *See, e.g.*, *Schwab*, 589 N.W.2d at 37; United States v. Rindge, 208 F. 611, 620–22 (S.D. Cal. 1913) (no easement by implication arose on behalf of the government where it was possible to build a road over the mountains even though it would be expensive to construct and would be steep and difficult and not as convenient or desirable as ways over private land).

[140] John W. Weaver, *Easements are Nuisances*, 25 REAL PROP. PROB & TR. J. 103, 115–16, 119–20, 144–45 (1990).

In the case of a private landowner asserting an easement over federal land, the courts have ruled, "[a]n express easement must be expressly conveyed . . . [t]he intent to grant an easement [against the government] must be so manifest on the face of the instrument . . . that no other construction can be placed on it."[141] On the other side of the coin, the Court has rejected an assertion of an implied easement in favor of the government. In *Leo Sheep Co. v. United States*,[142] that same landowner who prevailed under the Unlawful Inclosures Act, also defeated a claim by the government for an implied easement over its land. The landowner owned a checkerboard section of formerly federal land granted to the Union Pacific Railroad,[143] and charged fees to members of the public who sought to cross its lands to reach a federal reservoir. To stop this practice, the BLM built a road, mostly on federal land, that crossed the landowner's property at the section corners.[144] The landowner sought to quiet title against the United States alleging a taking of property without just compensation.[145] The district court held for the landowner.[146] The Tenth Circuit reversed, holding that when the Government "granted the land to [the railroad], it implicitly reserved an easement to pass over the odd-numbered sections, [those conveyed to the railroad], in order to reach the even-numbered sections that were held by the Government."[147] The Supreme Court reversed.[148] First, it pointed out that the government did not argue that there was an express reservation of a right to cross.[149] Even though there were

---

[141] Petroff v. Schafer, No. 08-1971, 2009 U.S. Dist. LEXIS 32304, at *13–14 (D. Ariz. Apr. 1, 2009) (quoting Fitzgerald Living Trust v. United States, 460 F. 3d 1259, 1267 (9th Cir. 2006)) (rejecting quiet title act claim by landowner successor to original patentee to rights in a strip reserved to the United States for a road, situated so as to provide access through the homestead conveyed to other National Forest Lands beyond the homestead, where nothing in the language of that reservation showed "an unmistakable intent to create an easement interest running to the homestead land;" instead, the documents simply referred to the government's reservation of a "road," or "roadway," or a "road strip," without mentioning any other interest created). *See* United States v. Balliet, 133 F. Supp. 2d 1120, 1128 (W.D. Ark. 2001) ("[w]hile '[a]n implied easement can exist if [the United States] intended to grant an easement for access when it granted title to the [property] . . . [t]he general rule is that nothing passes by implication in a public grant.'" (quoting Fitzgerald v. United States, 932 F. Supp. 1195, 1202 (D. Ariz. 1996) (citing Albrecht v. United States, 831 F.2d 196, 198 (10th Cir. 1987))) (easement by necessity); United States v. Dunn, 478 F.2d 443, 446 (9th Cir. 1973) (easement by necessity applies against the United States); Fitzgerald v. United States, 932 F. Supp. 1195, 1202 (D. Ariz. 1996) (no easement by necessity or implied easement against the United States).

[142] Leo Sheep Company v. United States, 440 U.S. 668 (1979).

[143] *Id.* at 677–78.

[144] *Id.* at 678.

[145] *Id.*

[146] *Id.*

[147] *Id.* The Court noted that the holding of the district court affected property in 150 million acres of land in the western United States and granted certiorari on that basis. *Id.*

[148] *Id.* at 688.

[149] *Id.* at 678.

exceptions made in the grant, an express easement would have been a difficult argument given the purposes of the original grant to the railroad to facilitate the construction of a railroad line, and this would be better accomplished by a grant with few limitations.[150]

Instead, the Government argued that an "implicit reservation of the asserted easement [was] established by 'settled rules of property law' and by the Unlawful Inclosures Act."[151] The Supreme Court rejected that argument as well. Ordinarily, when a private landowner conveys to another a portion of his lands and retains the rest, leaving the remainder otherwise landlocked, it is presumed under common law that the grantor has reserved an easement to pass over the granted property—an "easement by necessity."[152] However, the Court determined that when the federal government is the grantor, there is no necessity because it has the power of eminent domain.[153] The court noted that a number of western states had abandoned the theory of easement by necessity in the case of government grants in favor of condemnation with the payment of compensation to the servient landowner.[154] Even if an easement by necessity were found to exist, the Court doubted that it would privilege the government to construct a road on the servient estate.[155]

The Court discussed the two theories underlying the easement by necessity: (1) the intent of the parties,[156] and (2) avoidance of useless and unproductive land.[157] On the intent theory the Court was doubtful that Congress intended to reserve any rights in the grants to the railroads given that the grants contained express exceptions on other matters.[158] At the same time, the Court acknowledged

---

[150] *Id.* The only limitations here were that the grant was not to include land "'sold, reserved, or otherwise disposed of by the United States,' such as land to which there were homestead claims," and mineral land claims. *Id.* Given these express exceptions, the "Court has in the past refused to add to this list by divining some 'implicit' congressional intent." *Id.* at 679.

[151] *Id.* at 679; *see also* 43 U.S.C. § 1061 (2012).

[152] *Leo Sheep Co.*, 440 U.S. at 679 (citing 3 POWELL, THE LAW OF REAL PROPERTY, ¶ 410 (1978)); Hollywyle Ass'n, Inc. v. Hollister, 324 A.2d 247, 252–53 (Conn. 1973) (discussing easements by necessity and their application).

[153] *Leo Sheep Co.*, 440 U.S. at 679–80.

[154] *Id.* at 680.

[155] *Id.* at 679.

[156] *Id.* at 681; *see also* Schmidt v. Eger, 289 N.W.2d 851, 854 (Mich. App. 1980); Murphy v. Burch, 205 P.3d 289, 293 (Ca. 2009) (easement implied based upon implied intent "as determined from the terms of the relevant instrument and circumstances surrounding the transaction" and "grounded in the public policy that property should not be rendered unfit for occupancy or successful cultivation because access to the property is lacking.").

[157] *Leo Sheep Co.*, 440 U.S. at 680; *see also Murphy*, 205 P.3d at 293.

[158] *Id.* at 681.

that Congress might not have given much thought to the need for access, instead relying on "negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes."[159] The Court refused to apply the rule of construction that all grants should be construed in favor of the government noting that the rule has not been applied "in its full vigor to grants under the Railroad Acts."[160] The rule should not apply "to defeat the intent of the legislature, or to withhold what is given either expressly or by necess[ity] or by fair implication."[161] In the case of an act of Congress:

> Operating as general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes from which is was enacted.[162]

Thus, in the Court's view, that rule of construction would not help the Government. But, let us consider the intent of Congress. In the first instance, Congress sought to provide an inducement to investors to undertake the

---

[159] *Id.* There was some account of a proposed amendment to the Congressional Act granting the land to the railroad that would assure "the right to the public to enter granted land and prospect for valuable minerals." *Id.* at 682 n.18. That amendment was, however, defeated. *Id.* There were also debates on an earlier Pacific Railroad bill which suggested "that there be 'a reservation in every grant of land that [the Government] shall have a right to go through it, and take it at proper prices to be paid hereafter.'" *Id.* "Apparently, the intended purpose of this proposed reservation was to permit railroads to obtain rights-of-way through granted property at the Government's behest." *Id.* The Court did not think this debate evinced "any prevailing assumption that the government implicitly reserved a right-of-way through granted lands." *Id.*

[160] *Id.* at 682. Instead, the court referred to an 1885 decision which observed that

> [t]he solution of [ownership] questions [involving the railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.

Id. (alteration in original) (quoting Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618, 625 (1885)).

[161] *Id.* at 682–83 (quoting United States v. Denver & Rio Grande R.R. Co., 150 U.S. 1, 14 (1893)).

[162] *Id.* at 683 (quoting *Denver & Rio Grande R.R. Co.*, 150 U.S. at 14).

construction of the railroad.[163] At the same time, such a huge land giveaway was not politically wise. Therefore, in order to compensate for granted land, Congress hoped to sell the retained land to individuals for private use.[164] Those retained lots would have value because they adjoined the railway. They would also have value because they adjoined federal land, particularly land that contained a reservoir.[165] They would also need access across the granted land, in order to get to the reservoir. Moreover, Congress could have rightly assumed that common law property rules would apply to the grants to the railroads, to fill in the gaps, toward the end of achieving the mutual expectations from the land ownership. If it were necessary to condemn a right of way, Congress would be giving away land and then buying it back from the grantee.[166]

On the second theory—of avoiding uselessness of the property retained—the Court stated that "it could not reasonably be maintained that failure to provide access to the public at large would render [the public land,] the Seminole Reservoir land useless."[167] But one of the primary purposes of a reservoir is use

---

[163] *Id.* at 670–71.

[164] *Id.* at 672–73.

[165] *Id.* at 678. Prior to the litigation, private owners were either denying access over their lands to the reservoir area or charging fees for access. *Id.*

[166] *Id.* at 680.

[167] *Id.* at 680 n.15. The implied easement theory addressed by *Leo Sheep* was an easement by necessity. *Id.* at 1083. One district court has considered and rejected the alternative theory of prior use, or quasi-easement, when asserted to establish an easement by implication over private land once owned by the federal government. United States v. Balliet, 133 F. Supp. 2d 1120, 1126–27 (W.D. Ark. 2001). However, this rejection did not address the applicability of the theory because the facts did not establish all the elements. *Id.* at 1127–28. The main reason the landowner's claim failed was that he was unable to establish that at the time of purchase the putative servient and dominant tenements were owned by the same person while owned privately. *Id.* at 1123. In fact, "the only time the two properties had a single owner was when they were held by the United States as federal public lands." *Id.* at 1127. The court explained that "[a]lthough an easement of necessity or by implication may arise when the United States issues a patent for public lands," the plaintiff failed to show that the road over which he sought access existed at the time of severance. *Id.* 1127–28. Recently, the Montana Supreme Court considered claims made by a mining patent holder that an easement was created by reservation by reference to government maps. Our Lady of the Rockies, Inc. v. Peterson, 181 P. 3d 631 (Mont. 2008). There, the holder of the mining patent asserted that an existing road, part paved and part unimproved, was a public road that could be used to reach its proposed development on the theory, among other things, that the road was a public easement created when the patent was issued to the western claims by express reference to a survey map. *Id.* at 636–37, 651. The district court ruled in favor of the mining patent holder stating that "[a]n express easement by reservation arises when the purchaser's deed refers to a plat where the easement is clearly depicted," where the reference is "sufficient to put the purchaser on 'inquiry notice' that the property is being conveyed pursuant to a particular recorded document." *Id.* (alteration in original) (internal citations omitted). Here, the westernmost mining claim referred to a survey map describing that claim and showing a road, among other things. *Id.* at 638. The court also determined the road was public because at the time the claim was surveyed, it "belonged" to the United States and any road traversing federal land was therefore public. *Id.* Further, the court reasoned that at the time the mining claim was patented, the road was the only ingress and egress

by the public. The need to access a water source has been the kind of necessity sufficient to establish an easement by necessity.[168]

In *Leo Sheep*, the Court recognized a possible avenue for establishing a right to access, that is, based upon long-held custom.[169] The Court, citing *Buford v. Houtz*,[170] recognized and affirmed a common law implied license that permitted a herder to graze his cattle on open, unfenced land.[171] In *Buford*, the plaintiff owned some 300,000 acres of formerly federal lands, which were scattered throughout a 900,000 acre area of federal lands.[172] They sought to enjoin the grazing of sheep within the larger area on the grounds that grazing on the federal lands would necessarily involve a trespass to their unenclosed land.[173] The Court pointed

---

to the easternmost claim. *Id.* Finally, the court observed that over the last century various survey maps have identified the road as a public road. *Id.* The Montana Supreme Court reversed the district court on two grounds. *Id.* at 646, 652. First, while the express reservation by reference to a map was a valid theory under Montana law, it was only of "recent vintage" and not recognized at the time the putative easement was created. *Id.* at 641. The court nevertheless went on to find that even if the theory applied, it would fail because there was no showing of the required clear and unmistakable reference of a right of way on a plat or certificate of survey. *Id.* at 650. And in any case, the theory would only operate to establish a private, but not a public road as the plaintiff sought. *Id.* at 651. Second, even under prevailing federal law, the patent holder loses. *Id.* at 641. It was well-settled that references in a deed to a plat that contains "a description of land, the courses, distances, and other particulars" are to be "regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed." *Id.* at 642, 641–42 (citing Jefferis v. E. Omaha Land Co., 134 U.S. 178, 194–95 (1890)). But it was still necessary for the court to determine whether the federal government intended to reserve a public road across the claim. In fact, the survey notes, objects, and data on the survey map were for the purpose of aiding the identification of the mining claim, and not for establishing rights outside the express language of the conveyancing instrument. *Id.* at 643. The court found persuasive the holding in *Leo Sheep*, where the Supreme Court was unwilling to imply rights-of-way that would have a substantial impact on property rights granted over 100 years ago. *Id.* at 642 (citing *Leo Sheep Co.*, 440 U.S. at 682). Using the same rule of construction, the Montana Supreme Court found that while the deed contained reservations by the government for ditches and canals, nothing in the language could be read as reserving a road, let alone a public road. *Id.* at 642–43.

[168] *See* Night Sisters Corp. Inc., v. Hog Island, Inc., 2007 R.I. Super. LEXIS 31 *24 (Super. Ct. R.I. February 26, 2007) (access to well); Hansuld v. Lariat Diesel Corp., 245 P.3d 293, 298 (Wyo. 2010) (easement by implication for waterline); Homes Dev. Co. v. Simmons, 70 N.W.2d 527, 581 (S.D. 1955) (easement by implication to access irrigation ditch); Smith v. Heissinger, 745 N.E.2d 666, 671–72 (Ill. Ct. App. 2001) (easement by necessity is not limited to ingress and egress, but may also cover access to water); Pickett v. Whipple, 216 A.D.2d 833, 835 (N.Y. App. Div. 1995) (recognizing applicability of theory of easement by necessity for access to a water source, but failing to find requisite necessity); Bear Island Water Ass'n, Inc. v. Brown, 874 P. 2d 528, 536 (Idaho 1994) (recognizing aptness of theory of necessity for access to a well, but finding facts did not establish easement).

[169] *Leo Sheep Co.*, 440 U.S. at 688 n.24.

[170] Buford v. Houtz, 133 U.S. 320, 332 (1890) (right to cross private land to allow cattle to get to public land for grazing).

[171] *Leo Sheep Co.*, 440 U.S. at 688 n.24.

[172] *Buford*, 133 U.S. at 325–26.

[173] *Id.* at 324–26.

out that throughout history, federal lands had played an important role in the production of beef by allowing unrestricted grazing and pasturage of cattle.[174] Even lands being improved under the Homestead Acts were subject to the general public's rights to pasturage.[175] Also, nearly all the states had fence laws early on, which allowed a landowner to protect cultivated lands by fencing out cattle and other domestic animals likely to cause damage to crops, but where absent a fence, cattle were free to roam.[176] The United States had rejected the English rule that imposed a duty on herders to keep his herd within his own enclosure under penalty of damages for resulting injuries.[177]

While this opinion was a clear affirmation of the right of the public to enjoy public lands, it also implied that an abutting landowner must suffer the burdens of the public right to access to the public lands. The right of a landowner to control access to his land, to be sure, remains an important right to be observed by the courts, and will normally control even if it leaves a neighbor with no or limited access. This preference for the landowner's interest in excluding others is revealed not only in the reluctance of the law to imply easements, but also in the courts' delineating the scope of easements. Thus, even when an easement is expressly created in favor of the government in a grant, it does not always follow that a right of access extends to the public.[178] This attitude was made plain in *Cal-Neva Land & Timber, Inc. v. United States.*[179] There, the landowner sought to limit BLM access across private land for administrative purposes only and to preclude general public access.[180] The easement granted by the landowner's predecessor granted a "perpetual easement and right-of-way, including but not limited to the right and privilege to locate, construct, relocate, maintain, control, and repair a roadway . . . ."[181] The BLM agent who negotiated the easement testified that the purposes of the easement were to gain access to BLM timber and the management of BLM lands.[182] The testimony further showed that from the time of the grant in 1957 to 1981, any gates on the land covered by the easement were unlocked, which meant regular access by the public.[183] In 1981, the new manager of the

---

[174] *Id.* at 326–27.

[175] *Id.* at 327.

[176] *Id.* at 328, 330.

[177] *Id.* at 331.

[178] *See, e.g.*, Cal-Neva Land & Timber Inc. v. United States, 70 F. Supp. 2d 1151 (D. Oregon 1999).

[179] *Id.*

[180] *Id.* at 1154–56.

[181] *Id.* at 1155–56.

[182] *Id.* at 1155. There were certain reservations in the grant including the requirement to pay for transporting logs, approve the location of new roads, and the requirement to repair of any damage to irrigation ditches, fences, and gates. *Id.* at 1156.

[183] *Id.* at 1156.

ranch over which the easement passed posted no trespassing signs and then began blocking the main gate, at first during hunting seasons, and then at all times.[184] When the manager refused to remove the lock in response to the BLM's demand, the BLM cited the manager for locking the gate.[185] This dispute led to a quiet title action. The court's analysis focused on the scope of the easement.[186] It explained that "[o]rdinarily, an easement passes no rights to the grantee except those that are necessary for the easement's reasonable and proper enjoyment."[187] However, the easement owner's rights to use and enjoyment are limited only by express and unequivocal restrictions or reservations appearing in the written document or by extrinsic evidence demonstrating an intent by the original parties to the limit the easement rights.[188] When an easement's scope is not specifically defined, "the rule is that it need be only such as is reasonably necessary and convenient for the purposes for which it was created."[189] This means that "an easement granted in general and in unlimited terms," will be deemed to give unrestricted reasonable use and no specification of every allowable use within this conception is necessary to confer these rights.[190]

Applying these principles, in order to ascertain any such restrictions or limitations, the court first looked to the plain language of the granting instrument viewed in the context of the entire document,[191] then looked to determine whether there was any ambiguity which could be resolved by an examination of the circumstances surrounding the grant.[192] The court determined that while the easement did not mention the public, it unambiguously gave the BLM the right to allow public access.[193] This was because the express language granted the BLM a "'perpetual easement and right-of-way, including but not limited to the right and privilege to locate, construct, relocate, maintain, control, and repair a roadway' over and across their real property."[194] This "including but not limited to" language meant the purposes were expressly unlimited.[195] With

---

[184] *Id.*

[185] *Id.*

[186] *Id.* at 1157–63.

[187] *Id.* at 1157 (quoting Watson v. Banducci, 973 P.2d 395, 400 (Or. 1999) (citing Miller v. Vaughn, 1880 WL 1543 at *3 (Or. 1880))).

[188] *Id.* (quoting *Watson*, 973 P.2d at 400 (citing Jones v. Edwards, 347 P.2d 846, 848 (Or. 1959); Kell v. Oppenlander, 961 P.2d 861, 863–64 (Or. 1998))).

[189] *Id.* (quoting Fendall, v. Miller, 196 P. 381, 383 (Or. 1921)).

[190] *Id.* at 1158 (quoting Criterion Interests, Inc. v. Deschutes Club, 902 P.2d 110, 113, *modified* 903 P.2d 421 (1995)).

[191] *Id.* at 1157 (citations omitted).

[192] *Id.* (citations omitted).

[193] *Id.* at 1158.

[194] *Id.*

[195] *Id.*

"unlimited purposes come unlimited uses," especially where there were no express restrictions on the easement's use.[196] While "logging" was expressly mentioned as an authorized use for the easement, the court found that nothing suggested that that use was intended to be an exclusive use.[197] Moreover, the word "control" meant "the BLM [had] the right to regulate, govern, administer, and oversee the road after it [had] been located and constructed."[198] This interpretation of the language of the easement, however, did not end the inquiry into the scope of the easement. Instead, the government had to establish that the terms "licensees" and "permittees," as referenced in the granting instrument, were intended to include the public.[199] The instrument itself did not define these terms, but the language was found to be broad enough to include recreationists.[200] Nothing in the language or history of the parties' negotiations limited licensees to persons engaging in particular activities, such as harvesting timber or grazing.[201] Nor did the absence of language describing the permissible uses of the easement create an ambiguity.[202] Instead, the easement scope was broad enough to be used for all reasonable purposes.[203]

While the rights of the public to cross in *Cal-Neva Land & Timber* were established by the interpretation of an express easement, the case nonetheless shows that such rights cannot be assumed, although rights over or in another's land can be defined by reference to acts upon the land.[204]

---

[196] *Id.*

[197] *Id.* at 1161.

[198] *Id.* at 1158.

[199] *Id.* at 1159.

[200] *Id.* at 1159 ("describing historical use by general public of the United States' public domain for recreation and other purposes as access under implied license") (citing United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1283 (9th Cir. 1980)).

[201] *Id.* at 1158–59.

[202] *Id.* at 1161.

[203] *Id.* at 1159.

[204] Having concluded the terms of the grant were not ambiguous, and therefore extrinsic evidence was not admissible, out of caution, to avoid a remand where the parties would have to resubmit evidence, the court went on to consider extrinsic evidence bearing on intent. *Id.* at 1161. The parties presented no evidence of specific discussions of the public use of the easement during negotiations, but the BLM agent testified "it was common knowledge at the time that BLM-constructed or controlled roads were open to the public, and that the easements could be used for a variety of purposes." *Id.* Other evidence was conflicting as to whether permission was required for use of the roadway. *Id.* at 1161–63 (while some asked, others did not, in either case there were never any locked gates). And the permission usually sought was not to use the roadway to access public lands, but to hunt or recreate on private lands. *Id.* From this, the court concluded that at the time the easement was granted, the roadway was burdened with public use. This indicated an intent that public uses would continue. *Id.* at 1163. The court found evidence of conduct by the landowners, BLM, and others, after the grant, not helpful. *Id.* Indeed, if the landowners blocked access, it would only mean that they engaged in conduct in violation of the BLM's rights. *Id.*

D. The Right to Fence Out Never Inhered in the Title

Perhaps the most fundamental reason for finding public access over private land to reach public lands is the proposition that the right to exclude the public never inhered in the title to land that stands as a gateway to public resources. This proposition is consistent with the Supreme Court's oft-stated aphorism that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[205] Most recently on a regulatory takings claim, Justice Scalia, in *Lucas v. South Carolina Coastal Council*,[206] restated this long-held view.[207] In large measure, the common law is about property ownership. Some of the earliest concerns of society had to do with securing individuals rights in land. "[F]reedom, and the security of private property were linked together as the ancient liberties of the free English subject."[208] Laws arose in the community to protect these liberties.[209] It is the protection of property that encourages owners to invest in order to accumulate more, which in turn, enables forward thought, invention, and ultimately artistic and leisurely pursuits, after the base human needs have been provided for.[210]

---

[205] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (alteration in original) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)); *see also* Hughes v. Washington, 389 U.S. 290, 295 (1967) ("[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer.") (internal quotation omitted); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992); Texaco v. Short 454 U.S. 516, 525 (1982); United States v. Locke, 471 U.S. 84, 115–16 (1985).

[206] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[207] *Id.* at 1030 (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

[208] William H. Taft, *The Right of Private Property*, 3 MICH. L. J. 215, 215 (1894).

[209] Indeed, "[a] government which recognized no such rights, which held the lives, liberty and property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, a despotism." *Id.* at 233.

[210] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347–59 (1967) (asserting that private property facilitates efficiency and utility by the internalization of externalities); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 251, 353 (1988) (concluding that the concept of property allows individuals to keep what they acquire; that private property is necessary to sustain and develop the "abilities and self-conception definitive of . . . status as persons").

1. The Common Law as Evolving and Fluid: Responses to Externalities

A large part of the common law was formed by the rules that developed to protect private property. But what is the common law?[211] "As a body of rules and concepts, it cannot be dated much earlier than the first half of the twelfth century."[212]

A.W.B. Simpson, the highly regarded chronicler of the English common law, once noted that if the common law's existence is thought of in terms of a set of rules, "it is in general the case that one cannot say what the common law is."[213] "As a system of legal thought the common law . . . is inherently incomplete, vague and fluid."[214] Professor Simpson wrote:

> The ideas and practices which comprise the common law are customary . . . in that their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning . . . . Such rules . . . serve . . . as guides to proper practice, since the proper practice is in part the normal practice . . . .[215]

---

[211] ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 23–25 (Pa. Press 1989). Perhaps the greatest monument to the common law is Blackstone's Commentaries, written "in part as an extended essay celebrating the genius and liberty of the English people and demonstrating how English common law exemplified 'the general spirit of laws to principles of universal jurisprudence.'" WAYNE MORRISON, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND xii (Wayne Morrison ed., Cavenish Publishing Limited, 2001). Blackstone's guiding notion was that custom and tradition of the past would provide a template for resolving problems over time. *Id.* at iv, xiv–xvi, lv–lvi, 12, 47–52. Many writers since have rejected this premise, arguing that modernity should apply rules and principles of current times which are more relevant to the current issues. *E.g.*, JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 7 (Frederick G. Lawrence trans., MIT Press 1987). Perhaps, Blackstone's greatest critic was Jeremy Bentham, who accused him, among other things, of offering ideas that masked rational jurisprudence in favor of adherence to past notions. *See* JEREMY BENTHAM, *A Fragment on Government, in* A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 391–98 (J. H. Burns & H. L. A. Hart eds., 1977).

[212] 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 2-1 (Vol. 2 1909). There were, to be sure, well-defined rules and customs that governed the lives of the Anglo-Saxons in the six centuries before the Conquest. *Id.* at 2–106. These laws and customs governed a person's status in society, criminal acts, property, and family law. *Id.* at 2-15; 2-25-2-106.

[213] Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 8, 16 (William Twining ed., 1986).

[214] *Id.* at 17.

[215] *Id.* at 20–21.

The common law is viewed as embodying an ancient wisdom, which may be timeless, but is continually evolving through collective experience.[216] This seems to set up a sort of conundrum—common law thought embracing complex notions, explaining and justifying past practices, and providing guidance for future conduct. At the same time, common law thought allows the development of new doctrines and ideas, so it has a dynamism which custom may lack.[217]

At first the common law of property aimed to secure possession. Other interests emerged including establishing right, succession, and alienation. Consequently, the set of rules that comprise the common law is not precise and finite.[218] "[T]he heart of [property law]" is "not in specific decisions or rules." Instead, it is the "broad notions which are difficult to unify or systematise, but which [are yet] 'woven into the fabric of life.'"[219] It is the uncertainty of law that endows it with its intrinsic virtue, contributing to its stability. Indeterminacy also makes it possible for the law to remain stable while adapting to changing circumstances by making a new interpretation of the words. Because the words are not repudiated, the rule stands; continuity is preserved; innovation is introduced.[220]

Property has long-since lost its all or nothing conception. Instead, it has evolved into a law of accommodation—evolving with societal needs and efficiency.[221]

---

[216] Simpson, *supra* note 213, at 20. The "common law is a system of customary law . . . as it consists of a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance . . . ."

[217] COTTERRELL, *supra* note 211, at 28.

[218] COTTERRELL, *supra* note 211, at 23. Yet, in *Leo Sheep v. United States*, the Court was reluctant both "as a matter of common-law doctrine and as a matter of construing congressional intent, . . . to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication" from the Government. 440 U.S. 668, 680–82 (1979).

[219] COTTERRELL, *supra* note 211, at 24.

[220] SHIRLEY R. LETWIN, ON THE HISTORY OF THE IDEA OF LAW 337–38 (Noel B. Reynolds ed., 2005). This indeterminacy of law was the main target of the Realist movement. *Id.* at 337–38. The authors asserted that because law is not discovered in Nature, or revealed by God, or imprinted in human reason, it cannot be objective. *Id.* at 338. Rather, it is solely the product of the individual judges' beliefs, prejudices, and inclinations. *Id.* It is thus arbitrary. The retort to this assertion is that even though a resolution of a dispute is not susceptible to resolution as a mathematical problem, it is yet not necessarily irrational or subjective. It is possible to refer to statutes, decisions, and procedures to find reasons in a decision, even though one might come to a different resolution.

[221] In marking out the contours of intellectual property rights, courts typically look to property law generally for analogies. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60–61 (1884) (defining authorship as individual creation); Nash v. CBS, Inc., 899 F.2d 1537, 1541–43 (7th Cir. 1990) (demarcating private rights from that in public domain). Perhaps, in this instance, the converse may be true. The copyright statute begins by declaring that an author shall have certain exclusive rights (to copy, distribute, make derivative works, perform, and display publicly), all of which, however, are subject to the fair use provisions. 17 U.S.C. §§ 106–07 (2012). While the current fair use provisions are codified in the statute, until the 1976 enactment of the current statute, fair use was premised on the notion of implied consent by the author and measured by a rule of reason. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550–60 (1985);

The current conception of property is one that reflects the recognition "that property is not a natural right, but a deliberate construction by society."[222] There are necessary limits on the power that property confers, largely as a consequence of the imposition of stewardship responsibilities on ownership. The New Jersey Supreme Court in *State v. Shack* eloquently expressed this view.[223] The court pointed out that "a man's right [to] his real property . . . is not absolute, [it is] a maxim of the common law that one should . . . use his property" in a way that does not "injure the rights of others."[224] This maxim expresses "the inevitable proposition that rights are relative . . . and must be [accommodating] when they meet."[225] The court went on to note that, "it has long been true that necessity, private or public, may justify entry upon the lands of another."[226] The court further noted, "[W]hile society will protect the owner in his permissible interests in land, yet '[s]uch an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies.'"[227] In sum, property "serves human values [and is] recognized to that end."[228]

The ruling in *Shack* does not fit within classical liberal contractarianism. Farmer did not consent to allow the service workers to enter. And, under *Shack's* principles, the utility of the result can be questioned—the workers who depend upon the landowner for their very being are not likely to complain too much

---

Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). Another could make limited use of copyrighted work for the purposes for which the work was created—that is, to edify, delight. However, wholesale appropriation was not permitted. Folsom, 9 F. Cas. at 342. Fair use was one of those compromises, it seems, necessary to justify the monopoly that the act conferred upon authors consistent with the purposes of protecting intellectual property to start with—to benefit society in some way. *Harper & Row Publishers, Inc.*, 471 U.S. at 557–59. The analogy is apt to a point, and perhaps ends at the idea that the right to exclude inhering in physical property is demanded by the finite characteristics of the property. There is a real concern with dissipation and exhaustion, whereas, with intellectual creations, the monopoly is not necessary to guard against exhaustion, but to enable financial rewards to facilitate more creations. *See id.* ("[E]ncouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'") (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

[222] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

[223] New Jersey v. Shack, 277 A.2d 369 (N.J. 1971). Defendants, a field worker, and a staff attorney from a non-profit corporation formed to provide health services, legal advice, and representation for migrant workers, were convicted of violating a trespass statute when they entered private farming property to meet with the migrant workers in the privacy of their living quarters without the farmer-employer's permission or supervision. *Id.* at 277–301. The Supreme Court of New Jersey held that defendants did not invade the "possessory right of the farmer-employer." *Id.* at 375. The defendants' conduct therefore was "beyond the reach of the trespass statute." *Id.*

[224] *Shack*, 277 A.2d at 373.

[225] *Id.*

[226] *Id.*

[227] *Id.* (alteration in original) (citation omitted).

[228] *Id.* at 372.

about conditions, especially while on the other's land. The economy of the result is not well-established as it might allow interferences with the productive activities occurring on the land. Nevertheless, the result does fit within an evolving conception of property as having regard for a spectrum of values and limits as it relates to those affected by the right to exclude; it recognizes the absence of true choice, i.e., whether to venture off the farm for services and possibly compromise the position or suffer without them, the position intact. It seems that property rights should not be measured solely and irreversibly "on the basis of [the] initial allocation or recognition of entitlements and obligations, but also" on competing interests when enforcement of those rights is required.[229]

Other writers seem to share the view of the New Jersey Supreme Court. Cohen states:

> [W]e can no longer maintain Montesquieu's view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain . . . . To be really effective . . . , the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property . . . [I]f the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest.[230]

C.B. MacPherson had a similar view asserting, "[T]he right to exclude is no more the essence of property—as a matter of logic or as a matter of propriety—than *the right not to be excluded* . . . ."[231] When framed in this context, the issue is no longer "putting limits on the property right, but of supplementing the individual right to exclude others by the individual right not to be excluded by others . . . . This latter right . . . may provisionally be stated as the individual right to equal access to the means of labour and/or the means of life."[232]

---

[229] *See* Amnon Lehavi, *How Property Can Create, Maintain, Or Destroy Community*, 10 THEORETICAL INQ. L. 4, 62–63 (2009) (discussing "property law is measured not only on the basis of initial allocation or recognition of entitlements and obligations, but also on the ongoing enforcement of such interests by the legal system," which diverges based "on the type of resource, the nature of the alleged infringement and competing interests").

[230] Morris R. Cohen, *supra* note 18, at 21, 26.

[231] C.B. MacPherson, *Liberal-Democracy and Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 199, (C.B. MacPherson ed., 1978) (emphasis added).

[232] *Id.* at 201. Richard Epstein has taken a radically different view in favor of absolute rights providing the basis for later market transactions: so long as there are enough buyers and sellers, market forces will check abuse. Richard A. Epstein, Book Note, *Rights and "Rights Talk"*, 105 HARV. L. REV. 1106, 1109 (1992).

By rejecting the all or nothing monolithic conception, property law serves human ends by moving away from enforcement or no enforcement and instead seeking to resolve conflicting interests by accommodation. This is the way courts are now conceiving and addressing issues involving non-possessory rights in land. Under this dynamic approach, an express easement holder may be allowed to change the scope of an easement if the easement will retain its utility, but not unduly burden the servient owner. A permitted change/expansion necessarily curtails the servient owner's right to exclude while broadening the easement holder's available access. One could argue that the servient owner, having voluntarily given an easement, does surrender some power. In the context of the issues in this paper, while no landowner has voluntarily entered into such a relationship, this is usually the case where the easement may be implied by law. Just as a landowner selling land that needs access over the retained land should anticipate use by the owner of that sold land, which right the law finds by implication, so should one purchasing land that stands as a gateway to natural areas. The parallel is exact.

2. The Landowner's Title is Burdened by the Public Trust Doctrine

If the public trust doctrine applied to burden the public lands while under government ownership, by operation of that doctrine, either the lands could not be alienated or the burdens of the trust would continue even after severance of a parcel to private owners. The earliest conception of the public trust doctrine pertained to waters, in particular, tidal waters.[233] All rivers and ports were public, and the right of fishing was common to all, which meant that "the state's sovereignty extended over the foreshore, [which] was considered the people's common property, of which the state was merely trustee." [234] As such, the government was constrained to "exercise its sovereign powers only in a regulatory capacity," that is, to ensure use in common.[235]

---

[233] *See generally* THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES 90–92 (Thomas C. Sandars trans., 1922) ("The sea-shore, that is, the shore as far as the waves go at furthest was considered to belong to all men . . . . The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself . . . ."). Emperor Justinian in 533 A.D. codified, under Roman Law, natural law communal rights in certain basic and omnipresent natural resources. *Id.* at 1–2, 90–91; *see also The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763–64 (1970). By natural law, these things—air, running water, sea, shores, are the common property of all. THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES, *supra* note 233, at 90. For a discussion suggesting even earlier origins of the concept see Charles F. Wilkinson, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow: Introduction and Overview: The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–30 (1989).

[234] Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF.L.REV. 839, 842–43 (1984); THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES, *supra* note 233, at 91. "Foreshore" refers to that part of a shore that lies between the highest and lowest watermark. Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2598 (2010).

[235] Wilson, *supra* note 234, at 842–43.

The concept took on a slightly different expression under English common law. It was generally held that the shore and tidal lands were held in trust by the King for the citizenry to guarantee the free exercise of commerce, navigation, and fishing.[236] The common law distinguished between *jus privatum*, property and/or land which the King could transfer to individuals in fee ownership and the *jus publicum*, the right vested in the King to hold such property as the sea, submerged land, rivers, and land below the high water mark for the benefit of the public.[237] *Jus privatum* applied to land not affected by the tide.[238] *Jus publicum* applied to submerged land under navigable waters, which was narrowly defined to mean those waters subject to the ebb and flow of the tides.[239] Absent a grant to the contrary, the riparian owner held title to the submerged land to the thread of the current, or centerline, of the river or lake to which the land abutted.[240] However, all waters, whether tidal or not, were subject to a general public right of use for navigation and fishing.[241] This meant that neither the King nor the private riparian owner could use ownership to obstruct or deny free navigation to the public.[242]

---

[236] Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842); United States v. 1.58 Acres of Land Situated in the City of Boston, Cnty. of Suffolk, Commonwealth of Mass., 523 F. Supp. 120 (D. Mass. 1981) ("[N]either the federal government nor the state may convey land below the low water mark to private individuals free of the sovereign jus publicum.").

[237] Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 26 (1963).

[238] *See generally* JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATER-COURSES: INTENDED MORE PARTICULARLY AS AN ILLUSTRATION OF THE RIGHTS AND DUTIES OF THE OWNERS AND OCCUPANTS OF WATER PRIVILEGES: TO WHICH IS ADDED AN APPENDIX, CONTAINING THE PRINCIPAL ADJUDGED CASES 17 (1824) ("[T]he uniform mode of ascertaining [navigability], as well in this country as in England, (with one exception in the state of Pennsylvania) has been by the *flowing of the tide*.").

[239] Shively v. Bowlby, 152 U.S. 1, 11 (1894) ("By the common law . . . where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king . . . . Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit."); *see also* JAMES KENT, 3 COMMENTARIES ON AMERICAN LAW 344 (1828) (concept of navigability linked to fact of tidal waters); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317–18 (1987), *overruled on other grounds by* Or. ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 370–72 (1977).

[240] ANGELL, *supra* note 238, at 17.

[241] Shively v. Bowlby, 152 U.S. at 13.

[242] The concept came to be expressed in the Magna Carta. *See* Magna Carta, ch. 13 (1215), *reprinted in* J.C. HOLT, MAGNA CARTA app. at 455 (2d ed. 1992) (private ownership limited to the foreshore); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 389 (1842) (noting that Magna Carta constrained King's power to grant rights to navigable waters); Weston v. Sampson, 62 Mass. 347, 352 (1851) (noting that Magna Carta constrained King's power to grant exclusive fishing rights).

However, the American conception of the reach of the public trust diverged from this early English conception.[243] It extended to non-tidal lands to the extent they were navigable.[244] In *Phillips Petroleum Co. v. Mississippi*, the Supreme Court ruled that the public trust even covered tidal waters that were not navigable.[245] This is because the state's interest in such waters, such as for bathing, swimming, recreation, fishing, and mineral development, are not related to navigability.[246] "Limiting the public trust doctrine to only tidelands under navigable waters might well result in a loss to the public of some of these traditional privileges."[247] The Court also found that the burdens of the public trust doctrine passed to the states as they were admitted to the union.[248]

As it is generally conceived, under the public trust doctrine, waters that are navigable are not susceptible to the ordinary rights of private ownership, but are reserved to achieve the larger interests in public navigation and commerce.[249] Similarly, the use of the banks of rivers is also free, such that all persons are at liberty to land their vessels and to tie up on the banks or unload cargo. All persons have the freedom to use the seashore to the highest tide line. The fundamental aim remained clear—providing access.

One of the earliest expressions of the American concept of public trust doctrine came in *Illinois Central Railroad Co. v. Illinois*[250] where the court ruled

---

[243] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 286 (1997) (citing JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND §32 (2d ed. 1891)). "[T]hese developments in American law [were] a natural outgrowth of the perceived public character of submerged land[], a perception which [informed] the principle that these lands were tied in a unique way to sovereignty." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 286. American law did not embrace *jus privatum*, thereby avoiding recognition of the sovereignty's right "to seize private structures on shores and marshes reclaimed from tidewaters." *Id.* at 286 (citations omitted) (internal quotation marks omitted).

[244] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988) (discussing Barney v. Keokuk, 94 U.S. 324, 338 (1877)); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454 (1851).

[245] *Phillips Petroleum Co,* 484 U.S. at 479–85 (discussing that the test for determining reach of public trust doctrine is tidal versus non-tidal lands as opposed to navigable versus non-navigable).

[246] *Id.* at 482.

[247] *Id.* at 483 n.12.

[248] Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317–18 (1987), *overruled on other grounds by* Or. ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410, 417 (1842) (recognizing that New Jersey, and each of the original thirteen states, gained "absolute right to all their navigable waters, and the soils under them for their common use" and the people have a common right to fish for shell fish and floating fish).

[249] *Bonelli Cattle Co.*, 414 U.S. at 322 (citation omitted); 101 Ranch v. United States, 905 F.2d 180, 182–83 (8th Cir. 1990).

[250] 146 U.S. 387 (1892).

that the public trust doctrine was not limited to the navigable seas, as under English law, but applies to any navigable water. Additionally, the Court found that "[t]he [public trust] doctrine [was] founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide."[251] In this respect, the public trust doctrine operated much like a public easement.[252]

The Court ruled that the state grant, whereby it ceded all control over the land, could not be sustained because the state held such land in trust for the public and the public trust responsibility could not be relinquished by a transfer of the property. The state regulatory authority can never be lost.[253] According to the Court, the State could "no more abdicate its trust responsibility in managing property," . . . except in the limited instances for improvement of navigation and when transfers do not impair the public interest in the resource retained, any more than it "c[ould] abdicate its police powers in the administration of government and the preservation of the peace."[254] The trust responsibility with which navigable waterways are held, therefore, was governmental and could not generally be alienated.[255]

Thus, the Supreme Court extended the public trust doctrine to cover submerged land under navigable inland waterways not subject to the ebb and flow

---

[251] *Illinois Cent. R.Co.*, 146 U.S. at 436. Suit was commenced by the Attorney General of Illinois for a declaration of title to certain lands on the east, or lake front, of the city of Chicago. *Id.* at 433. The land was situated between the Chicago River and Sixteenth Street, which had been reclaimed from the waters of the lake. *Id.* The area had been used for the usual structures and apparatus employed in a railroad business, including tracks, piers and submerged lands running for a mile, from the south pier near the Chicago river. *Id.* at 433–34. The Illinois Railroad maintained it had title based on a grant from the State and a city ordinance conveying the bed of Lake Michigan, lying east of the tracks and breakwaters of the company. *Id.* at 438. The grant and ordinance also conveyed the right to construct in the harbor such wharves as it needed for its operations. *Id.* The grant from the state was based on a grant from Congress in 1850 to the State of Illinois, a right of way, one hundred feet in width for its length for the construction of a railroad. *Id.* at 439. The Railroad constructed tracks on a 200 foot tract, reclaimed from the waters of the Lake to enable entry into the city. *Id.* at 469–70. The Court began with the recitation of the

> settled law that . . . ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of [C]ongress to control the navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

Id. at 435.

[252] Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 580–84 (1989).

[253] *See Illinois Cent. R.R. Co.*, 146 U.S. at 452–53.

[254] *Id.*

[255] *Id.* at 455–56.

of the tide.[256] This extension was based on the observation that the original rule was founded on the need for public use of navigable waterways, but due to particular factual settings, England equated "tide waters" with "navigable waters."[257] Here, in the United States, there were tens of thousands of miles of navigable waterways not subject to the tide. Yet, because they were essential to interstate travel, it was equally necessary to extend the underlying doctrine—that is, to ensure the accomplishment of the important public values in free movement and to facilitate commerce.[258]

a. The Public Trust Doctrine as Part of Evolving Common Law

Professor Robin Craig, in her latest work on the public trust doctrine, urges us to conceive of the public trust as any other common law principle—one that expands and adjusts in response to an evolving and changing society.[259] In this conception, the public trust doctrine embraces both public rights in and public values of natural resources and is no longer limited to using water for navigation, commerce, and fishing, but instead is extended to facilitate public enjoyment, preservation and conservation of a host of natural resources.[260] Professor Craig states that "[l]ike any other category of state common law . . . , state public trust doctrines both reflect historic concerns and public policies—specifically, the particular public concerns regarding water in particular locations of the United States—and provide the states with an 'ability to adapt to emerging societal needs.'"[261] While state courts "have celebrated the flexible and evolutionary nature of their public trust doctrines, . . . scholars have been reluctant to embrace the rich mixture of approaches to balancing public and private rights in water and other natural resources that [have] emerged" in precedent.[262] Professor Craig explains that the western states' greater flexibility in approaches to the recognition (or not) of public rights in, and the public values of, water and other aspects of the environment can be explained by four factors:

---

[256] *Id.* at 435–37; *see also* Barney v. Keokuk, 94 U.S. 324, 338 (1876).

[257] *Illinois Cent. R.R. Co.*, 146 U.S. at 435–36.

[258] *Id.* at 436–37.

[259] Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

[260] *Id.* at 92. She traces the development of the doctrine over the centuries and across the states.

[261] *Id.* at 91 (citing Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 78 (2009)).

[262] *Id.* at 91.

> [1)] the severing of water rights from real property ownership and the riparian rights doctrine[, thereby freeing them] from one set of potentially confining private property rights [; 2)] subsequent state declarations of public ownership of fresh water[,] . . . [thereby allowing] public trust doctrines to operate independently of state title to submerged lands and federal pronouncements regarding 'the' public trust doctrine [; 3)] perceptions of shortages of fresh water, submerged lands, and environmental amenities[, prompting] increased interest, compared to the East, in preserving the public values in these resources[; and 4)] the willingness of most western states to raise water and other environmental issues to constitutional status and/or to incorporate broad public trust mandates into statutes [thereby encouraging the evolution of] water-based public trust principles into expanding ecological public trust doctrines.[263]

She concludes, true to a common law fashion, state courts are using state public trust doctrine to respond to particular and emerging state needs—the loss of native species, protecting coastal waters, and responding to "climate-change driven appearance of new publicly usable water resources." Craig explains:

> While such evolutions and expansions complicate the identity—indeed, the very existence—of any unitary, national, perhaps Constitution-based public trust doctrine, they also provide place-based balancing of public and private needs and values in that most basic of natural resources—fresh water—that may better serve the long-term interests of the nation as a whole.[264]

The concept of public trust is now interpreted to encompass a broad range of interests affecting the public interest in lands—to include the right to portage on private land around stream barriers[265] and public access rights to tidelands and shorelands.[266] The doctrine has been extended to protect wildlife[267] and rural

---

[263] *Id.* at 92.

[264] *Id.*

[265] Mont. Coal. for Stream Access v. Curran, 682 P. 2d 163 (Mont. 1984); Mont. Coal. for Stream Access v. Hildreth, 684 P. 2d 1088, 1092 (Mont. 1984) (determining that title to underlying streambed is immaterial to determining navigability for recreational use), *overruled on other grounds by* Gray v. Billings, 689 P.2d 268 (Mont. 1984).

[266] CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1121 (Alaska 1988) (finding ownership of tidelands is subject to fishing rights in the public); City of Berkeley v. Superior Court of Alameda Cnty., 26 Cal. 3d 515, 534 (1980) (grants of tideland subject to rights under public trust); Marks v. Whitney, 6 Cal. 3d 251, 260 (1971) (en banc) (same); Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist., 733 P. 2d 733, 737 (1987) (finding public trust renders public uses indestructible).

[267] Geer v. Connecticut, 161 U.S. 519 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979). The Supreme Court affirmed that extension, pointing out that

parklands.[268] At first, it was limited to protecting the wet sand of a beach, but now it has been expanded to cover the dry sand.[269] It was extended in California to inland from the shore.[270] Other states have broadened the public trust concept to include a wide range of activities,[271] for purposes other than the facilitation of commerce or food production, including: recreation, canoeing, bathing, and aesthetic values, as a spiritual retreat.[272] Other courts, while recognizing the right of the public for access to the shores, stopped short of recognizing a right to recreate thereon.[273]

---

at common law, wild animals, "having no owner, were considered as belonging in common to all citizens of a state." *Id.* at 522. The Court further stated:

> While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id. at 529. *See also* Wade v. Kramer, 459 N.E.2d 1025, 1027–29 (Ill. App. Ct. 1984) (recognizing that while wildlife are protected by the Illinois public trust, the legislature has the authority to reallocate public trust property to different uses in the public interest); Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1003 (Haw. 2006).

[268] Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 120–21 (Mass. 1966); Friend of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053 (2001).

[269] *See* Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978) (holding that dry beach is subject to the public trust doctrine, even though the area has been leveled and graded to create the beach by a private owner).

[270] California v. Superior Court of Lake Cnty., 625 P.2d 239, 252 (Cal. 1981) (holding that riparian owner of land along navigable non-tidal water held title to land between the high and low water marks, but that the title was impressed with a public trust); California v. Superior Court of Placer Cnty., 625 P.2d 256, 260 (Cal. 1981) (holding that boundaries between public and private ownership of riparian lands should be determined with reference to the lake's current level); *see also* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (applying public trust doctrine to water appropriation rights).

[271] *See, e.g.*, Larman v. Iowa, 552 N.W.2d 158, 161 (Iowa 1996) (stating that the public trust doctrine embraces recreational purposes); State v. Longshore, 5 P.3d 1256, 1262–63 (Wash. 2000) (stating the public trust in Washington includes "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purpose generally regarded as corollary to the right to navigation and use of public waters"); Walton County v. Stop the Beach Renourishment, 998 So.2d 1102, 1108 (Fla. 2008) (same).

[272] Gion v. Santa Cruz, 465 P.2d 50, 58–60 (Cal. 1970) (en banc) (finding strong public policy in favor of public access to the shoreline); Hixon v. Pub. Serv. Comm'n, 146 N.W.2d 577, 582 (Wis. 1966) (discussing the public trust doctrine as historically including the right to hunt, swim, fish, and sail); Glass v. Goeckel, 703 N.W.2d 58, 73–74 (Mich. 2005) (finding the public trust ensures the right to walk along the shores of the Great Lakes).

[273] *See* Dep't of Natural Res. v. Mayor & Council of Ocean City, 332 A.2d 630, 638 (Md. 1975) (finding that a prior grant of the foreshore to the owner of the littoral, limits the public's right to navigation and fishing); Opinion of the Justices to the House of Representatives, 313 N.E. 2d 561, 566–67 (Mass. 1974) (holding public trust doctrine does not include the right to walk on the beach or public bathing); Eaton v. Town of Wells, 557 A.2d 168, 177 (Me. 1989) (finding that the public trust gives right of fishing, fowling, and navigation only).

In the context of shore lands, one state embraced a practical conception of the public trust doctrine. The New Jersey Supreme Court declared that not only does the public have the right to enjoy the seashore, notwithstanding abutting private land, but that those abutting landowners must give access over their land to get to the shore.[274] In *Matthews v. Bay Head Improvement Association*,[275] a resident of Point Pleasant who desired to swim and bathe at the Bay Head beach sued an association of homeowners and individual homeowners to establish the right to cross privately owned land in order to gain access to the public beach. The court found the public trust doctrine imposed burdens, necessary to facilitate the enjoyment of natural resources in the public trust, upon private landowners. In the court's view "the public trust doctrine does not prohibit all alienation by the state of riparian lands, but that conveyances are subject to use by the public depending on the nature of the land."[276] While the state has the unquestioned power to lease and grant the foreshore and ocean beach property consistent with the public interest,[277] at the same time, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore.[278] That interest "may be of the sort enjoyed by the public in municipal beaches, namely, the right to sunbathe and generally enjoy recreational activities."[279] The court pointed to what was uncontested, that beaches are a "unique" and "irreplaceable" resource.[280]

Without some means of access, the public right to use the foreshore would be meaningless. "To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public a feasible access route would seriously impinge on, if not effectively eliminate, the rights associated with the public trust doctrine."[281] The right conferred is not an "unrestricted right to cross at will over all property bordering common property," but ensures only "reasonable access to the sea."[282] Thus, "where use of dry sand is essential or reasonably necessary for enjoyment of the

---

[274] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 375–66 (N.J. 1984).

[275] 471 A.2d 355 (N.J. 1984).

[276] *Id.* at 361–65 n.5 (citing N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 545 (N.J. 1972)).

[277] *Id.* at 362, n.5.

[278] *Id.* at 363.

[279] *Id.* at 364.

[280] *Id.*

[281] *Id.*

[282] *Id.*

ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."[283]

As an evolving concept, the public trust doctrine should be and is applied to reflect our evolving relationship with the natural environment. With respect to private lands abutting common property, it is properly subject to a right of use and enjoyment by the public. In effect, the private owner holds land, to a point, as trustee for the benefit of the public.

To be sure, certain interests—like the air and the sea—have such importance to the citizens of the country as a whole that they cannot be the subject of private ownership. In our early history water served as a means of commerce and communication between disparate parts of the country; rivers offered the paths for exploration, facilitated the fur trade, and enabled timber harvests by log floats. Where the dense forests made road construction difficult and very costly, the aesthetic and spiritual values inhering in mountainous areas and forests have, in modern times, taken on the same value in our national psyche.

The public lands, particularly those in the mountainous and wilderness areas of the West, have the same public values as lands touched by the sea.[284] Wildlife, minerals, timber, and pastures for grazing are an important source of commerce. Public land serves as a natural habitat for many species of wildlife and vegetation; the rivers and streams flowing through public land have served as places for recreation, apart from their service of commerce and communication.

b. The Original Public Trust Burdens on Federal Lands

While *Matthews* was in certain respects groundbreaking, its application to federal public land access may be hampered by two philosophical and theoretical impediments. First, despite the very clear federal land policy in favor of preservation and conservation, there is yet no general agreement on the need for protection of the public lands by the public trust doctrine. After all, throughout most of our history, the policy animating the federal government was one of disposal, not retention or conservation. Second, it is not well-settled whether or not the public trust doctrine binds the federal government in the same way as it burdens state governments.

---

[283] *Id.* at 365; *see also* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54–55 (N.J. 1972) (finding the public trust doctrine forbids municipalities from discriminating between residents and nonresidents when charging user fees for the beach—access must be provided equally to all).

[284] For a discussion of the various public interests courts have recognized as implicating the public trust doctrine, see Richard J. Lazurus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

Decades ago, one of our nation's most avid environmentalists, Professor Joseph Sax, spoke about the overarching role of the public trust doctrine as it applied to natural resources.[285] Under his conception, the larger philosophical and spiritual aims that traditionally define the public trust doctrine seem equally apt for public lands.

Professor Sax's conception found some support in Supreme Court pronouncements made more than a century earlier. The earliest recognition that the government's public land ownership might be impressed with a trust was established in *United States v. Trinidad Coal & Coking Co*.[286] In that case, the Court stated the government's vacant coal lands "were held in trust for all the people; and, in making regulations for disposing of them, [C]ongress . . . , in the discharge of a high public duty, and in the interest of the whole country, sought to develop the material resources of the United States . . . . "[287]

This position was reiterated in *Light v. United States*,[288] where the Court upheld a trespass judgment against a cattle herder on public lands. The Court reminded us that:

> All the public lands of the nation are held in trust for the people of the whole country . . . . And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose.

---

[285] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1969–1970). Professor Sax believed that "[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." *Id.* at 474. He explained the public trust doctrine rests upon the belief "that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs[;] . . . that to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them." *Id.* at 484.

[286] 137 U.S. 160 (1890).

[287] United States v. Trinidad Coal & Coking Co., 137 U.S. 160, 170 (1890); *see also* United States v. California, 332 U.S. 19, 40 (1947) ("The government, which holds its interest here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property . . . . "); Saulque v. United States, 663 F. 2d 968, 976 (9th Cir. 1981) (finding the government holds lands in trust for all people).

[288] 220 U.S. 523 (1911).

> These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.[289]

The limits to those powers as trustee seem to be that they be exercised for some "national or public purpose."

In *United States v. Beebe*, in an action to set aside and cancel certain land patents, the Supreme Court noted that the "public domain is held by the Government as part of its trust."[290] This means that "[t]he Government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation . . . ."[291]

The Court in *Illinois Central* discussed the public trust doctrine as it applied to limit a state's disposition of a public trust resource. The burdens of the public trust, with respect to what the federal government can do with federal lands, is much less certain. The Court stated, although in dicta, that title to land under navigable waterways is "different from the title . . . the United States hold[s] in the public lands which are open to pre-emption and sale."[292] One could interpret this language to indicate that the public trust doctrine does not apply to inland public lands. Alternatively, one might interpret the public trust doctrine as being inapplicable to lands that Congress has not reserved or withdrawn.

Perhaps the best sense of the court's conception of the extent of the public trust burdens on the federal government is found in *Alabama v. Texas.*[293] The Court explained the nature of the public trust, stating:

> The United States holds [such] resources . . . in trust for its citizens in one sense, but not in the sense that a private trustee holds for a *cestui que trust*. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the . . . Nation.[294]

---

[289] *Id.* at 537 (citations omitted) (internal quotation marks omitted).

[290] United States v. Beebe, 127 U.S. 338, 342 (1888).

[291] *Id.*

[292] Illinois Cent. R.R. Co., 146 U.S. 387, 452 (1892).

[293] 347 U.S. 272 (1953).

[294] Alabama v. Texas, 347 U.S. 272, 277 (1953) (emphasis added); *see also* United States v. California, 332 U.S. 19, 38–39 (1947) (finding *jus publicum* as to oil found in waters within three mile limit off shore).

The lower courts have been less than uniform in their interpretation of the public trust as it applies to the federal government.[295] In the late 1970's and early 1980's, lower federal courts seemed susceptible to the idea of the public trust doctrine covering federal lands. During this period, the Sierra Club filed a series of suits against the Department of Interior seeking to establish that the Department had "trust" obligations apart from statutory directives, requiring it to take specific action to protect public lands. In *Sierra Club v. Block*,[296] the District Court seemed squarely to recognize the public trust doctrine as applying to federal lands[297] and the holding appeared to affirm the validity of the public trust doctrine as it applied to the federal government as a source of duties and as a restraint of sorts on its powers in dealing with federal lands. But that restraint and those duties were found to extend no further than the express limits or duties Congress has imposed in legislation dealing with federal lands. In this sense, the public trust doctrine is coterminous with applicable legislation. In *Sierra Club v. Dep't of the Interior*,[298] the parties had some initial success asserting the public trust doctrine, with the court noting:

---

[295] United States v. Burlington Ne. R.R. Co., 710 F. Supp. 1286 (D. Neb. 1989) (finding public trust gave the United States standing to recover for injury to wildlife); United States v. 1.58 Acres of Land in Boston, Suffolk, Mass., 523 F. Supp. 120, 125 (D. Mass. 1981) (holding that "federal government is as restricted as the state in its ability to abdicate to private individuals its sovereign rights in the land"); *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (finding Virginia and federal government could recover under the public trust doctrine from property owner for the killing of water fowl); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1084 (D.C. Cir. 1984) (declining to expressly state whether or not the public trust doctrine applied to tidal waters and the land submerged beneath them, even though the concept of the federal government holding public lands in trust for the public was longstanding). *But see* Alaska Constitutional Legal Def. Conservation Fund, Inc. v. Kempthorne, 198 F. App'x 601, 603 (9th Cir. 2006), *cert. denied*, 549549 U.S. 1181 (2007) ("Public Trust Doctrine is currently applicable only to states. Because [plaintiffs] provide no support for extending this doctrine to the federal government, the district court properly dismissed this claim."); United States v. 11.037 Acres of Land, 685 F. Supp. 214, 217 (N.D. Cal. 1988) (finding public trust does not survive federal condemnation of trust land). While one suit was met with a rather sympathetic ear, in the end, all courts who addressed the issue rejected the idea that there are undefined, fluid obligations directing the government to manage the public lands toward any particular ends. Indeed, all the courts recognized that while the Secretary of Interior is charged with managing the public lands toward the general ends stated in the statutes, how the Secretary carries out those directives is left largely within the discretion of the Secretary. Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981); Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980); Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985). In all three cases, the Sierra Club sought to have the Department of the Interior take specific action not expressly required by statute, that is, to assert federal water rights as this would safeguard and protect the public lands. At the same time, at least one court recognized that that discretion is not unlimited. *Andrus*, 487 F. Supp. at 448–49.

[296] 622 F. Supp. 842 (D. Colo. 1985).

[297] *Block*, 622 F. Supp. at 846.

[298] 398 F. Supp. 284 (N.D. Cal. 1975).

> [T]here is . . . a general trust duty imposed upon the National Park Service, Department of Interior, by the National Park System, 16 U.S.C. § 1 et. seq., to conserve scenery and natural and historic objects and wildlife [in the National Parks, Monuments, and reservations] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[299]

However, when the case returned to the court after the district court ordered the government to come up with a plan for the management and protection of the redwoods, the court found that the only duties applicable to the Department were those found in the statutes.[300]

Even if the management directives found in the various statutes could be read to preclude the government from engaging in certain activities likely to violate those directives, it would be a huge leap to read them to require the government to take any particular act in managing public resources.

c. The Public Trust Doctrine Servitude

Even if courts were more susceptible to a generalized trust concept that burdened the federal government's management of public lands, would that trust necessarily mean that the public must be afforded access? Or, is it fulfilled by the government's acts toward protection and preservation? If these public lands had been covered by the public trust, it would mean that the government was incapable of alienating a part of the land that did not bear the burdens of that trust. This would mean that a public right to continue using the conveyed away parcel would persist for the purposes of the trust.

It seems without dispute that the public trust would impose upon the government an "affirmative obligation" to protect resources. This is generally said to mean that government must act as a fiduciary to manage the resources covered by the doctrine in a way that safeguards them from avoidable dissipation. Yet, two fundamental issues need to be addressed. The first is whether this duty to protect and preserve means a duty to facilitate the enjoyment of the resources covered. It would seem so, since enjoyment of the resources really is the reason for the trust to start with. The second is whether it is fair to look back now, to apply the evolved concept of public trust to an interest acquired centuries ago. Considering the importance of the public lands and that the abutting private land serves as

---

[299] Sierra Club v. Dep't of the Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (alteration in original) (citation omitted). *See also* Sierra Club v. Dep't of the Interior, 424 F. Supp. 172 (N.D. Cal. 1976); Sierra Club v. Dep't of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974). Sierra Club v. Dep't of the Interior, 398 F. Supp. 284 (N.D. Cal. 1975).

[300] Sierra Club v. Dep't of the Interior, 424 F. Supp. at 175.

the gateway to this important public resource, it would not be unfair to find that the private owner should reasonably have been expected to accommodate the public by allowing access. In *Leo Sheep*, the Supreme Court discussed the history of the land disposal policy that largely resulted in the blocked access and found that at the time, the access problems were known, and Congress anticipated that neighbors would act neighborly to work them out.[301] This comment suggests some anticipation or at least the wisdom of anticipation by the parties of new rights and consequently new burdens to undertake.

More than anything, property is about expectations—of continued control, exclusive possession, and return on investment. Relationships and acquisitions are created and founded upon prevailing rules and conventions in the community and these could be entirely frustrated if new, exogenous rules were to be imposed. There is a great societal interest in leaving undisturbed settled rules as to what is or is not property in order to create reliance. Reliance encourages investment for productivity: if we want farmers to plant crops in the spring, they must have some assurance that they will be free to harvest that crop for their benefit in the fall.[302] If we want farmers to maintain an efficient and well-maintained farm, they must be assured that they will be able to continue farming. Security in property ownership leads to more stable and well-governed communities. Landowners take a greater interest in the well-being of their communities. Property rules, then, create expectations among the holders of property. But those expectations are bounded by what a state chooses to recognize as entitled to protection. This means that certain private expectations or desires of property owners may not be supported by the state and, therefore, are not recognized as property if they fail to serve larger interests determined by the community to be desirable. As stated earlier, any reliance must embrace the inevitability of evolving notions of property in the common law. The prevailing conception is that property is a social instrument: it exists to serve human needs.[303] This means that while there are some bedrock principles that protect property, those same principles are not etched in that bedrock. Instead, as human needs change so do property rights. Communities created property and communities can curtail it.[304]

---

[301] *See* Leo Sheep Co. v. United States, 440 U.S. 668, 672–73, 676–77 (1979).

[302] *See* Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 748 (2007).

[303] State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

[304] In recent times, states have altered the nature of many interests in real property by legislation and by judge-made rule. For example, a possibility of reverter created when a fee simple determinable is conveyed may not last forever, as was the conception at common law. Instead, by statute in a number of states, they terminate if the event that will cause the estate to revert does not occur within thirty years of creation unless the holder of the interest records notice of the existence of the interest. *See, e.g.*, MCKINNEY'S REAL PROPERTY LAW, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED § 345 (2013); CAL CIV. CODE § 885.030 (West 2013). In other states covenants cannot be created to last forever, but terminate after thirty years unless renewed by the interested parties, and then they are only enforced by damages and not an injunction. *See, e.g.*, MASS. GEN. LAWS. ch. 184, § 27, 30 (West 2013).

David Hume, in his *Treatise of Human Nature*,[305] described property rights as "conventions"[306] that arise spontaneously from:

> [A] general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules . . . . [T]he actions of each of us have a reference to those of the other, and are perform[ed] upon the supposition, that something is to be perform[ed] on the other part.[307]

A convention is generally a shared understanding or implicit agreement adhered to because of a general expectation that others will follow.[308] Conventions arise in response to a felt need, then, as routinely practiced, take on the force of law. They guide behavior and set the contours of rights and obligations.

It is doubtful that any notion of property rights as inviolate has ever risen to the level of a convention. Nuisance laws seemed to have always been a part of the fabric of the common law. So too was a neighbor's right to subjacent support and limits on a riparian owner's water uses. In the modern era, limits on land use are pervasive. Regulations not only determine what structures can be placed on land, but also prohibit what can be removed.[309] These effects and benefits of regulations radiate outwardly toward the public at large.

VII. CONCLUSION

What are the government's obligations as trustee? The Supreme Court has expressed its reluctance to second-guess Congress as to how it administers the trust.[310] Does the Property Clause give Congress unreviewable powers to deal with the public lands in any way it sees fit? Could Congress decide to give away all the public lands without judicial scrutiny?[311] Surely, if it decided to give away

---

[305] DAVID HUME, A TREATISE OF HUMAN NATURE, *reprinted from the original edition in three volumes and edited* (L.A. Selbybiggie ed., Oxford, Clarendon Press 1965) (1739).

[306] *Id.* at 490.

[307] *Id.*

[308] 1 THE NEW PALGRAVE DICTIONARY OF ECONOMIES AND THE LAW 454 (Peter Newman ed., 1998).

[309] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (upholding regulations defining habitat destruction as a taking within the meaning of the endangered species act); N.J. Shore Builders Ass'n v. Jackson, 970 A.2d 992 (N.J. 2009) (upholding ordinance requiring replacing a tree for each one in connection with development of lots).

[310] Alabama v. Texas, 347 U.S. 272, 273 (1954); United States v. San Francisco, 310 U.S. 16, 29–30 (1940); Light v. United States, 220 U.S. 523, 539 (1911).

[311] Indeed, until 1976, the prevailing federal policy was to dispose of federal land by sales or grants to states, corporations, railroads, and individuals. For a further discussion of the history of the governments public land policies, see *supra* Part V.

lands only to Irish descendants, that would be challengeable on equal protection grounds. Or can it be argued that there is some implied limitation that only those actions that serve some public or national interest will be upheld (although the Court would give great deference to Congress' determination of the public interest)? Nonetheless, courts should have the power to review agency decisions to determine compliance with statutory mandates and duties of a trustee as Congress has incorporated them in particular statutes.[312] More than three decades ago, Professor Sax developed a theory of "limited review" in the context of the public trust.[313] He stated that courts should overturn an agency action that breaches the trust unless the legislature has enacted a statute expressly authorizing the action.[314]

As stated, under the Property Clause of the Constitution, Congress' power over public lands is plenary and includes the power of a sovereign as well as a proprietor.[315] Even if it is said that Congress holds public lands in trust for the citizenry, how Congress manages that trust generally is left to Congress.[316] Even though in our early history, the policy of the federal government has been to alienate lands,[317] in recent times, Congress, or the administrative agency in charge, has often reserved lands for special purposes (such as national forests, wildlife refuges, and national monuments) or withdrew lands from the operation of the disposition laws altogether. Through these recent actions, Congress has acknowledged that special public values inhere in the natural world residing within public lands. The specific language in various forms of legislation confirms this. A public trust both animates and limits the government's, and hence its transferee's, powers as owner. *Nemo dat qui non habet*.[318]

---

[312] *See generally* Sierra Club v. Dep't of the Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (discussing a statute expressly authorizing the Secretary to take certain steps protecting a national park from damage).

[313] Sax, *supra* note 285, at 494–95.

[314] Sax, *supra* note 285, at 542–43; *see also* United States v. Jenks, 129 F.3d 1348 (10th Cir. 1997) (recognizing government's power to regulate access by inholders over public land, but cautioning that "imposition of onerous requirements on inholders seeking access rights which are unrelated or disproportionate to any expected public benefit [may] constitute arbitrary and capricious conduct in violation of law").

[315] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[316] Light v. United States, 220 U.S. 523, 537 (1911) ("[I]t is not for the courts to say how that trust shall be administered. That is for Congress to determine . . . . [Rights to set up or withdraw reserves] are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.").

[317] *See generally* 43 U.S.C. § 2 (1988). Title 43, Section 2 of the United States Code, assigning duties to the Secretary of the Interior, reflects this attitude. The Secretary was to: "perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government." 43 U.S.C. § 2 (1988).

[318] "*He who hath not cannot give*."