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Public Lands - Problems in Acquiring Access to Public Lands across Intervening Private Lands - Leo Sheep Co. v. United States

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PUBLIC LANDS—Problems in Acquiring Access to Public Lands Across Intervening Private Lands. Leo Sheep Co. v. United States, ____ U.S. ____, 99 S.Ct. 1403 (1979).

In December, 1973, the Bureau of Land Management bladed a dirt road across petitioner Leo Sheep Company's land to gain access to Seminoe Reservoir, a public area used for fishing and hunting.[1] No compensation was offered nor were condemnation proceedings initiated.[2] Petitioners, Leo Sheep Company and Palm Livestock Company, sought declaratory and injunctive relief under the Quiet Title Act[3] against the United States of America, the Secretary of Interior and the Director of the Bureau of Land Management claiming that the Government had illegally entered on Leo Sheep Company property.[4] The United States acknowledged that it had constructed the road[5] but claimed it had a legal right to do so because the Union Pacific Act of 1862[6] contained an implicit reservation of an easement to cross intervening private lands to reach public lands. To establish an implicit reservation,[7] the Government also relied on the common law doctrine of easements by necessity, the rule construing public land grants in favor of the Government and the corner crossing privilege recognized by the Unlawful Inclosures of Public Lands Act of 1885.[8] The United States Supreme Court rejected the Government's arguments and concluded that the Union Pacific Act contained no implicit reservation of access across intervening private lands to reach public lands,[9] that the doctrine of easements by necessity did not apply to the sovereign,[10] that public land grants should be construed so as not to defeat the intent of the legislation,[11] and that the Unlawful In-

1. Leo Sheep Co. v. United States, 570 F.2d 881, 884 (10th Cir. 1977).
2. Petition for Writ of Certiorari at 4, Leo Sheep Co. v. United States, ____ U.S. ____, 99 S.Ct. 1403 (1979).
3. 28 U.S.C. § 2409a (1976).
4. Leo Sheep Co. v. United States, *supra* note 1, at 883.
5. *Id.*
6. Act of July 1, 1862, ch. 120, 12 Stat. 489, *as amended,* Act of July 2, 1864, ch. 216, 13 Stat. 356.
7. Leo Sheep Co. v. United States, ____ U.S. ____, 99 S.Ct. 1403, 1409-13 (1979).
8. 43 U.S.C. § 1061-66 (1976).
9. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
10. *Id.* at 1410.
11. *Id.* at 1411.

closures of Public Lands Act did not create a right of access across private lands to reach public lands.[12] The Court held that the Government must compensate a private landowner when the United States constructs a road across intervening private lands to reach public lands.[13]

BACKGROUND OF CONFLICT BETWEEN PRIVATE LANDOWNER AND FEDERAL GOVERNMENT

The conflict between the petitioners and the Bureau of Land Management had its origins in 1965 with the formation of a corporation known as the Elk Mountain Safari, Inc.[14] A group of ranchers in Carbon County, Wyoming "pooled their one-third of a million acres of private land"[15] to form the Elk Mountain Safari, Inc. Pursuant to incorporation and the purpose of providing "recreational opportunities on privately owned lands for the general public . . . ,"[16] the Elk Mountain Safari, Inc. began assessing access and use fees to the public entering upon and using the privately owned lands of the rancher incorporators. Signs requiring a visitor's permit were posted on the borders of the private lands and a patrol was established to "keep out all those persons who [did] not want or [could not] afford to buy an Elk Mountain Safari permit."[17]

The private lands which comprised the Elk Mountain Safari, Inc.[18] included those of petitioners, Leo Sheep Company and Palm Livestock Company, along with other area ranchers. Petitioners, as successors in fee from the Union Pacific Railroad, were the owners of certain odd-numbered sections of land in Carbon County, Wyoming.[19]

12. *Id.* at 1412.
13. *Id.* at 1414.
14. Elk Mountain Safari, Inc. was a plaintiff in the present case, but was withdrawn by a Notice of Dismissal. Petition for Writ of Certiorari at app. 3, Leo Sheep Co. v. United States, *supra* note 2.
15. ELK MOUNTAIN SAFARI, INC., ELK MOUNTAIN SAFARI LANDS 1 (date unknown).
16. Articles of Incorporation of Elk Mountain Safari, Inc., Corporation No. 95384, State of Wyoming, February 23, 1965.
17. Farmer, *Wyoming's Fee Land Areas*, WYOMING WILDLIFE, August, 1968, at 5.
18. Elk Mountain Safari, Inc. does not own land itself but manages the recreational activities on the lands of various ranches, including petitioners'.
19. Leo Sheep Co. v. United States, *supra* note 7, at 1409.

The Union Pacific Railroad originally acquired the odd-numbered sections of land here involved by a congressional grant in 1862[20] as a "part of a governmental scheme to subsidize the construction of the transcontinental railroad."[21]

> The land grants made by the 1862 Act included all the odd-numbered lots within 10 miles on either side of the track. When the Union Pacific's original subscription drive for private investment proved a failure, the land grant was doubled by extending the checkerboard grants to 20 miles on either side of the track.[22]

Under this scheme, the United States retained the even-numbered sections.[23] A checkerboard configuration resulted by the reserving of the even-numbered sections as public domain, and the granting to the railroad of the odd-numbered sections.[24]

To achieve an integrated ranching unit, Leo Sheep Company acquired the interlocking even-numbered lands under a Section 3 permit of the Taylor Grazing Act[25] for general grazing and pasturage.[26] Neither petitioners nor the Government raised the fact that Leo Sheep Company's grazing rights on the even-numbered sections were of particular significance. For the purpose of the case, the even-numbered sections were treated as public domain.[27]

Due to the checkerboard pattern and the lack of public roads[28] in the Seminoe Reservoir area,[29] access to the Reservoir and other public lands required crossing the private

20. Act of July 1, 1862, ch. 120, 12 Stat. 489, *as amended,* Act of July 2, 1864, ch. 216, 13 Stat. 356.
21. Leo Sheep Co. v. United States, *supra* note 7, at 1404-05.
22. *Id.* at 1408.
23. Leo Sheep Co. v. United States, *supra* note 1, at 885.
24. *Id.*
25. 43 U.S.C. § 315b (1976).
26. Brief for Respondent at 3, Leo Sheep Co. v. United States, *supra* note 7.
27. Leo Sheep Co. v. United States, *supra* note 1, at 883.
28. The Hanna-Leo Road, a county road, running more or less north and south at the eastern edge of Section 14, Township North, Range 83 West, 6th P.M. (*see* map) is the notable exception.
29. The Wyoming Recreation Commission had prioritized this area as one where more public access was needed. WYOMING RECREATION COMMISSION, WYOMING ACQUISITION AND DEVELOPMENT FIVE YEAR IMPLEMENTATION PLAN 29 (1972-1977).

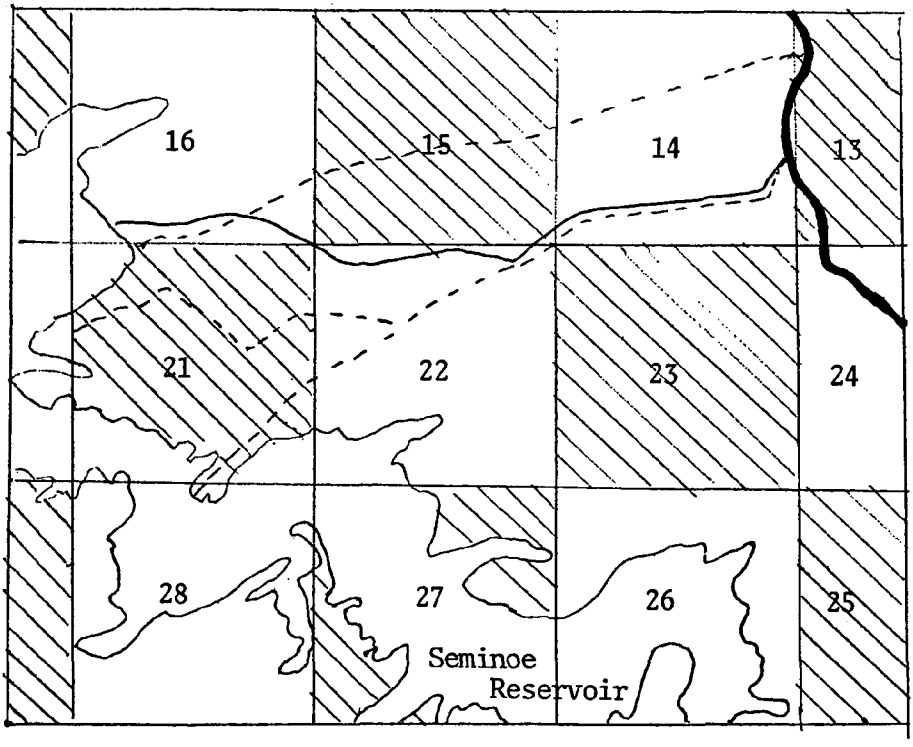
roads[30] of the petitioner. Throughout the latter part of the 1960's and the early 1970's, Wyoming's congressional delegation and the Bureau of Land Management received complaints from the public that access to the federal lands was being denied[31] because the Elk Mountain Safari, Inc. was charging access fees.[32] A series of negotiations was conducted between several Elk Mountain Safari, Inc. landowners and the Bureau of Land Management to discuss different alternatives for increasing public access to Seminoe Reservoir.[33] An impasse was reached.[34]

In December, 1973, the Bureau of Land Management constructed an access road to Seminoe Reservoir across the SE and SW corners of one section of Leo Sheep Company property.[35] The Bureau of Land Management also posted signs encouraging the public to use the road as a route to the Reservoir.[36]

> [BLM] began blading a pre-existing road starting at a county road in the south half of Section 14, Township North, Range 83 West, 6th P.M., on Bureau of Land Management lands, continuing westerly across said Section 14 and crossing the SE corner of Section 15 (fee section of Plaintiff Leo Sheep Company) approximately 30 feet from the Section corner through a pre-existing cattleguard into Bureau of Land Management Section 22, thence continuing southwesterly approximately 1000 feet where the blading operation departed the pre-existing road and resumed a westerly course marking a new route to the NW corner of Bureau of Land Management Section 22 co-terminal with the SW corner of Plaintiff Leo Sheep Company Section 15,

30. Roads crossing both public and private lands, unless formally dedicated as public roads, are considered private. *See generally:* Nixon v. Edwards, 72 Wyo. 274, 264 P.2d 287 (1953); Big Horn County Commissioners v. Hinckley, 593 P.2d 573 (Wyo. 1979).
31. Leo Sheep Co. file, Bureau of Land Management Office, Cheyenne, Wyoming.
32. Two of the original incorporators of the Elk Mountain Safari, Inc. defended the practice as one which opened up private lands which would otherwise not be available to the public and as a protection of the wilderness status of the ranches. Ansley, *Feds May Need to Buy Land,* Casper Star-Tribune, June 22, 1979, at 21, col. 4, 5, & 6.
33. Leo Sheep Co. file, Bureau of Land Management Office, Cheyenne, Wyoming.
34. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
35. Leo Sheep Co. v. United States, *supra* note 1.
36. Leo Sheep Co. v. United States, *supra* note 7, at 1409.

crossing said corner of Section 15 approximately four feet from said section corner, into Bureau of Land Management Section 16 and thence bladed westward to the shore of Seminoe Reservoir.[37]



Hanna-Leo Road

Odd-numbered sections granted to railroad in 1862 and now owned by plaintiff

Even-numbered sections of public domain

Pre-existing dirt road

Pre-existing dirt road improved by B.L.M. December 1973.

Dirt road relocated by B.L.M. December 1973.[38]

Petitioners, Leo Sheep Company and Palm Livestock Company, filed suit in United States District Court for the District of Wyoming seeking declaratory and injunctive

37. Leo Sheep Co. v. United States, *supra* note 1.
38. *Id.* at 889.

relief under the Quiet Title Act.[39] The court granted petitioners' motion for summary judgment, concluding that as a matter of law there was no implied reservation of an easement nor was there an easement by way of necessity.[40]

On appeal, the Court of Appeals for the Tenth Circuit reversed,[41] with one judge dissenting. The court held that the grant of odd-numbered lands to the Union Pacific Railroad included an implied reservation of an easement to pass over the odd-numbered sections to reach the even-numbered sections.[42]

The Supreme Court granted certiorari because this holding affected property rights in 150 million acres of land in the western United States.[43] The opinion by Mr. Justice Rehnquist reflected the unanimous decision of the Supreme Court for reversal of the court of appeals.[44]

THE COURT'S ANALYSIS

The Government used a four-pronged attack in its argument for a reserved easement authorizing construction of a public road across Leo Sheep Company land.

Implicit Reservation Under the Union Pacific Act

First, the Government argued that under the Union Pacific Act,[45] Congress implicitly reserved a right of access when it granted the odd-numbered sections to the Union Pacific Railroad and retained the even-numbered sections as public domain.[46] The Government did not claim an express reservation in the Union Pacific Act.[47] It relied on the findings by the court of appeals that an implied easement of access across the odd-numbered sections to the even-numbered sections existed.[48] The court of appeals

39. 28 U.S.C. § 2409a (1976).
40. Leo Sheep Co. v. United States, *supra* note 1.
41. *Id.* at 888.
42. *Id.* at 885.
43. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
44. *Id.* Justice White took no part in the consideration of the case.
45. Act of July 1, 1862, ch. 120, 12 Stat. 489, *as amended*, Act of July 2, 1864, ch. 216, 13 Stat. 356.
46. Brief for Respondent, *supra* note 26, at 9.
47. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
48. Leo Sheep Co. v. United States, *supra* note 1, at 885.

found that the dominant intent behind the Union Pacific Act "was to 'open up' the West and develop it"[49] and that the reservation of an easement of access was necessary to this goal.[50] The Government argued that Congress intended to reserve access across private lands to enhance the value of the public lands.[51] This finding was justified and "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight"[52] which the court of appeals was unwilling to do.[53]

The Supreme Court dismissed this argument, saying that the failure of Congress to expressly reserve an easement was conclusive that none existed.[54] The Court said that under the rule of *Missouri, Kansas, Texas Railway Co. v. Kansas Pacific Railway Co.*,[55] if Congress had intended to reserve an easement for access to the even-numbered sections across the private sections it should have so declared. Because an easement of access was not one of the specific reservations under Section 3 of the Union Pacific Act,[56] the Court was unwilling to "divin[e] some 'implicit' congressional intent."[57]

Implicit Reservation Supported by Easement by Necessity Doctrine

The second argument by the Government was that the common law doctrine of easements by necessity would support a finding of an implicit reservation in the grant of the odd-numbered sections of land to the railroad and the retention of the even-numbered sections.[58] At common law, an easement by necessity was found when the owner conveyed a portion of his land in such a manner that it was

49. *Id.*
50. *Id.*
51. Brief for Respondent, *supra* note 26, at 7, 10 & 19.
52. *Id.* at 7.
53. Leo Sheep Co. v. United States, *supra* note 1, at 885.
54. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
55. Missouri, Kansas, and Texas Railway Co. v. Kansas Pacific Railway Co., 97 U.S. 491, 497 (1878).
56. The explicit exceptions include lands sold, reserved, or otherwise disposed of by the United States; homestead claims and mineral lands. Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489, *as amended*, Act of July 2, 1864, ch. 216, 13 Stat. 356.
57. Leo Sheep Co. v. United States, *supra* note 7, at 1409.
58. *Id.*

necessary to pass over the granted portion to reach the retained land.[59] As a matter of public policy which sought "to prevent the remaining land from being nonusable,"[60] the law implied that the parties to the conveyance intended that an easement of necessity would exist.[61] The circumstances, not the language of the grant, were the basis for inferring intent.[62] Intent was determined at the time of the conveyance.[63]

The Government claimed that:

> [i]n the case of the checkerboard pattern it is apparent that the grantor (United States) and grantee must cross each others land to reach their own. Furthermore, the need to do so clearly arose at the time of the conveyance. Thus, it does not seem unreasonable to conclude that their objective intent was for the United States to retain an easement to cross the private sections in order to reach the public sections.[64]

The Government utilized the *objective* intent theory of easements by necessity as an alternative to the agrument that Congress *actually* intended to reserve access under the Union Pacific Act. The Government first argued that Congress had *actually*, though not expressly, reserved across the private lands.[65] If the Court did not ascribe such *actual* intent to Congress and there was no evidence to the contrary, the Government argued alternatively that Congress objectively intended to reserve a right of way.[66]

The Supreme Court rejected the Government's easement by necessity argument by focusing on the elements of necessity and intent. The Court first said there was no necessity because it was not at all clear that the right to construct a road for public access to a recreational area would be a

59. POWELL, 3 REAL PROPERTY § 410 (1979).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See also*, Comment, *Access to Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149, 162 (1973).
65. Brief for Respondent, *supra* note 26, at 7, 10 & 19.
66. *Id.*

necessity.[67] Secondly, the Court eliminated the element of necessity by saying that "the 'easement by necessity' doctrine [was] not available to the sovereign,"[68] as the United States had the power of eminent domain by which to condemn and acquire access.[69]

In addressing the question of intent, the Court found that it was just as likely as not that at the time of the enactment of the Union Pacific Act,[70] Congress focused on negotiations and eminent domain as devices for obtaining access.[71] With no clear-cut indication of Congressional failure to consider the access question, the Court was "unwilling to imply rights of way, with the substantial impact that such implication would have on property rights granted over 100 years ago."[72]

Implicit Reservation Supported by Rule Resolving Doubts in Government's Favor

The Government urged that in construing grants to federal lands, the rule of *Andrus v. Charlestone Stone Products Co.*[73] should be followed. Doubts should be resolved for the Government, not against it.[74]

The Court placed little credence in the Government's argument that the rule of *Charlestone* should be adhered to.[75] The Court instead relied on *United States v. Denver & Rio Grande Railway Co.*,[76] which said that grants are strictly construed against the grantee, but not as "to defeat the intent of the legislature, or to withhold what is given expressly or by necessary or fair implication." In the present case, the Court indirectly indicated that to find for the Government would be to go against the intent of Congress and the purpose of the railroad grant.[77] The first five pages of the Court's

67. Leo Sheep Co. v. United States, *supra* note 7, at 1410.
68. *Id.*
69. *Id.*
70. Act of July 1, 1862, ch. 120, 12 Stat. 489, *as amended*, Act of July 2, 1864, ch. 216. 13 Stat. 356.
71. *Id.*
72. *Id.*
73. Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978).
74. *Id.*
75. Leo Sheep Co. v. United States, *supra* note 7, at 1411.
76. United States v. Denver & Rio Grande Railway Co., 150 U.S. 1, 14 (1893).
77. Leo Sheep Co. v. United States, *supra* note 7, at 1411.

opinion were devoted to the determination that the major purpose of the Union Pacific Act was to find an incentive for the construction of a transcontinental railway.[78] All attempts were made to make the land grant scheme attractive to the Union Pacific Railroad.[79] The Court suggested that retention of an access easement would not have furthered this goal and would have promoted uncertainty and unpredictability in land titles.[80] The Court indirectly rejected the Government's argument, adopted by the court of appeals, that the major purposes of the railroad grant were to open up the West by assuring access,[81] enhance the values of the retained lands[82] and only incidentally help the railroads.[83]

Implicit Reservation as Established by the Unlawful Inclosures of Public Lands Act

The Government's final argument was that by congressional enactment of the Unlawful Inclosures of Public Lands Act,[84] (hereinafter cited as Act) Congress reaffirmed the implicit reservation of an easement under the checkerboard land grant scheme.[85] The Act prohibited all enclosures of public lands by persons having no claim or color of title; the maintenance, construction, or control of such an enclosure; and the assertion of the right of exclusive use without claim or color of title.[86] Under the Act, it was also illegal to prevent or obstruct a person from peaceably entering upon or passing over public land by force, threat, intimidation, fencing or other unlawful means.[87]

The Supreme Court, in *Camfield v. United States*,[88] construed the Act as prohibiting fences built on private land which worked as an enclosure of public lands.[89] The

78. *Id.* at 1404-1408.
79. *Id.*
80. *Id.* at 1413-14.
81. Leo Sheep Co. v. United States, *supra* note 1, at 885.
82. Brief for Respondent, *supra* note 26, at 7-8.
83. Leo Sheep Co. v. United States, *supra* note 1, at 885.
84. Act of Feb. 25, 1885, ch. 149, 23 Stat. 321-22, *as amended* 43 U.S.C. §§ 1061-66 (1976).
85. Brief for Respondent, *supra* note 26, at 22.
86. 43 U.S.C. § 1061 (1976).
87. 43 U.S.C. § 1063 (1976).
88. Camfield v. United States, 167 U.S. 518 (1897).
89. *Id.* at 525.

Court said, "(i)t is only by treating it as prohibiting *all* 'enclosures' of public lands, by whatever means, that the act becomes of any avail."[90] (*Emphasis added.*) Following the reasoning of *Camfield v. United States*, the Government argued that petitioner Leo Sheep Company's refusal to allow access over any section corner to reach the enterlocking public lands operated effectively as an enclosure.[91]

The Court rejected the argument by first saying that the Act was a specific remedy for a specific wrong, the range war situation, and had little significance to the reserved easement situation.[92] Second, the Court found the case of *Camfield v. United States* to have limited application to the question of right of access because the case was determined on the basis of nuisance law.[93] Third, *Camfield v. United States* affirmed the grantee's right to fence completely his own land and thus deny access if he did so without the intent of so enclosing the public lands.[94] The Court seemed to indicate that the element of intent controlled the question of lawfulness. Fourth, the Secretary of Interior[95] assumed that access rights would have to be purchased under the checkerboard land pattern.[96] Such a presumption meant the Act did not apply to the question of right of access.

EFFECTS OF THE DECISION

The Court's decision is not so unsettling in its outcome as it is in the method used to reach that outcome. It would be understandable if a fair balancing of the policy reasons behind the ranchers' and the Government's arguments had been pursued and a determination made that the equities rested with the ranchers. The Court, however, addressed the Government's arguments in a purely mechanical fashion. The Court's analysis went no further than to establish such maxims as the failure to expressly reserve

90. *Id.*
91. Brief for Respondent, *supra* note 26, at 25.
92. Leo Sheep Co. v. United States, *supra* note 7, at 1416.
93. *Id.* at 1412.
94. *Id.*
95. 1 REPORT OF THE SECRETARY OF THE INTERIOR FOR FISCAL YEAR ENDING JUNE 3, 1887, at 15 (1887).
96. Leo Sheep Co. v. United States, *supra* note 7, at 1413.

an easement was conclusive that none existed,[97] eminent domain is an alternative to easements by necessity,[98] and the Unlawful Inclosures of Public Lands Act only applied to range war situations.[99] The Court should have addressed the court of appeals' holding that the absence of an express reservation in the patent did not negate the implied reservation,[100] the Government's argument that eminent domain was not a feasible alternative to an easement by necessity,[101] and the opinion of the Wyoming Supreme Court in *United States v. Douglas-Willan Sartoris Co.*[102] that the Unlawful Inclosures Act spoke to the question of access:

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

In addition to addressing these questions, the Court should have balanced the policy considerations behind the Government's arguments that there is a strong public policy favoring land utilization[103] against the ranchers' concern for certainty and predictability in their land titles.[104]

Access to Public Lands Within the Checkerboard Region

In the wake of the Supreme Court decision, the Bureau of Land Management must compensate petitioner Leo Sheep Company for lands taken when the road was constructed across petitioner's land.[105] The road did open up access to one public section of Seminoe Reservoir, but the practice of assessing access and use fees by the Elk Mountain Safari,

97. *Id.* at 1409.
98. *Id.* at 1410.
99. *Id.* at 1411.
100. Leo Sheep Co. v. United States, *supra* note 1, at 888.
101. Brief for Respondent, *supra* note 26, at 13.
102. United States v. Douglas-Willan Sartoris Co., 3 Wyo. 287, 22 P. 92, 97 (1889).
103. Powell, *supra* note 51, at § 410.
104. Leo Sheep Co. v. United States, *supra* note 7, at 1413.
105. *Id.* at 1414.

Inc. continues on remaining sections of private lands where the roads have not been dedicated to public use.[106]

The question remains: How is the Government to assure public access to public lands when a group like Elk Mountain Safari, Inc. charges access and use fees to cross the private lands to reach the public lands? If access is not acquired, the public will be forced to pay such fees or be denied access across private lands to reach the public lands. The injustice of of the situation and the dilemma which faces the Bureau of Land Management in light of such a practice is well summarized in the statement of one Wyoming resident, "It's not the cost, it's the idea that we have to pay for our public lands."[107] According to one Bureau of Land Management spokesman, "The results [of the case] are tragic and bad as far as use of the land by the public."[108]

The Bureau of Land Management is not without recourse in acquiring access to public lands across the intervening private lands. The decision makes it clear that the Government can use its power of eminent domain to acquire access.[109] The feasibility of this alternative was characterized by the Government during the course of the trial as being "unreasonable and unworkable."[110] The Bureau of Land Management has said it will employ the method of buying access to public lands but has also indicated "[i]t is not high on the bureau's priority list, however . . . . [I]t's a horribly involved thing to get access into each sector."[111]

In general, the Bureau of Land Management can look to the Federal Land Policy and Management Act of 1976,[112] (hereinafter cited as FLPMA) as its source of eminent domain power. FLPMA provides the Secretary of Interior with authority to acquire access to public lands by "purchase, exchange, donation or eminent domain" subject to specified

106. Ansley, *supra* note 32, at 21.
107. *Id.*
108. *Id.*
109. Leo Sheep Co. v. United States, *supra* note 7, at 1410.
110. Brief for Respondent, *supra* note 26, at 13.
111. Ansley, *supra* note 32, at 21.
112. 43 U.S.C. §§ 1701-82 (1976).

provisions.[113] The Bureau of Land Management can also utilize the Department of Interior's annual appropriation act[114] in conjunction with the condemnation power of 40 U.S.C. § 257 (1976) to acquire eminent domain power. The appropriation act authorizes construction of roads and other projects while 40 U.S.C. § 257 (1976) contains powers of condemnation for projects which are authorized. Laws for specific purposes or regions of the country should also be consulted, as they may contain powers of eminent domain.

In addition to eminent domain, the Government can look to its powers of conditioning Taylor Grazing Act permits and leases as a means of acquiring access to the public lands across the intervening private lands.[115] A strong argument can be advanced that the Government has the authority to require that a landowner allow the public across his private lands to reach adjacent public lands before the Government issues a grazing permit for the public lands. FLPMA provides that permits and leases can be made

> subject to such terms and conditions as the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, ...[116]

The ability to impose conditions, specifically for recreational or other non-agricultural uses, comes from the language of the Taylor Grazing Act itself and from the multiple use concept of FLPMA. The Taylor Grazing Act declares that nothing in the subchapter on public lands in the lower 48 states and Hawaii shall be:

> construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of

113. 43 U.S.C. § 1516 (1976).
114. This is a yearly act in which the Interior Department budgets for certain projects including road construction. For latest appropriation *see:* Authorizations-Department of the Interior and Related Agencies, Pub. L. No. 95-465 (1978).
115. 43 U.S.C. § 1752 (1976).
116. *Id.*

> any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.[117]

The regulations promulgated pursuant to the Taylor Grazing Act declare that administration of livestock grazing on public lands shall be consistent with the multiple use concepts under the Federal Land Policy and Management Act of 1976.[118] FLPMA includes outdoor recreation as one of the uses for which the public lands shall be managed.[119] The broad legislative grant of regulatory power for enforcing FLPMA,[120] coupled with the above-mentioned laws, provides the conceptual framework for an argument that the Government can pass regulations conditioning a rancher's Taylor Grazing Act rights with a requirement that he allow access to the public lands across his lands. If a rancher rejects such conditions and does not accept a permit or lease, then the Government can use its eminent domain powers to gain access to public lands across the rancher's land.

The Unlawful Inclosures of Public Lands Act

The Supreme Court determined that the Unlawful Inclosures of Public Lands Act,[121] (hereinafter cited as Act) confers no right to cross private lands to reach public lands.[122] The role to which the Act has now been relegated is twofold.

First, the Court seems to indicate that the Act will have significance if the landowner *intentionally* encloses his lands so as to deny access to public lands.[123] The Court quoted *Camfield v. United States*[124] to say that if a landowner

> under the guise of enclosing his own land, . . . builds a fence which is useless for the purpose, and can only have been intended to enclose 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.

117. 43 U.S.C. § 315 (1976).
118. 43 C.F.R. § 4100.0-2 (1978).
119. 43 U.S.C. § 1701 (1976).
120. 43 U.S.C. § 1733 (1976).
121. 43 U.S.C. § 1061-66 (1976).
122. Leo Sheep Co. v. United States, *supra* note 7, at 1411-13.
123. *Id.* at 1412.
124. Camfield v. United States, *supra* note 88, at 528.

In the above situation, the fence would be torn down because of the landowner's intent to keep the public off the public lands. The livestock would be allowed to cross to the public domain if a "fence out" statute was involved, as in *Camfield v. United States.* However, the victory would be small. Under the Leo Sheep Company decision, there would be no right of access for the public at large, but only for livestock.[125] The size of the victory is further diminished in that the days of the open range are gone. The only one who would be entitled to graze his cattle on the particular public section would be the one holding a grazing permit under the Taylor Grazing Act.[126] Clearly, the element of intent does little to revive the import of the Act.

The second role which the Act plays is not diminished by the Court's decision. The Act would apply to a situation in which there is no intervening private lands question but where a private party unlawfully builds a fence or where a permittee under the Taylor Grazing Act

> is authorized to build a fence on public lands, and the public is authorized to enter upon and use the same lands. When a member of the public is unlawfully excluded from such lands by locked gates, no trespassing signs, or intimidation the Act provides an obviously desirable remedy.[127]

Easement by Necessity

The Court handled the question of easement by necessity by saying that access to recreational areas did not represent a necessity and that eminent domain was an alternative to the common law.[128] The Court went no further in its analysis than to establish these two maxims.

There are two fallacies in the Court's dismissal of a recreational use as not being a necessity. First, the actual issue is one of ingress and egress, not type of use. The Bureau of Land Management had no route except across petitioner's land by which to reach the public land. Access

125. Leo Sheep Co. v. United States, *supra* note 7, at 1411-13.
126. 43 U.S.C. § 315, 315a-315r (1976).
127. Comment, *supra* note 64, at 159.
128. Leo Sheep Co. v. United States, *supra* note 7, at 1410.

across the petitioner's land was necessary, regardless of the type of use on the public land. Secondly, outdoor recreation is recognized by the Federal Land Policy and Management Act,[129] as one of the multiple uses for which the public lands are managed. Prior to the passage of FLPMA, the Taylor Grazing Act[130] recognized the public's right to hunt and fish on public lands. It seems a blatant mistake to dismiss access to recreational areas as not being a necessity when the Bureau of Land Management is charged with managing the public lands for such a purpose.

Another shortcoming in the Court's opinion is its failure to adequately address whether or not eminent domain proceedings are a feasible alternative to the doctrine of easements by necessity. The Court never considered the Government's argument that to require the use of eminent domain proceedings in all of the checkerboard lands was "unreasonable and unworkable"[131] and therefore not really a viable alternative to the doctrine of easements by necessity. The fact that the Government would have to initiate thousands of suits to acquire access[132] to its lands hardly seems to be the equivalent to a right which vests one with an easement by the circumstances of the conveyance.

In addition to discussing the shortcomings of the Court's opinion in regard to easements by necessity, it is appropriate to examine future applications of the doctrine. The Court's decision leaves unanswered the applicability of the doctrine to two situations, use by states against the federal government, and use by private parties against the federal government.

The question arises: Does a state have an easement by necessity if its lands are entirely surrounded by federal lands? Eminent domain as an alternative to the easement by necessity doctrine was crucial to the Court's decision in the present case.[133] In this hypothetical, the state, being the inferior sovereign, has no power of eminent domain against

129. 43 U.S.C. §§ 1701-82 (1976).
130. 43 U.S.C. § 315, 315a-315r (1976).
131. Brief for Respondent, *supra* note 26, at 13.
132. *Id.* at 12.
133. Leo Sheep Co. v. United States, *supra* note 7, at 1410.

the United States. Following the Supreme Court's thinking in the present case, the state can demonstrate the element of necessity by its lack of eminent domain proceedings. It follows that an easement by necessity should be found.[134]

Another context in which the easement by necessity argument might arise would be the reverse fact situation of the present case. Suppose petitioners wanted access to their private lands across the intervening public lands. Do the private landowners have an easement by necessity? Under the Federal Land Policy and Management Act,[135] proceedings can be initiated by private parties to acquire rights of way over public lands.[136] The element of necessity for private parties disappears in the wake of FLPMA's procedures for granting rights of way. Petitioners, however, could argue that their easements are a property right which vested at the time of the grant and that the subsequent enactment of the FLPMA in 1976 does not apply to petitioners. FLPMA specifies that it will have no effect on existing rights of way.[137] Petitioners could argue that to require compliance with FLPMA for acquiring a right of way is a "taking" of a vested right without just compensation.[138] The route the courts will choose in deciding the taking issue is not clear.[139]

CONCLUSIONS

The Bureau of Land Management is not totally without remedy in its efforts to acquire access to public lands across intervening private lands. It can rely on its powers of eminent domain and its powers to define the terms under which grazing permits will be issued.

The Unlawful Inclosure of Public Lands Act has been rendered meaningless in a determination of the question of access over intervening private lands to reach public lands.

134. This discussion does not purport to be a thorough analysis of the situation or the route which courts should follow. It is only suggestive of an argument which arises as a result of the Court's decision in this case.
135. 43 U.S.C. §§ 1701-82 (1976).
136. 43 U.S.C. §§ 1761-1771 (1976).
137. 43 U.S.C. § 1769 (1976).
138. U.S. CONST. amend V.
139. NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 440-450 (1978).

The Court's analysis was purely mechanical and lacking in a balancing of policy considerations. This shortcoming was especially obvious in the Court's treatment of the doctrine of easement by necessity. The application of the doctrine to parties other than the United States is still an open question.

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