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## An Overview of the Question of Access across Indian Lands

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## COMMENTS

### AN OVERVIEW OF THE QUESTION OF ACCESS ACROSS INDIAN LANDS

Because of increases in both our population and the amount of leisure time available, greater demands are being made for new sources of energy and new recreation areas. In responding to this increased demand, some thought must certainly be given, by Indians and non-Indians alike, to development of some of the 50,000,000 acres<sup>1</sup> held by the American Indians. Lack of access may be a serious impediment, however, to oil, mineral,<sup>2</sup> and recreation development of these lands, and the impact on the unwary developer may be catastrophic.

#### *Dry Creek Lodge, Inc. v. United States.*<sup>3</sup> A WARNING

In 1965 Mr. and Mrs. Albert Cook purchased 160 acres of land within the exterior boundaries of the Wind River Indian Reservation in Wyoming.<sup>4</sup> They used the land for stockraising purposes for eight years and then incorporated Dry Creek Lodge, Inc., for the purpose of using the same land as a resort lodge with drinking and dining facilities. During those eight years they used a three and a half mile dirt road for access to and from Highway 26. This road had been used by their predecessors in interest ever since the land was patented in 1926. The corporation applied for a

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1. T. TAYLOR, *THE STATES AND THEIR INDIAN CITIZENS* 176 (1972).
2. This article deals with access over Indian lands generally, and, although the general discussion is relevant, there are some additional considerations involved where access is contemplated for oil or mineral development. See *Appleton v. Kennedy*, 268 F. Supp. 22 (N.D. Okla. 1967); Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 ROCKY MT. MIN. L. INST. 217 (1965); Gibbons, *Examination of Indian Mineral Titles*, 10 ROCKY MT. MIN. L. INST. 73 (1965); Lonergan, *Access to Intermingled Mineral Deposits, Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands*, 8 LAND & WATER L. REV. 125 (1973).
3. No. C74-74 (D. Wyo. July 11, 1974).
4. This paper will deal with the access problem generally, and discussion will not be limited to the situation in Wyoming. Both the statutory material and the common law considerations will be applicable throughout the states, although the practitioner is advised to study the specific treaties and statutes dealing with the particular tribe involved in his case. For example, in the case discussed above, the starting point of a lawyer's research would have to be the treaty with the Shoshones and Bannacks, July 3, 1868, 15 STAT. 673.

loan from the Small Business Administration in order to finance construction of the "dude ranch" buildings. The Small Business Administration expressed concern over the Cooks' access rights, and it was informed by the Superintendent of the Wind River Indian Reservation that no valid right-of-way had been granted or made of record. The Superintendent advised the Cooks, however, that there would be no problem with regard to access, and a \$250,000 loan was subsequently approved. Thereafter the necessary accommodations were built, and the lodge was ready for business.

On May 17, 1974, upon commencement of the enterprise, the primary access road to the Cooks' land was blockaded by the Indian owners of the allotted trust lands through which the road passed. Four days later a temporary restraining order was entered whereby the blockade was removed and access allowed, but not for commercial purposes. Dry Creek Lodge, Inc., the Cooks, and employees of the lodge then brought suit in federal district court, District of Wyoming, praying:

- 1) for a declaratory judgment finding that plaintiffs had a way of necessity across lands of defendant Indians, held by defendant United States as trustee;
- 2) that the court quiet plaintiffs' title to such way of necessity;
- 3) that the court permanently enjoin defendants and their successors from interfering with the access way of plaintiffs; and,
- 4) for substantial monetary damages for mental suffering and loss of business, employment, and wages.

Among District Court Judge Kerr's findings were:

- 1) that questions with respect to Indian lands held in trust by the United States are solely for consideration of the federal government;
- 2) that there were available administrative procedures for the acquisition of a right-of-way over Indian lands;

3) that such administrative procedures, as outlined in 25 C.F.R., part 161,<sup>5</sup> provide an "adequate and complete" remedy at law;

4) that the existence of such remedies barred the court from granting any injunctive or equitable relief; and,

5) that the court would retain subject matter jurisdiction pending the exhaustion of the administrative remedies.<sup>6</sup>

Judge Kerr ignored plaintiffs' way-of-necessity argument, and it was not clear whether it would be considered upon exhaustion of the administrative remedies. It will soon become apparent that the applicability of the way-of-necessity argument, and other arguments based upon common law easement notions, may be very decisive in cases like this. The administrative remedy requires that one obtain the consent of the Indians whose land is crossed.<sup>7</sup> If they decide that it is in their best interest not to consent, then the interior, non-Indian landowner is without a remedy unless the courts will allow a common-law prescriptive or implied easement argument to prevail.

These cases will also involve a jurisdiction problem, which is reflected in "the continuous struggle by the states to assert control over Indian reservations."<sup>8</sup> After a brief but necessary discussion of the historical patterns of Indian land-holding and the terminology that has developed as a result, attention will be focused on the jurisdiction area, as it has developed judicially and statutorily. Then the access problem proper will be dealt with, both from the statutory and common-law standpoints.

#### PATTERNS OF INDIAN LANDHOLDING

Prior to conquest by the White Man, there were no property-line fences in the native Americans' America, and although particular tribes could be identified with particular

5. 25 C.F.R. § 161, *et seq.* (1974) (rights-of-way over Indian lands).

6. Dry Creek Lodge, *supra* note 3, findings of law Nos. 5, 9, 12 and 24.

7. 25 C.F.R. § 161.3 (1974).

8. M. PRICE, *LAW AND THE AMERICAN INDIAN* 183 (1973).

places, there weren't any concepts, much less records, of "land ownership" as we know it.<sup>9</sup> Pursuant to a Congressional policy of separatism, the eastern tribes were moved westward onto reservations,<sup>10</sup> and the western tribes were required to cede huge sections of their land to the federal government. This reduction in available land began to stimulate a need for self-regulation, and the bundle of tribal powers came to include the "power to regulate the use and disposition of individual property among its members."<sup>11</sup> Although some of the tribal land was occupied and developed by individual Indians, such occupancy did not create a vested right in the individual as against the tribe. The tribal members held the land in common,<sup>12</sup> with no right to partition the common estate.<sup>13</sup> The property interest of each individual was founded upon tribal membership.<sup>14</sup> During all this time (from 1776 to 1887), the concept of tribal ownership was recognized by the courts and by the Indians themselves, but, for the most part, the concept of individual ownership was still absent.<sup>15</sup>

Shifting from a policy of separation to one of assimilation, Congress passed the General Allotment Act of 1887.<sup>16</sup> This piece of legislation is the most important in Indian land law history. It authorized the President to allot to each Indian, from the land of the reservations, 40 acres of irrigable agricultural land, or 80 acres of non-irrigable agricultural land, or 160 acres of grazing land. The land was to be held by the United States as trustee for 25 years, for the sole use and benefit of the allottee, with provisions for the extension of the trust period at the President's discretion (and later at the discretion of the Secretary of the Interior). When, and if, the trust period expired, the allottee received the

9. See *Ex parte Tiger*, 2 Indian Terr. 41, 47 S.W. 304, 305 (1898), stating that Indians are strangers to common law notions.

10. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 53-62 (1945).

11. *Id.* at 143.

12. The individual's interest in tribal property did not amount to that of a tenant in common. *Id.* at 183.

13. For an excellent discussion of the general property rights of the individual Indian, see *Id.* at 183-94.

14. *Halbert v. United States*, 283 U.S. 753, 762-63 (1931).

15. R. POWELL, THE LAW OF REAL PROPERTY ¶ 111 (rev. ed. 1973).

16. Act of February 8, 1887, 24 STAT. 388, as codified in 25 U.S.C. §§ 331-34, 341-42, 348-49, and 381 (1970) (hereinafter cited to U.S.C.).

patent in fee, and thus became subject to the civil and criminal laws of the state in which he resided.<sup>17</sup>

The Allotment Act was intended to accomplish several objectives: (1) to allow the Indians to civilize themselves by working with the land as the white settlers had,<sup>18</sup> (2) to break down the tribal system by dealing directly with the individuals, rather than with the tribe;<sup>19</sup> and, (3) to allow white settlers to get at some of the land held by the Indians.<sup>20</sup> The Act only really succeeded in accomplishing the third objective. If land was allotted to the individuals of a tribe and there was reservation land left over, the federal government would retake this "surplus" and offer it for sale on behalf of the Indians.<sup>21</sup> If an allottee died prior to termination of the trust, his land was usually sold, and the proceeds divided among his heirs. In addition, the allottees had only acquired a small piece of land, and not the skills that were required to utilize it.<sup>22</sup> As a result, much of the allotted land was leased to non-Indians who had these skills, and upon termination of the trust, these same lands were sold to the lessees. The net result of the operation of the Allotment Act was that Indian landholding decreased from 138,000,000 acres in 1887 to 48,000,000 acres in 1934.<sup>23</sup>

Appalled at the quickly diminishing land base of a people which had traditionally "lived off of the land", Congress

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17. The original provisions of the Allotment Act were interpreted as subjecting the allottees to state jurisdiction even during the term of the federal trust. In the *Matter of Heff*, 197 U.S. 488, 502-04 (1905). The Congress reacted in 1906 by expressly providing for the postponement of state jurisdiction until after the land had been patented in fee. 34 STAT. 182. See *United States v. Pelican*, 232 U.S. 442 (1914).
  18. F. COHEN, *supra* note 10, at 208; Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445, 456-57 (1970).
  19. T. TAYLOR, *supra* note 1, at 15-17; S. Tyler, *Indian Affairs: A Work Paper on Termination* 5 (Institute of American Studies, Brigham Young Univ., 1964), where President Theodore Roosevelt is quoted as saying in 1901: "In my judgment the time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass."
  20. F. COHEN, *supra* note 10, at 209; THE PUBLIC LANDS 322 (V. Carteson ed. 1962); Comment, *The Indian Battle for Self-Determination*, *supra* note 15, at 47.
  21. Act of February 8, 1887, ch. 119, § 5, 24 STAT. 389, as codified in 25 U.S.C. § 348 (1970).
  22. R. POWELL, *supra* note 15, at ¶ 111.
  23. F. COHEN, *supra* note 10, at 216.

passed the Wheeler-Howard Act of 1934,<sup>24</sup> also known as the Indian Reorganization Act. This Act prohibited any further allotment of Indian lands,<sup>25</sup> indefinitely extended the trust imposed on lands already allotted,<sup>26</sup> and required the restoration to tribal ownership of any "surplus lands" remaining unsold by the government.<sup>27</sup> The Act also prohibited any further sale, devise or gift of restricted Indian lands other than to the tribes themselves.<sup>28</sup> Finally, the Act provided a basis for adoption of tribal constitutions,<sup>29</sup> prescribed the procedures for reorganizing Indian self-government, and allowed for the incorporation of the tribe as a business.<sup>30</sup>

This brief history has failed to trace the treatment of decedents' estates in Indian law, but that does not seem necessary because any easement that is considered here is appurtenant, and any statutory right-of-way endures for a term of years. Also, no mention has yet been made of the recent termination acts which will be dealt with in the discussion of statutory jurisdiction.

#### TERMINOLOGY

As a result of the shifting policies of Congress, we are left with a rather muddled system of Indian landholding. The following terminology is part of the result. Although one or more of the definitions may be theoretically incorrect, they are consistent with the definitions used in the relevant federal statutes on jurisdiction, Indian lands,<sup>31</sup> and access over such lands.

*Allotted Lands*—This includes lands allotted to individual Indians pursuant to the General Allotment Act of 1887, or pursuant to allotment provisions in the applicable

24. 25 U.S.C. § 461, *et seq.* (1970) originally enacted as Act of June 18, 1934, ch. 576, § 1, *et seq.* 48 STAT. 984.

25. 25 U.S.C. § 461 (1970).

26. 25 U.S.C. § 462 (1970).

27. 25 U.S.C. § 463 (1970).

28. 25 U.S.C. § 464 (1970).

29. 25 U.S.C. § 476 (1970).

30. 25 U.S.C. § 477 (1970).

31. "Indian lands" is not a term used in the relevant statutory material, and for purposes of this paper, it will simply mean the total of both trust lands and patented lands.

treaties or statutes dealing with a particular tribe.<sup>32</sup> This land is either held in trust by the United States for the benefit of the individual, or held by the Indian in fee, subject to federal restrictions against alienation or encumbrance.

*Tribal Lands*—Lands held by the United States in trust for a tribe, or title to which is in the Indian tribe<sup>33</sup> subject to federal restrictions against alienation or encumbrance. This includes all unallotted or unpatented reservation lands, as well as non-reservation lands acquired by the tribe.

*Trust lands*—The total of all allotted lands and all tribal lands.

*Patented lands*—Lands allotted in severalty to individual Indians, upon which the trust or restrictions against alienation have been terminated.

The reader will find that familiarity with such terms is necessary in this area of the law, and that by defining such terms early, the following discussion can be that much simpler.

#### JURISDICTION OVER INDIAN LANDS: JUDICIAL DEVELOPMENT

Before dealing with the specific holdings on jurisdiction over Indian lands, a review of the judicial concept of jurisdiction over Indians in general may be pertinent.

“Until about 1800, Indian tribes were treated as independent nations by the judiciary and accorded international law treatment.”<sup>34</sup> By the 1830’s, Indian tribes were relegated

32. Although this article addresses itself to the provisions of the General Allotment Act in dealing with allotted and patented lands, it should be kept in mind that many of the earlier treaties contained various allotment provisions. These provisions are similar, however, to those of the Allotment Act, and the sometimes obscure intent of Congress as to those earlier provisions is usually determined in light of the more detailed provisions of the Allotment Act and its amendments.

33. R. POWELL, *supra* note 15, at ¶ 113, where the author points out that there are no substantial restrictions on the ability of a tribe to acquire and hold title to property.

34. Comment, *Economic Development of Indian Reservations: Increasing Tribal Participation, Limiting Federal Control*, 48 TUL. L. REV. 649, 656 (1974).

to "domestic dependent nations", but were still accorded a degree of sovereignty. In the 1832 case of *Worcester v. Georgia*,<sup>35</sup> Chief Justice Marshall held that the Constitution vested jurisdiction over intercourse between the United States and the Indians in the federal government, and that within the Indian territory, state laws had no application. The federal judiciary steadfastly held to this federal preemption theory until 1959. In *Williams v. Lee*,<sup>36</sup> decided that year, the Court reformulated the rule to allow state action where not prohibited by Congress, and where such action did not infringe on the right of reservation Indians to make their own laws and be ruled by them. The 1962 case of *Village of Kake v. Egan*<sup>37</sup> further reduced the federal preemption construct and practically "reduced federal involvement to supremacy clause terms."<sup>38</sup> Although the Supreme Court made somewhat of a retreat to the federal preemption doctrine in 1965,<sup>39</sup> it is apparent that as a matter of general jurisdiction, the applicability of the federal preemption doctrine is in a state of uneasy flux.<sup>40</sup>

On the other hand, the courts have been consistent on the federal-state-Indian jurisdictional relationship as regards Indian lands. The Tenth Circuit Court of Appeals held in *United States v. Oklahoma Gas and Electric Co.* that the interpretation and construction of a statute authorizing condemnation of allotted land is "peculiarly within the competence of the federal courts."<sup>41</sup> In 1968, the Eighth Circuit stated that, "All questions with respect to rights of occupancy in land, the manner, time and condition of extinguishment of Indian title are solely for consideration of the federal government."<sup>42</sup> In 1970, the Ninth Circuit held that unallotted

35. 31 U.S. (6 Pet.) 515, 560 (1832).

36. 358 U.S. 217, 220 (1959).

37. 369 U.S. 60 (1962).

38. Comment, *The Indian Battle for Self-Determination*, *supra* note 18, at 476. This 45-page comment contains an excellent history of Indian law in general.

39. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

40. For recent developments in this area see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973).

41. 127 F.2d 349, 352 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943).

42. *Bennett County v. United States*, 394 F.2d 8, 11 (8th Cir. 1968).

tribal lands may not be condemned unilaterally by a state for public purposes.<sup>43</sup>

Other than *Dry Creek Lodge, Inc. v. United States*, the only case to have dealt with the question of private access rights across Indian lands was *Superior Oil Co. v. United States*.<sup>44</sup> There the Ninth Circuit held that the extent of any easement over trust land was to be governed by federal law because the Constitution gave Congress the power to make all the rules and regulations respecting the territory and property belonging to the United States government.<sup>45</sup>

All of these cases dealt with the jurisdiction question in the context of trust land, and it is now well settled that the federal courts have exclusive jurisdiction over trust land questions. This does not necessarily preclude the application of common-law easement theories to such land, but it does require a decision as to the relationship of these theories to the administrative remedy.

#### JURISDICTION OVER INDIAN LANDS: LIMITED CONGRESSIONAL AUTHORIZATION FOR STATE JURISDICTION

The General Allotment Act of 1887 ostensibly<sup>46</sup> gave the states general jurisdiction over patented lands. The amount

43. *United States v. 10.69 Acres of Land*, 425 F.2d 317, 319 (9th Cir. 1970).

44. 353 F.2d 34 (9th Cir. 1965).

45. *Id.* at 37 n.4.

46. 25 U.S.C. § 349 (1970). The states' criminal jurisdiction over acts committed on patented lands has been greatly reduced by a series of federal statutes giving the federal government exclusive jurisdiction over much of the criminal area. 18 U.S.C. §§ 1151-65 (1970). These statutes authorize the federal jurisdiction within "Indian country", defined as the entire area within the exterior boundaries of Indian reservations. See Comment, *Criminal Jurisdiction over Non-Trust Lands within the Limits of Indian Reservations*, 9 WILL. L. J. 288 (1973); cf. *United States v. Mazurie*, 487 F.2d 14 (10th Cir. 1973), cert. granted, 415 U.S. 948 (1974).

It may be argued that the same sort of concept, i.e., the reservation as a jurisdictional unit, exists as regards civil jurisdiction over Indians. Recent case law seems to imply that 25 U.S.C. § 349 will not be implemented to the fullest degree in giving the states jurisdiction over patented lands. See *Williams v. Lee*, supra note 36; *McClanahan v. State Tax Comm'n*, supra note 40. On the other hand, the courts have traditionally interpreted 25 U.S.C. § 349 as granting the general jurisdiction that the statutory language clearly intends. See In the Matter of Heff, supra note 17, at 502-03; *Larkin v. Paugh*, 276 U.S. 431, 439 (1928); *Dillon v. Antler Land Co.*, 341 F. Supp. 734, 741 (D. Mont. 1972); 42 C.J.S. *Indians* § 87 (1944); 41 AM. JUR. 2d *Indians* § 66 (1968); T. TAYLOR, supra note 1, at 35.

The question remains to be answered whether or not any judicial limitations imposed on the jurisdiction granted under 25 U.S.C. § 349 will affect the states' jurisdiction over patented lands in cases involving easements.

of this land, relative to the amount of trust land, is quite small. To the extent that the alleged easement crosses patented lands however, it would appear that the states probably have jurisdiction over easement controversies. If the servient estates consisted entirely of such patented lands, the state would be free to determine the issue, and the administrative remedy required in *Dry Creek Lodge, Inc. v. United States* would be inapplicable as it deals only with trust lands. *Dry Creek Lodge* is an example, however, of the situation where some of the servient estates are held in trust, and others patented. It is apparent that the part of the alleged easement coursing over trust land would have to be dealt with in the federal courts.

Although the amount of land held in fee pursuant to the Allotment Act is relatively small, a recent development has terminated the federal trust over tribes holding an additional 1,130,000 acres.<sup>47</sup> Throughout most of this last century there has been a movement underfoot to shift the guardian's robes from the federal government to the states. This movement gained momentum during the 1940's, when there was a stress on economy. Congress "was dissatisfied with the pace of the Bureau in accomplishing self-sufficiency on the part of the Indians and reducing the need for the Bureau of Indian Affairs."<sup>48</sup> This dissatisfaction set the stage for the termination act policy of the 1950's. Eleven termination acts were passed during that decade, and one has been passed since.<sup>49</sup> These acts had the effect of terminating the federal trust relationship with the tribes involved, with an accompanying termination of the flow of federal services. They also trans-

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47. T. TAYLOR, *supra* note 1, at 231-32. The acreage held by Menominee Indians of Wisconsin has not been included because the federal trust has since been restored. 87 STAT. 770 (1973) (The Menominee Restoration Act).

48. T. TAYLOR, *supra* note 1, at 55.

49. 1954: Klamath Indians of Oregon, 25 U.S.C. § 564 (1970).  
 Uintah and Ouray of Utah, 25 U.S.C. § 677 (1970).  
 Western Oregon Indians, 25 U.S.C. § 691 (1970).  
 Alabama and Coshatta Indians of Texas, 25 U.S.C. § 721 (1970).  
 Paiutes of Utah, 25 U.S.C. § 741 (1970).  
 1956: Wyandotte tribe of Oklahoma, 25 U.S.C. § 791 (1970).  
 Peoria tribe of Oklahoma, 25 U.S.C. § 821 (1970).  
 Ottawa tribe of Oklahoma, 25 U.S.C. § 841 (1970).  
 1958: California Ranchierias, August 18, 1958, P.L. 85-671, 72 STAT. 619.  
 1959: Catawba tribe of South Carolina, 25 U.S.C. § 935 (1970).  
 1962: Ponca tribe of Nebraska, 25 U.S.C. § 971 (1970).

ferred jurisdiction to the states wherein the tribes resided, and expressly prohibited application of any federal Indian statutes to these tribes.<sup>50</sup> These acts have served to transform the tribal trust land involved into some sort of tribal patented land. The states where such tribes reside will therefore have jurisdiction of all cases involving access across land held by such tribes.

Other than these statutes transferring jurisdiction over patented lands, Congress has offered the states some general jurisdiction over the Indians, but very little jurisdiction over their lands. The offer of general jurisdiction came in the form of a statute commonly known as "Public Law 280".<sup>51</sup>

Prior to the passage of Public Law 280, Congress had already given the states some regulatory authority over Indian health and educational facilities.<sup>52</sup> Much broader jurisdictional authority was offered the states under Public Law 280. Under this 1953 statute, five states<sup>53</sup> were unilaterally (on the part of the federal government) given both criminal<sup>54</sup> and civil<sup>55</sup> jurisdiction of the Indians within their borders. The law also provided for assumption of such jurisdiction by other states through legislative acceptance,<sup>56</sup> but since 1968 such an assumption also requires the consent of the tribes involved.<sup>57</sup> Because some degree of jurisdiction under Public Law 280 has devolved upon Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, and has been assumed by

50. The termination acts all contain a provision entitled "Termination of Federal Trust: (a) Application of Federal and State Laws." These sections provide, in part, that:

All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

51. Pub. L. No. 83-280, 67 STAT. 588 (1953) as amended by Pub. L. No. 90-284, § 401, 82 STAT. 78 (1968) and codified in 25 U.S.C. §§ 1321-26 (1970).

52. Act of February 15, 1929, ch. 216, 45 STAT. 1185; August 9, 1946, ch. 930, 60 STAT. 962, as codified in 25 U.S.C. § 231 (1970).

53. California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added in 1958 (Pub. L. No. 85-615). This unilateral imposition of jurisdiction upon the named states by the federal government is at odds with usual notions of federalism. See M. PRICE, *supra* note 8, at 213.

54. 18 U.S.C. § 1162 (1970).

55. 28 U.S.C. § 1360 (1970).

56. The assumption of jurisdiction by the state must be signified by "affirmative legislative action." *Kennerly v. Dist. Ct.*, 400 U.S. 432 (1971).

57. 82 STAT. 78, 25 U.S.C. §§ 1321-22, 1326 (1970).

Arizona,<sup>58</sup> Florida,<sup>59</sup> Idaho,<sup>60</sup> Iowa,<sup>61</sup> Montana,<sup>62</sup> Nevada,<sup>63</sup> North Dakota,<sup>64</sup> South Dakota,<sup>65</sup> and Washington,<sup>66</sup> it becomes important to determine how such jurisdiction will affect the question of access over Indian lands.

Although the general language of the introductory sections<sup>67</sup> of Public Law 280 seemed to convey the idea that a broad new power was being created for the states, section (4)<sup>68</sup> of the Act expressly withheld state jurisdiction from proceedings involving probate or ownership of trust lands. It also protected such lands from any alienation, encumbrance, or taxation by the state.<sup>69</sup> In effect, the expenses of general jurisdiction were transferred to the states, while the trust property continued to be protected from the property taxes needed to fund them.<sup>70</sup> Because of section (4) of Public Law 280, it is apparent that Congress has done nothing to limit the constitutionally based, judicially interpreted federal jurisdiction over cases involving easement or encumbrance with respect to trust lands.

To briefly summarize the law as regards the jurisdictional aspect of the access problem, it is clear that both Congress and the courts feel that the trust land is within the peculiar competence of the federal courts, while patented lands and lands recently terminated have been allowed to move under the jurisdictional wing of the state courts. Having determined the right court, the access problem itself can now be addressed.

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58. ARIZ. REV. STAT. ANN. §§ 36-1801, 36-1865 (1974).

59. FLA. STAT. ANN. § 285.16 (1962).

60. IDAHO CODE § 67-5101 *et seq.* (1973).

61. IOWA CODE ANN. § 1.12 *et seq.* (Supp. 1974).

62. MONT. REV. CODES ANN. § 83-801 *et seq.* (1966).

63. NEV. REV. STAT. § 41.430 (1973).

64. N.D. CENT. CODE § 27-19-01 *et seq.* (1974).

65. S.D. COMPILED LAWS ANN. § 1-1-12 (1974).

66. WASH. REV. CODE ANN. § 37.12.010 *et seq.* (1964).

67. 25 U.S.C. §§ 1321(a), 1322(a) (1970).

68. 25 U.S.C. §§ 1321(b), 1322(b) (1970).

69. This section embodies the exclusive federal jurisdiction over trust lands that had been mapped out by the Constitution and interpreted by the courts. For a discussion of this aspect of Public Law 280, see Comment, *State Jurisdiction over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND & WATER L. REV. 421 (1974).

70. M. PRICE, *supra* note 8, at 216-18.

## ACCESS OVER INDIAN LANDS: STATUTORY RIGHTS-OF-WAY

Because nearly all of the land within the exterior borders of Indian reservations is trust land, the statutory material which follows will be relevant in most cases involving easements over reservation lands. The extent to which these statutes will preempt the use of common-law easement arguments is as yet unknown, but the Wyoming Federal District Court has held that the administrative remedy must be exhausted prior to any consideration of equitable or injunctive relief.<sup>71</sup>

In initiating the discussion of statutory rights-of-way, it should be noted that "special purpose" access statutes exist and can be used if one proposes to use the right-of-way for purposes of railways,<sup>72</sup> telegraph and telephone lines,<sup>73</sup> oil and gas pipelines,<sup>74</sup> electrical plants, poles and lines,<sup>75</sup> and power and communications facilities and lines.<sup>76</sup> These statutes, on their face, do not require the consent of the Indian landholder. Since 1948, however, the procedure for acquiring such rights-of-way has been that prescribed in 25 C.F.R., part 161, which requires Indian consent.<sup>77</sup>

There are also statutes dealing with acquiring rights-of-way for public purposes by eminent domain. Pursuant to 25 U.S.C. § 311,<sup>78</sup> the Secretary of the Interior may grant permission to the proper state or local authorities for the opening and establishing of public highways over trust lands. There is some doubt that a private party could use this section via a state statute, such as Wyoming Statute § 1-795,<sup>79</sup> which vests limited eminent domain powers in individuals or corporations for special purposes. It doesn't seem that these statutes would satisfy the "public highway" language of section 311.

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71. See text *supra* p. 95.

72. 25 U.S.C. §§ 312-18 (1970).

73. 25 U.S.C. § 319 (1970).

74. 25 U.S.C. § 321 (1970).

75. 43 U.S.C. § 959 (1970).

76. 43 U.S.C. § 961 (1970).

77. See text accompanying note 75 *supra*.

78. 25 U.S.C. § 311 (1970).

79. WYO. STAT. § 1-795 (Supp. 1973).

States are authorized by 25 U.S.C. § 357 to condemn patented land for any public purpose<sup>80</sup> without approval from the Secretary of the Interior. Although this statute simplifies eminent domain proceedings involving patented lands, it really does not create any new powers in the states beyond what was given them in the General Allotment Act of 1887.<sup>81</sup>

Although it did not have the effect of repealing the special purpose access and eminent domain statutes discussed above as to trust land, the General Purpose Right-of-Way Act of 1948<sup>82</sup> was intended to supersede them.<sup>83</sup> This statute authorizes the Secretary of the Interior to grant rights-of-way for all purposes across trust lands. No such grant shall be made across tribal lands, however, without the consent of the proper tribal officials.<sup>84</sup> Grants across land allotted to individuals also require the consent of those individuals, but the Secretary may decide to allow a majority vote of such landholders to constitute the required consent of all. The Secretary is also authorized to relieve the applicant from the consent requirement whenever there are so many individual landowners that it would be impractical to obtain their consent.<sup>85</sup> Section (6) of the Act, now 25 U.S.C. § 328, authorizes the promulgation of regulations pursuant to 25 U.S.C. § 323-27 (The General Purpose Right-of-Way Act).

These regulations are contained in 25 C.F.R., part 161. They provide the procedure for obtaining the general purpose right-of-way, as well as the procedure now required for obtaining the special purpose rights-of-way discussed above. Failure to exhaust this administrative remedy is what barred the court in *Dry Creek Lodge, Inc. v. United States* from granting any injunctive or equitable relief.

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80. 25 U.S.C. § 357 (1970). It provides that:

Land allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

The Supreme Court has held that a state could not use this section to condemn trust land. *Minnesota v. United States*, 305 U.S. 382 (1939).

81. See text *supra* pp. 101-02.

82. 25 U.S.C. §§ 323-28 (1970).

83. 1 AMERICAN LAW OF MINING, § 2.82 (1974).

84. 25 U.S.C. § 324 (1970).

85. 25 U.S.C. § 324 (1970).

The regulations require that written application be made to the Secretary of the Interior, citing the statute under which application is made, and describing the length and width of the desired right-of-way.<sup>86</sup> Such application must include the consent of the Indian landowners involved.<sup>87</sup> Evidence of financial responsibility must be attached, and all applicants must agree to construct the roadway in a "workmanlike manner", and to promptly pay any damages resulting from such construction.<sup>88</sup> The regulations authorize a preliminary survey to be made on trust lands,<sup>89</sup> which might be necessary in order to locate the desired way, and to allow for production of the sealed map that must be attached to the application. Finally, the application must be accompanied by a deposit of the total estimated consideration for the easement itself, the damages from the survey, and those anticipated to result from construction.<sup>90</sup>

Once the application is approved and the construction completed, the applicant has a right-of-way for an unlimited tenure for access to homesites, or ways for railroads, telephone lines, power lines, sanitary sewers, and various types of pipelines. Rights-of-way for other purposes shall be for a period not to exceed 50 years, but such rights-of-way may be renewed.<sup>91</sup> The grant may be terminated by the Secretary if the grantee fails to comply with any of the conditions of the grant, or fails to use the way for the purpose granted for two consecutive years, or otherwise abandons it.<sup>92</sup>

Ignoring for the moment those situations where a common-law easement may exist, the procedure outlined above must be complied with if a non-Indian landowner desires to perfect an access right across trust land. The compensation aspect of the procedure should not have a chilling effect as to prospective applicants, especially commercial enterprises. If the roadway already exists and is being used by the prospec-

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86. 25 C.F.R. § 161.5 (1974) (Application for right-of-way).

87. 25 C.F.R. §§ 161.3-.5 (1974).

88. 25 C.F.R. § 161.5 (1974).

89. 25 C.F.R. § 161.4 (1974). This survey also requires Indian consent.

90. 25 C.F.R. § 161.14 (1974).

91. 25 C.F.R. §§ 161.18-.19 (1974).

92. 25 C.F.R. § 161.20 (1974).

tive applicant, getting consent from the tribe or from the individual Indians for continued use should be rather easy because it means compensation to them for a use of their land for which they are not now being compensated. If the non-Indian landowner waits until a roadblock is put up, however, substantial injury may be done to his business during the period of application for the administrative remedy. This period may be prolonged because of the unnecessary animosity that may have developed with such a confrontation. In addition, the likelihood of obtaining the necessary consent may have decreased. This is not to imply, however, that where Indian resistance appears as to the use of a roadway, application would be fruitless. In many of these cases, the Indians will probably permit the intended use of the roadway providing that they are adequately compensated. If the right of access could be perfected as a matter of course in developing Indian lands, the non-Indian landowner will not have to experience what the Cooks experienced in *Dry Creek Lodge, Inc. v. United States*.

If the procedure outlined above fails to produce a satisfactory result,<sup>93</sup> or if the applicant or his predecessors in interest had been using an access way prior to the application, it seems that he should try to press his claim in court, using a common-law easement theory.

#### THE COMMON-LAW IMPLIED EASEMENT THEORY

Despite the presence of the statutory scheme outlined above, a strong argument can be made that, as regards old access ways, the "federal common law"<sup>94</sup> is controlling, and that an implied easement must exist of necessity.<sup>95</sup> The argu-

93. 25 C.F.R. § 161.2(b) (1974). This section authorizes appeal from the administrative action in accordance with 25 C.F.R. § 2 (1974).

94. "Notwithstanding *Erie R.R. v. Tompkins*, . . . there still exists certain fields . . . where legal relations are governed by a 'federal common law', a body of decisional law developed by the federal courts untrammelled by state court decisions." O'Brien v. W. Union Tel. Co., 113 F.2d 539, 541 (1st Cir. 1940). *Accord*, *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Bd. of County Comm'rs v. United States*, 308 U.S. 343, 349 (1939), which involved the "federal common law" in an Indian law case.

95. Although there may be theoretical differences between an implied easement and a way of necessity, both will be treated here under the heading of im-

ment here is that the right-of-way statutes deal with "new"<sup>96</sup> rights-of-way, and that application need not be made in order to perfect existing easements because they are of right under the common law. If such easements did not exist, then the Allotment Act and its amendments authorizing lease and sale of allotted lands would amount to a fraud upon both the Indian and non-Indian lessees and grantees.

At common law, the existence of an implied easement is determined by ascertaining the intent of the parties to the original transfer (particularly the grantor), ascertaining such "objective intent" from the circumstances surrounding the transfer.<sup>97</sup> According to the Restatement of Property § 476(e), one of the important factors to be considered in determining such intent is the "extent of the necessity of the easement to the claimant." It may be argued that a common-law easement was not of necessity to the Indian allottees themselves, because of the existence of some sort of intra-tribal access privilege.<sup>98</sup> On the other hand it may be argued that in allotting the land to individual Indians, the United States was imposing common-law notions of exclusive owner-

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plied easement. A way of necessity rests upon an implied grant, and an implied easement is often found to exist because of necessity. The way of necessity is a type of implied easement. Comment, *Access to Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149, 161-62 (1973).

96. The General Purpose Right-of-Way Act does not expressly limit itself to situations involving "new" rights-of-way, but that limitation should be implied by the courts in their construction of it. (The regulations are aimed mainly at road construction problems, which seems to imply a new roadway and, therefore, a new easement.) If the courts do limit the statute's application by implying a "new" easement restriction, a problem would develop as how to distinguish between "new" and "old" rights-of-way. It would seem that the statute should apply to proposed and yet unbuilt roadways, newly constructed roadways, old access ways with regard to which a new use is proposed, and roadways that supplement the primary access way.
97. *Superior Oil Co. v. United States*, *supra* note 44, at 37; RESTATEMENT OF PROPERTY § 476, comment *a* at 297-8 (1944); 2 A. CASNER, AMERICAN LAW OF PROPERTY § 8.31 (1952); 28 C.J.S. *Easements* § 30 (1941).
98. Prior to any allotment acts, common law easements did not exist as between the Indians themselves. The land was a table at which all could partake. Certainly tribal existence must have included some sort of intra-tribal access privilege from one's home to the tribal center and even beyond, to hunting areas and timber lands, and to sources of water. This privilege was not so formal as a "right of access", and it is not documented. However, to these many peoples whose existence depended upon movement with the seasons, such a privilege necessarily existed. There can be little doubt but that the Allotment Act had no effect upon the Indians' traditional notions of free access. In determining the existence of an implied easement, however, focus is put primarily on the intent of the grantor, which in this case was the United States.

ship and that accordingly, only common-law easements would give a right of access. Even setting aside the question of intent as to access by Indians, however, the lease and sale provisions regarding allotted land<sup>99</sup> reflect a congressional intent that this land was to be available to non-Indians.<sup>100</sup> Because of this highly foreseeable use of the granted land, by persons who needed an enforceable right of access in order to protect their investments, it may reasonably be inferred that the United States intended to create easements appurtenant to such allotments. The alternative is to attribute to Congress an intent to allow lease and sale of Indian lands, but to deprive the grantees thereof the right of access to their property. This second alternative involves a finding of fraud upon the part of the United States. Therefore, a court would seem to have but one viable solution, i.e., to find the creation of the implied easement.<sup>101</sup>

The only cases thus far that have involved the question of implied easement over Indian land are *Dry Creek Lodge, Inc. v. United States*<sup>102</sup> and *Superior Oil Co. v. United States*.<sup>103</sup> The non-Indian claimants in both of these cases made the argument outlined above. Judge Kerr in *Dry Creek Lodge* did not address the question, but simply withheld consideration until the claimants had exhausted their administrative remedies. This approach seems to interpret the General Purpose Right-Of-Way Act as applying to both new and old easements alike, thus denying the existence of the implied easement. On the other hand, Judge Kerr may intend to consider an implied easement argument subsequent to the exhaustion of the administrative remedy. If this is his position, however, it is plain that he may have subjected an owner of a common law easement to a procedure in which he

99. See text *infra* pp. 112-13.

100. In this discussion of the circumstances of the original transfer, the Allotment Act and later provisions relating to it will be treated as expressing a single intent and continuing purpose on the part of Congress. *Marchie Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911); *United States v. Pelican*, 232 U.S. 442, 446-51 (1914).

101. This argument is bolstered by the recognition of implied easements in the similar situation of patents issued under the homestead laws. See Lonergan, *Access to Intermingled Mineral Deposits, Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands*, 8 LAND & WATER L. REV. 125, 138 (1973).

102. *Supra* note 3.

103. *Supra* note 44.

will now be required to compensate the servient owners for a use of their land which he already possesses of right. Can it be said that this is any less of a "taking" than the fraud attributed to the Congress by the denial of the implied easement?<sup>104</sup>

The implied easement argument was dealt with in *Superior Oil Co. v. United States*. The land involved had been patented to a mission society pursuant to a statute authorizing such a grant solely for the purpose of missionary work.<sup>105</sup> The mission society leased the parcel to Superior Oil for drilling purposes. When appellant Superior Oil Company began to move heavy equipment to the leased premises, the access road, which coursed through trust lands, was blockaded by tribal officials and federal officers. Appellant argued that the unrestricted patent to the mission society created an implied easement appurtenant for all purposes to which the land might lawfully be put.<sup>106</sup>

The court held that certain factors<sup>107</sup> existed which precluded it from finding an implied easement *for appellant's purposes*. It was not clear from the decision whether or not an implied easement had existed in favor of the mission society, but the writer here proposes that the radical change in land use operated to extinguish the implied easement which very likely existed prior to that time.<sup>108</sup>

These two cases should not be read as the "death knell" of the implied easement argument in cases involving access

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104. It doesn't seem that Judge Kerr's decision could rest upon the equity/law distinction. Although declaratory judgment is considered equitable, the prayer for damages incident thereto presented a request for relief at law.

105. *Superior Oil Co. v. United States*, *supra* note 44, at 37. The statute authorizing the grant to the mission was the Act of March 3, 1909, 35 STAT. 781, 814.

106. *Superior Oil Co. v. United States*, *supra* note 44, at 36.

107. *Id.* at 37-38. The court here listed three such factors: (1) The purpose of the grant; (2) the fact that the grant was without consideration; and (3) the position of the grantor as guardian of Indian lands.

108. *Schwob v. Green*, 215 N.W.2d 240, 243 (Iowa 1974). The Iowa Supreme Court here stated that in a case of implied easement: "[T]he dominant estate acquires no greater user than the parties intended." The court further noted: "[W]e are not faced here only with increased use of the easement; we are faced rather with its use for a purpose totally different than that for which it was granted. Such use, we say, did impose an additional and unintended burden on plaintiffs' land."

over Indian lands. Rather, they should be viewed as cases recognizing a limitation on the easements created by implication. Both cases involved a radical change in land use, and, getting back to the circumstances of the original allotments, it will be seen that the implied easements were to only limited uses of Indian land.

The history of the federal government's relationship with the Indians indicates that it is similar to that between a guardian and ward.<sup>109</sup> Statutes are interpreted in a light favorable to the Indians, and courts refuse to imply an intent on the part of the United States to gain at the expense of the Indians.<sup>110</sup> Reading the allotment provisions in the light of this protectionist attitude, it becomes clear that the Government was to play a continuing role as conservator of the allotted lands and, as such, it was not to permit exploitation by the grantees of the patented lands. The following are a sample of the many provisions which provide for a specific limited use of allotted lands by allottees and their lessees and grantees.

Section (1) of the General Allotment Act authorized allotment of lands which could be "advantageously utilized for *agricultural or grazing purposes*."<sup>111</sup> Section (5) provided that the surplus lands not allotted to individuals could be sold by the Government on behalf of the tribe, but that such sales were to be made only to "actual and bona fide settlers" for *homesteading purposes*.<sup>112</sup> This section also allowed grants to be made to religious societies for *religious and educational purposes*. Section (7) authorized the Secretary to regulate the equal distribution of water for *agricultural purposes*. Other than the limited sale of "surplus lands" authorized above, the General Allotment Act of 1887 and most of the allotment provisions contained in the treaties with particular tribes contained no provisions for lease and sale of allotted land.

109. F. COHEN, *supra* note 10, at 218. "[T]he allotment of lands in severalty did not in any way affect the guardian-ward relationship existing between the national government and the Indian . . . ."

110. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938).

111. 25 U.S.C. § 331 (1970) (originally enacted as Act of Feb. 8, 1887, ch. 119, § 1, 24 STAT. 388).

112. 25 U.S.C. § 348 (1970) (originally enacted as Act of Feb. 8, 1887, ch. 119, § 5, 24 STAT. 389).

Later amendments did allow for the leasing of allotted lands, but the limitations and requirements contained therein reflect the continued interest of the federal government in protecting the Indians from changes in land use that would injure the tribes. Nearly all of the lease provisions required the obtaining of the consent of the Secretary of the Interior, and a five year restriction on the term of such leases was generally imposed.<sup>113</sup> An allottee could lease his land for *farming or grazing purposes*, however, subject only to the approval of the officer in charge of the reservation.<sup>114</sup> Where it appeared that the allottee was disabled or unable to improve his land, he could lease the same for a period not to exceed five years for *farming purposes only*.<sup>115</sup> The tribal councils were authorized to lease surplus lands for *farming purposes*.<sup>116</sup> The leasing of such lands for *mining*, however, required the approval of the Secretary and the authorization of the tribal council.<sup>117</sup> The provision dealing with leasing of unallotted land for *oil and gas purposes* required the Secretary to reject all bids "whenever in his judgment the *interest of the Indians* will be served by so doing."<sup>118</sup> Provisions dealing with the sale of allotted lands also required the consent of the Secretary and authorized him to set the terms and conditions of the transfer.

The above list of allotment and lease provisions is by no means complete, but it indicates the very protective stance taken by the federal government with regard to the development of Indian land. Non-Indian grantees were not to use the land in a manner adverse to Indian interests, nor were they to deprive the Indians of the enjoyment of the land retained by the Indians. If, in determining the existence of the implied easement, the courts consider this protective stance

113. 25 U.S.C. § 403 (1970) (originally enacted as Act of June 25, 1910, ch. 481, § 4, 36 STAT. 856).

114. 25 U.S.C. § 393 (1970) (originally enacted as Act of March 3, 1921, ch. 119, § 1, 41 STAT. 1232).

115. 25 U.S.C. § 395 (1970) (originally enacted as Act of May 31, 1900, ch. 598, § 1, 31 STAT. 229).

116. 25 U.S.C. § 402 (1970) (originally enacted as Act of Aug. 15, 1894, ch. 290, § 1, 28 STAT. 305).

117. 25 U.S.C. § 396a (1970) (originally enacted as Act of May 11, 1938, ch. 198, § 1, 52 STAT. 347).

118. 25 U.S.C. § 396b (1970) (originally enacted as Act of May 11, 1938, ch. 198, § 2, 52 STAT. 347).

as one of the circumstances of the original transfer, it is easy to see why they would be prone to find the easement extinguished in cases like *Dry Creek Lodge*, where the dude ranch would cause substantial increases in commercial traffic over Indian lands, or *Superior Oil*, where the lessee intended to initiate drilling operations on mission land.<sup>119</sup> The injury to the Indians which would result from such unintended uses of patented lands should not be allowed to flow from an implied easement theory, in the face of express congressional provision for the continued protective development of Indian lands and resources.<sup>120</sup>

In response to the writer's view that there is a limitation upon these easements, it may be argued that such a limitation would be just as much of a fraud upon grantees as no easement at all, in light of the provision vesting absolute ownership of patented land in the individual Indian. Replying to this argument, it may be pointed out that the existence of an implied easement depends upon a determination of the congressional intent as expressed in the entire scheme of allotment, lease, and sale, and not just the one section that implicitly authorizes sale by the patentees. Taking all of the relevant circumstances into consideration, the courts should find the existence of the implied easement, but, by the same circumstances, they should also find limitations upon it.

This view of a restricted implied easement is supported by analogy to Indian water rights. It has been held that each allottee has an implied right, where the treaty or statute does not express it, to some portion of the tribal water essential

119. Note that in *Dry Creek Lodge*, the Joint Business Council of the Arapahoe and Shoshone tribes took a very active role in the effort to deprive the dude ranch of an access way. In *Superior Oil Co.*, the Hopi tribe had passed ordinances regulating the extraction of gas and petroleum on the reservation. These actions by the tribes indicate the tribal interest in regulating development on the reservation. Intentional noncompliance with such tribal regulations would seem to provide strong evidence that the new use of the land will result in injury to the Indians.

120. This view is supported by the Ninth Circuit in *Superior Oil Co. v. United States*, *supra* note 44, at 38, where the court stated:

This is not to say that the land granted cannot lawfully be used for purposes adverse to the interests of the Indians. It is to say only that neither public policy nor a rational implication of intent on the part of the United States as trustee requires that this adverse purpose be implemented and made possible by a still further alienation of Indian property.

for agricultural purposes.<sup>121</sup> This right passes to the grantees of such allotments,<sup>122</sup> but the right is limited to the use of water for *agricultural purposes*.<sup>123</sup>

It should be noted here that no court has yet found the implied easement to exist across Indian land. The two cases in which the argument was made, however, were not a good test of the validity of the argument because they involved facts upon which the easement could be extinguished. The existence of a limited purpose implied easement makes eminent good sense in these cases, and the writer believes that such will be the holding of most courts.

#### ALTERNATIVE COMMON-LAW THEORIES

In addition to the implied easement theory, there are two prescriptive easement theories that may be asserted in these cases, although their chances of success are minimal.

The first theory is the common prescriptive easement theory asserted by an individual who had used an access way across Indian lands for the period of prescription.<sup>124</sup> Such use must have been open and notorious, with the knowledge and acquiescence of the owner, continuous and uninterrupted, adverse and exclusive.<sup>125</sup>

The problem with such an argument is that prescription generally does not run against the Government.<sup>126</sup> Where the land is held in trust the prescription is said to run against the trustee, which in these cases will be the United States.

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121. *United States v. Powers*, 305 U.S. 527, 531-33 (1939); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).
122. *United States v. Powers*, *supra* note 121, at 532; *Segundo v. United States*, 123 F. Supp. 554, 558 (S.D. Cal. 1954).
123. F. COHEN, *supra* note 10, at 220.
124. RESTATEMENT OF PROPERTY §§ 457-65 (1944).
125. *Lunceford v. Trenk*, 518 P.2d 266, 267-68 (Mont. 1974); *Robertson v. Robertson*, 214 Va. 76, 197 S.E.2d 183, 188 (1973); *Pierce v. Rabe*, 177 Neb. 745, 131 N.W.2d 183, 189 (1964); *Mueller v. Keller*, 18 Ill. 2d 334, 164 N.E.2d 28, 31 (1960); *McInnish v. Sibit*, 183 N.E.2d 237, 239 (Ohio Ct. App. 1953).
126. *United States v. Hunter*, 236 F. Supp. 178 (S.D. Cal. 1964); *Cassity v. Castagno*, 10 Utah 2d 16, 347 P.2d 834 (1959); Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 ROCKY MT. MIN. L. INST. 217, 222 (1965).

Another problem that might be encountered here is the requirement that the claimant's use must be exclusive. The claimant must clearly indicate his individual claim where the way is used by other members of the public.<sup>127</sup> This would be difficult in a case like *Dry Creek Lodge*, where the dirt road was used by "fishermen, school buses, and by every other variety of use and user from the date of the patent."

This use by the public brings us to the second type of prescriptive argument, and that is acquisition of an easement by public use. According to this theory, use by the public performs two functions: (1) it shows the intent of the owner to appropriate the land to public use; and, (2) it demonstrates acceptance of the dedication by the public.<sup>128</sup> Some jurisdictions do not recognize such an easement, and even where it is recognized, a showing of "public use" must be made. This theory, when applied to trust lands, would also have to contend with the general rule against allowing prescription against the Government.

In sum, these prescription theories can not be relied on to any great extent in solving the problems involved in acquiring access over Indian lands.

### CONCLUSION

With the increasing demand for land for all purposes, and with the growing awareness on the part of the Indians of their own self-interest, there is a reasonable probability that there will be more cases involving the question of access over Indian lands. Considering the large sums of investment capital that may be at stake in these cases, it is important that attorneys be aware of the problems involved so as to help their clients avoid the pitfalls in the area. The recommended approach here is to move cautiously and perfect access rights prior to making any substantial investment in Indian lands.

127. *Petersen v. Corrubia*, 21 Ill. 2d 525, 173 N.E.2d 499 (1961).

128. Comment, *The Acquisition of Easements by the Public Through Use*, 16 S. DAK. L. REV. 150 (1971).

Although a common-law easement right may already exist in some cases, such easements might be of a limited nature so as to allow for only limited uses of Indian land. Even where reliance on the existence of an implied easement may be warranted, the client should be forewarned of the risk involved, and be advised of the administrative remedy available.

In sum, it seems that the question of access over Indian lands has been long neglected, and that, as a result, many questions have yet to be answered by the courts. The writer anticipates, however, that the implied easement aspect of the question will be answered favorably to the lessees and grantees of Indian lands. It is possible, though, that such implied easements will be found to be of a limited nature, so as to prevent their unintended use whenever such use places an unreasonable burden on the servient estates or is adverse to Indian self-interest.

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