Land & Water Law Review

Volume 17 | Issue 2 Article 4

1982

# Gamemanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located within the Pacific Railroad Land Grants

George E. Powers, Jr.

# COMMENT

## GAMESMANSHIP ON THE CHECKERBOARD: THE RECURRING PROBLEM OF ACCESS TO INTERLOCKED PUBLIC AND PRIVATE LANDS LOCATED WITHIN THE PACIFIC RAILROAD LAND GRANTS

### INTRODUCTION

"Let us, then, not despise the Plains; but turn their capacities to best account."[1]

In 1850 the United States stood astride North America and was rapidly emerging as a major industrial power. In the east the original thirteen colonies had been joined by sixteen new states, carved out of the wilderness by legions of settlers steadily pushing the edge of the frontier westward. In the west American claims to the Oregon Territory had finally been settled, and California joined the Union as the first state on the Pacific Ocean. However, between the sleepy river towns of the Mississippi and the bustling gold camps of the Sierra Nevada lay a vast, empty wilderness, the Great American Desert. How to cross this forbidding expanse and thereby link the settlements along the Pacific coast with the rest of the country was hotly debated. The idea of a transcontinental railroad was born and soon captured the imagination of a generation.[2]

During the 1860's the era of the great railroads arrived, and three major land grants were authorized by Congress in order "to aid in the construction of the [roads] by a gift of lands along [the routes] . . . ."[3] The Union Pacific Land Grant Act of 1862,[4] the Northern Pacific Land Grant Act of 1864[5] and the Atlantic and Pacific Land Grant Act of



1. Samuel Bowles, speaking in 1865 of the tremendous wealth which awaited the coming of the rails to the western plains, *quoted in* R. ATHEARN, UNION PACIFIC COUNTRY 43 (1971).
2. In 1844 Asa Whitney proposed a plan to build a railroad stretching from Milwaukee to the Puget Sound. He proposed to finance this venture by petitioning Congress for the right to purchase a sixty mile wide swath of public lands along the proposed route for sixteen cents an acre. *See* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 363 (1968).
3. Missouri, Kan. & Tex. Ry. Co. v. Kansas Pac. Ry. Co., 97 U.S. 491, 497 (1878).
4. 12 Stat. 489, *amended by* 13 Stat. 356.
5. 13 Stat. 365.

1866[6] all conveyed liberal portions of the public domain[7] to private corporations, so that the construction of the railroads might be financed by private capital generated by land sales rather than by direct government subsidies.[8]

These land grants all incorporated a "checkerboard" pattern, which entitled the railroads to claim alternate sections of land lying within a certain distance of their rights of way.[9] Within these "checkerboards" the granted lands lay interlocked with retained lands. The effects of this original division of the public domain are still felt today, for despite over one hundred years of development the "checkerboards" have shown a surprising ability to retain this basic feature, interlocked lands held separately by a variety of individuals, corporations and agencies.[10]

The railroad land grants were part of a larger federal policy of disposing public lands in order to foster their private development.[11] While part of Congress' unparalleled generosity was clearly inspired by outright graft and corruption,[12] part was also due to the low estimation of value which Congress placed upon such distant, undeveloped

6. 14 Stat. 292.

7. Land grants by the federal government to railroad corporations totalled over ninety-four million acres. The Northern Pacific Railroad Land Grant ultimately affected over forty-five million acres over a route which stretched 2,128 miles. P. GATES, *supra* note 2, at 374, 385.

8. The construction of the transcontinental railroads required a commitment of capital resources that was simply beyond the capacity of private enterprise without some form of assistance. "The amount is too vast; the enterprise too formidable; the returns too remote and uncertain." Statement of Horace Greeley, *quoted in* R. ATHEARN, *supra* note 1, at 26. Since direct subsidy of otherwise private enterprise was constitutionally suspect, the scheme of land grants was used to allow public resources to bear the primary burden of construction. *See* P. GATES, *supra* note 2, at 360-65.

9. The idea of granting alternate sections of public lands on either side of a right of way was not new. It had been used previously to support the development of public roads, river improvements and railroads. However, it had never been implemented on such a grand scale. *See* P. GATES, *supra* note 2, at 353-62.

10. *See* WYOMING STATE PLANNING BOARD, UNION PACIFIC RAILROAD LAND IN WYOMING (1938). The map, attached to this volume, graphically illustrates the capacity of the "checkerboard" to retain its original form over time.

11. The Homestead Act of 1862, 12 Stat. 392 (repealed 1976), was passed by the same Congress that approved the original Union Pacific Land Grant Act.

12. Crédit Moblier of America was the construction company which largely built the Union Pacific Railroad. It ultimately lent its name to a scandal which touched the highest reaches of Congress as well as the Executive. *See* R. ATHEARN, *supra* note 1, at 124-27.

lands.[13] Unfortunately in the haste to launch the engines of progress across the mountains and plains, neither Congress nor the private parties responsible for financing, building and operating these great railroads anticipated the problem of acquiring access to the mutually landlocked sections within the "checkerboards". At least no express provision was ever made for such access.[14]

The federal government is no longer in the land disposal business. In 1976 Congress declared that the public lands were to be retained in federal ownership,[15] completing a change in federal policy in favor of the reservation and withdrawal of public land resources which began in the late nineteenth century.[16] As the federal government assumed its new responsibilities of managing the public lands rather than merely disposing of them, the twin problems of private access over public lands and public access over private lands became recurring issues. The "checkerboard" lands presented an aspect of these problems that was unique only because of its size.[17]

Two recent cases have had a significant impact upon rights of access to "checkerboard" lands. *Leo Sheep Co. v. United States*[18] involved the issue of public access to lands in Wyoming under the management of the Bureau of Land Management (BLM). *Montana Wilderness Association v. United States Forest Service*[19] presented the question of private rights of access across public lands in Montana being administered as a Wilderness Study Area by the National Forest Service. Together these decisions raise further issues of fundamental public policy which must be addressed in order to create a rational and intelligent basis for resource allocation.

13. "The land itself, which this bill proposes to give away, is worth nothing to the Government in its present condition. . . ." CONG. GLOBE, 38th Cong., 1st Sess. 2294 (1864) (statement of Rep. Donnelly).
14. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 678 (1979).
15. 43 U.S.C. § 1701(a)(1) (1976).
16. *See* General Revision Act of 1891, ch. 561, 26 Stat. 1103 (repealed 1976); Organic Act of 1897, 16 U.S.C. §§ 473-481 (1976).
17. Leo Sheep Co. v. United States, *supra* note 14, at 678.
18. *Supra* note 14.
19. 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (U. S. March 2, 1982) [hereinafter cited as *Montana Wilderness Ass'n II*].

## A BRIEF SURVEY OF THE "CHECKERBOARD"

The problem of access inherent in the "checkerboard" land grants may be described with deceptive simplicity. Six mile square townships were surveyed. These in turn were subdivided into thirty-six sections, each encompassing a square mile of land. The sections were numbered one to thirty-six and the railroads were granted all odd-numbered sections within a specified distance of the railroads' rights of way. Each section conveyed was entirely surrounded by other sections retained in federal ownership as public domain. Likewise, each section retained was entirely surrounded by sections conveyed. Technically one could not pass from one public section to the next without committing a trespass on some small part of the interlocked private lands, while the reverse was true of anyone attempting to cross from one private section to the next.

At the time of the grants, most of the land involved was undeveloped forest and range which was used by the few resident inhabitants as a common. The public lands were open to all on an equal basis and, in the face of such an apparently limitless resource, open conflicts between users were the exception rather than the rule. However, the coming of the railroad meant the coming of the surveyor. Soon the land, which had been so empty, was criss-crossed with markers, fence lines and claims, as a virtual flood of settlers streamed onto the plains from the old eastern states and Europe.[20] Land was bought, sold, mortgaged and occasionally even given away. Since the private corporations which were to build the transcontinental railroads depended almost entirely upon the sale of their granted lands in order to finance the immediate expenses of construction, they were perhaps more aggressive in their efforts to sell their lands

20. It was the land grants that persuaded capitalists to invest in securities of the railroads and enabled the railroads to advance far beyond the zone of settlement, to be the true pioneers in opening up new areas to growth. . . . The strenuous immigration promotion campaigns undertaken by the land grant railroads were felt all over Europe and in the older states. The results are to be seen in the rapid settlement of the West which, it had been earlier thought, would take one or two centuries. By 1890 the Superintendent of the Census could say: "The Frontier is gone."
P. GATES, *supra* note 2, at 381.

than the government.[21] This was particularly true in the more arid regions of the west, such as Wyoming, where much of the retained lands ultimately proved unsuitable for homesteading and dry land agriculture.[22]

In places some private landowners, who had purchased railroad lands, simply assumed *de facto* control over the public lands interlocked with their private holdings.[23] However, the efforts of these landowners to extend their control over the public lands were not viewed with favor by either the courts or the Congress in light of the greater federal public policy of encouraging open settlement of the public domain as well as other lawful uses of these public lands.

In *Buford v. Houtz*,[24] the Supreme Court adamantly rejected the attempt of one group of landowners to enforce an action in trespass against a stockman who was seeking to graze his animals on interlocked public lands. The Court expressed little sympathy for the landowners:

> "[B]eing the owners of one-third of this entire body of land [approximately 350,000 acres out of some 921,000 acres actually involved] . . . they propose by excluding the defendants to obtain a monopoly of the whole tract, while two thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes . . . is equal."[25]

The Court held that the defendants enjoyed an implied license to use the unenclosed public lands for grazing. This license grew "out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."[26]

21. By 1968, only 15,840,077 acres remained in railroad ownership out of more than ninety million acres originally granted. *Id.* at 384.
22. Much of the railroad land in Wyoming was allegedly offered for sale at prices as low as 50 cents at a time when the public domain was held at $1.25 an acre. This probably accounts for the success of the railroad in selling vast areas of its land while the public domain sections in arid counties largely remain in public ownership.
WYOMING STATE PLANNING BOARD, *supra* note 10, at 11.
23. *Id.*
24. 133 U.S. 320 (1890).
25. *Id.* at 325-26.
26. *Id.* at 326.

Thus the landowners' title and the rights of ownership incident thereto did not create sufficient equity to allow them to exploit the technical aspects of the "checkerboard" pattern in order to monopolize public rights in public lands.

Seven years later in *Camfield v. United States*[27] the Supreme Court struck down another attempt to monopolize public lands in the "checkerboard" by applying the Unlawful Inclosures of Public Lands Act of 1885[28] in order to compel the removal of the defendant's fences, which had illegally inclosed over 20,000 acres of public land. The Court specifically rejected the defendant's contention that his property rights in the alternate sections which he had purchased from the railroad allowed him to fence his lands as he saw fit, even if that meant public lands would be inclosed as a result.[29] The Court said:

> The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the Government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and *were bound to avoid obstructing or embarrassing it in such disposition.* If practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the Government in their appropriation of public lands, had acquired a title to them against everyone except the Government, and perhaps even against the Government itself.[30]

Under this decision Congress could constitutionally regulate activities on private lands, which threatened the government's right to determine the ultimate uses to which the public domain might be put, "even though it may thereby involve the exercise of what is ordinarily known as the police power."[31] If Congress had determined that the interlocked

27. 167 U.S. 518 (1897).
28. 43 U.S.C. §§ 1061-1066 (1976).
29. Camfield v. United States, *supra* note 27, at 526.
30. *Id.* at 527 (emphasis added).
31. *Id.* at 525-26.

public lands were to be held open for settlement, or by its acquiescence had allowed the land to remain open for use by the public as the government's licensee, then no private landowner would be allowed to exploit the accidental features of the "checkerboard" land grants in order to deny the public right of entry to and across such lands and thereby obtain a valuable monopoly over any lawful use of such public lands.[32]

The twentieth century has seen a fundamental shift in the public land policies of the federal government. Private acquisition of the public domain under the various land laws dwindled significantly.[33] Much of the land which remained in the public domain was either too dry, too remote or too poor to support homesteading or to attract a willing purchaser. The twin policies of withdrawal and reservation became the norm rather than the exception.[34] The relationship between the federal government and the public lands grew to resemble that of a proprietor in perpetuity as opposed to that of a mere land agent. During this period of shifting roles and policies the issues of public access across private lands and private access across public lands continued to arise. However, courts largely chose to side-step the issue of whether there was an enforceable right to such access.[35] Courts that did reach the issue split on the question of whether common law implied easements or easements by necessity should be allowed within the context of government land grants.[36]

32. *See also* Mackay v. Uinta Dev. Co., 219 F. 116, 118 (8th Cir. 1914). "As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership."*Id.*
33. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 73 (1981). *See* Comment, *Access to Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149, 150 (1973).
34. *See* Exec. Order No. 6910 of Nov. 26, 1934; Exec. Order No. 6964 of Feb. 5, 1935.
35. *See, e.g.*, United States v. Rindge, 208 F. 611 (S.D. Cal. 1913) (way of necessity denied upon failure of government to show strict necessity); Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965) (implied grant of way of necessity over public lands failed when viewed in light of the purpose of the particular land grant); United States v. Dunn, 478 F.2d 443 (9th Cir. 1973) (vacating trial court determination that necessity did not exist and remanding for determination of the permissible scope of any such easement under the purposes of the original grant).
36. *See* Comment, *Easements by Way of Necessity Across Federal Lands*, 35 WASH. L. REV. 105, 112 and n.48-50 (1960).

## LEO SHEEP CO. V. UNITED STATES: AN EXCURSION INTO THE NINETEENTH CENTURY IN SEARCH OF A TWENTIETH CENTURY SOLUTION

### *A Clash of Interests*

In 1973 the BLM bladed a road across "checkerboard" lands in Wyoming in order to provide public access to a fishing area located on public lands adjoining Seminoe Reservoir.[37] The road crossed private land owned by the Leo Sheep Co. at two points and the aggrieved landowner sued to quiet title to these two pieces of land as against the BLM.[38] However, the roots of this particular dispute extend somewhat further.

In 1965 Leo Sheep Co. had joined several of its neighbors and formed Elk Mountain Safari, Inc. This organization controlled over one third of a million acres, including substantial lands within the "checkerboard," which had been originally granted to the Union Pacific Railroad. It collected user fees from individuals who wished to enter these lands for hunting, fishing and other recreational activities, even if these individuals simply wanted to cross over the private lands in order to reach interlocked public lands.[39] Thus Elk Mountain Safari attempted to exploit its control over private lands in order to condition access to public lands and thereby gain a profitable monopoly over the lawful recreational use of a vast amount of public lands.

The BLM had received complaints about this practice, which conditioned public use of a public resource upon payment of a private fee.[40] The BLM's decision to open the road in this case was aimed directly at this problem. Moreover, since the BLM asserted an existing right of access either by implied reservation under the Union Pacific Land Grant Act of 1862 or by an easement of necessity, the issue of a public taking, which would require compensation to the private landowner, arguably was not presented under these

37. Leo Sheep Co., *supra* note 14, at 678.
38. *Id.*
39. Note, *Public Lands—Problems in Acquiring Access to Public Lands Across Intervening Private Lands*, 15 LAND & WATER L. REV. 119, 120-24 (1980).
40. *Id.*

facts. Thus the private landowners were threatened with the loss of their lucrative monopoly over the interlocked public lands.

The Supreme Court ultimately held that there was no public right of access to interlocked public lands within the "checkerboard". It rejected the BLM's claim of an implied reservation as not being within the intent of Congress,[41] and refused to find a way of necessity under these circumstances in particular or in favor of a sovereign entity in general.[42] In order to put this decision into perspective, a brief preliminary discussion of the common law doctrines which the BLM relied upon will be necessary.

## IMPLIED EASEMENTS AND EASEMENTS BY NECESSITY: COMMON LAW SOLUTIONS TO THE PROBLEM OF ACCESS

The doctrines of implied easement[43] and easement by necessity[44] arose from a common heritage. Writers who have considered the issues of public access over private lands and of private access over public lands have generally included a discussion of these common law doctrines and their potential as a solution to the problem of interlocked lands.[45] Although the consensus of these writers has favored the application of common law principles to solve the problem of access to interlocked federal, state and private lands, courts have largely limited, qualified or otherwise refused to enforce the full common law right in this context. A brief examination of these related common law doctrines may help

41. Leo Sheep Co. v. United States, *supra* note 14, at 679.
42. *Id.* at 679-80.
43. "*Implied easement.* One which the law imposes by inferring the parties to a transaction intended that result, although they did not express it. . . . One not expressed by [the] parties in writing but arises out of [the] existence of certain facts implied from the transaction." BLACK'S LAW DICTIONARY 458 (5th ed. 1979).
44. *Easement by necessity.* Such arises by operation of law when land conveyed is completely shut off from access to any road by land retained by the grantor or by land of grantor and that of a stranger. *Easement of necessity.* One in which the easement is indispensable to the enjoyment of the dominant estate.
*Id.* at 457.
45. *See* Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 579-80 (1925); Comment, *supra* note 36; Comment, *supra* note 33.

identify the specific concerns which have shaped the opinions of the various courts that have considered the issue.

Suppose S owned two contiguous lots, only one of which enjoyed access to a public highway. If S conveyed the lot without access to B, absent express terms to the contrary, B could claim a right of way over the lot retained by S. Likewise, if S conveyed the lot with access to B, even without an express reservation a similar right of way would arise in favor of S, so that he might use and enjoy the retained lot. The common law rationale behind these results can be traced to two fundamental principles of land use.

The common law sought to avoid results that would impair the usefulness of land, for land was the foundation upon which the wealth of the entire society was dependent. One theory stated simply that "the law will not presume that was the intention of the parties, that one should convey land to the other in such a manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder."[46] The principle was applied first in cases involving other express items of grant or reservation in order to allow the claiming party to secure additional easements necessary to the enjoyment of the rights specifically granted or reserved despite the absence of any language on the point within the terms of the conveyance itself.[47] In order to avoid the patently undesirable result of leaving a parcel of land without use or value, the courts looked beyond the strict terms of the conveyance and examined all circumstances of the particular transaction to determine whether some type of easement should be implied. The key concept was that by enforcing the easement the courts were enabling the parties to realize their true intent. Necessity for such an easement could not by itself create an easement, but the degree of necessity was widely accepted as relevant to the issue of intent.[48] The terms of the conveyance would not be

46. Collins v. Prentice, 15 Conn. 39 & 423 (1842), *cited in* Simonton, *supra* note 45, at 576 n.24.
47. Simonton, *supra* note 45, at 572-74.
48. *Id.* at 576; *see also* RESTATEMENT OF PROPERTY § 476(e) & comments (1944).

read by courts to exclude such easements in the absence of express language denying common law rights. However, such terms were considered relevant evidence of particular purposes that the parties had apparently intended to serve, thus allowing courts to imply additional easements if necessary to serve such purposes.

A second theory of common law arose which was based upon a general policy of law favoring the use and occupancy of land: "[I]t is not only a private inconvenience, but it is also to the prejudice of the public weal that land should lie fresh and unoccupied."[49] This general social policy allowed the courts to focus increasingly upon the issue of necessity, whenever the issue of an implied easement to secure fundamental rights of access arose. Although some "judges concluded that the easement by necessity arose because of the presumed intent of the parties,"[50] in fact it was a separate doctrine based upon a presumption that the parties to a conveyance would not intentionally render otherwise valuable land unfit for either occupancy or use.[51] Thus where a party could show a) unity of title between his dominant estate and the proposed servient estate, b) severance of this title by means of a conveyance and c) the necessity for an easement in order to secure a legally enforceable right of access to his land, a way of necessity arose in his favor.

One issue that has repeatedly divided courts attempting to apply these common law doctrines has been the degree of necessity which must be shown before an enforceable right to a particular easement can be established. Some courts have applied a strict necessity standard,[52] but this approach has been criticized as the "product of 19th century juristic thinking," which looked upon necessity solely as a means of divining the parties' true but unspoken intent.[53] The idea still retains some of its original vitality where a grantor

49. Simonton, *supra* note 45, at 574 n.11 (quoting Packer v. Welsted, 2 Sid. 39, 111 (1658)). *See also* 25 AM. JUR. 2d *Easements and Licenses* § 34 (1966).
50. Simonton, *supra* note 45, at 576.
51. Comment, *supra* note 36, at 107 and n.13.
52. United States v. Rindge, *supra* note 35; Alcorn v. Reading, 66 Utah 509, 243 P. 922 (1926), *overruled by*, Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).
53. Simonton, *supra* note 45, at 580.

claims the benefit of a common law easement in derogation of the express terms of his grant.[54] However, increasing recognition of the social interest in the full utilization of land and other resources has led other courts to favor a reasonable necessity standard which could be tailored upon occasion to meet the particular problems presented by any given situation. This flexible approach has been applied widely.[55]

A second issue which has divided the courts has been whether common law easements by implication or necessity should be recognized in the context of a land grant from a sovereign entity, such as the federal government. Generally there has been a pattern of judicial reluctance to extend the principles of the common law to include situations involving a sovereign entity as a party to the conveyance. Many land grants from the federal government, including the railroad land grants which created the problem of the "checkerboard", involve specific legislation which must be interpreted according to the attendant legislative intent. Such grants are more than mere conveyances; they are laws, and thus "the rules of the common law must yield in this, as in all other cases, to the legislative will."[56] Other courts have expressed their fear that general application of the doctrine of easements by necessity to situations where the only unity of title that could be shown between the dominant and servient estates depended upon tracing title back to when all land was held by the sovereign would result in a flood of litigation, since in theory all land was once held by the sovereign.[57] Commentators have criticized a blanket refusal to allow individuals to claim common law rights of access against the sovereign,[58] and some have expressed their belief that similar relief should be available to the sovereign as well.[59]

54. RESTATEMENT OF PROPERTY § 476(a) comment d, illustration 2 (1944).
55. Adamson v. Brockbank, *supra* note 52; Story v. Hefner, 540 P.2d 562 (Okla. 1975); Thisted v. Country Club Tower Corp., 146 Mont. 87, 405 P.2d 432 (1965).
56. Missouri, Kan. & Tex. Ry. Co. v. Kansas Pac. Ry. Co., *supra* note 3, at 497.
57. United States v. Rindge, *supra* note 35, at 619; Pearne v. Coal Creek Mining & Mfg. Co. 90 Tenn. 619, 18 S.W. 402, 404 (1891).
58. Simonton, *supra* note 45, at 580; Comment, *supra* note 36, at 112-14.
59. Comment, *supra* note 36, at 115-17; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 n.32 (1971).

The following three cases all involve a similar issue and illustrate some of the different rationales which courts have used to determine whether to apply common law easements in order to allow a sovereign government, state or federal, to obtain access necessary for the use or development of public lands. In *United States v. Rindge*, the court said that it was "very doubtful whether the doctrine of implied ways of necessity has any application to grants from the government,"[60] but then determined the case upon the failure of the government to establish strict necessity.[61] In *State v. Black Brothers* the court denied a state's claim to a common law easement on two grounds: first, the court noted that the state's sovereign power of eminent domain "would seem to negative the strict necessity on which the reservation of the right of way must be grounded," and second, that the reservation claimed in this case otherwise failed for want of a sufficiently detailed description of the particular right being claimed.[62] Finally in *Herrin v. Sieben* the Montana Supreme Court noted the impossibility of passing across public lands in the "checkerboard" without trespassing to some extent upon private lands and held that "there [was] an implied reservation by the federal government of a way of necessity, not only in favor of the government itself . . . but also in favor of the private citizens who wish to go upon them for lawful purposes."[63]

*The Leo Sheep Decision; A Resolution of Sorts.*

When *Leo Sheep* finally reached the United States Supreme Court in 1979, the Court held that the essential and controlling issue was whether Congress had "intended" to reserve a public right of access across the private lands in the "checkerboard".[64] In a unanimous opinion authored by Justice Rehnquist, the Court noted first that no such reser-

60. United States v. Rindge, *supra* note 35, at 619.
61. *Id.* at 621-22.
62. 116 Tex. 615, 297 S.W. 213, 219 (1927).
63. 46 Mont. 226, 127 P. 323. 328 (1912), *overruled by*, Simonson v. McDonald, 131 Mont. 612, 311 P.2d 982, 986 (1957), *in turn overruled by*, Thisted v. Country Club Tower Corp., *supra* note 55, at 440. While *Herrin* cannot be cited as primary authority in view of the confused subsequent case history, it nevertheless illustrates one possible solution to the problem of access.
64. Leo Sheep Co. v. United States, *supra* note 14, at 678-79, 681.

vation existed under the express terms of the original land grant legislation.[65] Furthermore, the Court held that no such reservation could be implied under the principles of the common law, since the BLM could not demonstrate sufficient necessity to warrant the enforcement of such an ill-defined reservation.[66] This conclusion was based upon two critical determinations by the Court: access to serve a public recreation area was not the type of necessity that could support an easement at common law, and the federal government's sovereign power to condemn any truly necessary right of way eliminated the issue of necessity entirely.[67] Finally, the Court rejected the government's argument that its claim to an implied easement was supported by either the common law way of necessity doctrine[68] or the Unlawful Inclosure of Public Lands Act of 1885.[69] Unfortunately, although the Court meticulously rejected each and every claim of the government, it did not show the same care in its analysis. Perhaps the Court's concern with history and its enthusiasm for the "battles" of Picacho Pass and Glorieta Pass displaced careful analysis of the "[a]dmittedly . . . mundane's issue of public access to public lands.[70] A close reading of the analysis offered reveals several critical flaws.

1. The Standard of Necessity

The *Leo Sheep* Court clearly based its decision to deny any implied easement on the failure of the government to meet a strict necessity standard rather than the more flexible reasonable necessity standard. While application of a strict standard might have been justified by the fact that the government, as grantor, was apparently claiming an implied reservation in derogation of the terms of the grant legislation,[71] the Court did not rely upon this premise in its opinion. Instead, the Court noted that the original grant had included several express reservations of certain lands

65. *Id.* at 678-79.
66. *Id.* at 679-88.
67. *Id.* at 679-80.
68. *Id.* at 680-81.
69. *Id.* at 683-87.
70. *Id.* at 669-77.
71. *See supra* note 54 and accompanying text.

within the "checkerboard",[72] and then revived a line of cases, in which the Court had "refused to add to [these reservations] by divining some 'implicit' congressional intent."[73] The government attempted to support its position by citing the general rule that ambiguities in government grants should be resolved in favor of the government. However, the Court chose instead to adopt the position that a "quasi public" enterprise, such as the transcontinental railroads, stands "upon a somewhat different footing from merely a private grant, and should receive at the hands of a court a more liberal construction in favor of the purposes for which it was enacted."[74] Thus, almost without comment the Court carved a huge exception out of the general rule that "[a]ll grants [by act of Congress] are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company."[75]

The case of *Missouri, Kansas and Texas Railway Co. v. Kansas Pacific Railway Co.*[76] provided the foundation for the *Leo Sheep* Court to examine the terms of the land grant legislation so narrowly. It also provides a degree of perspective on the proper scope of the "*quasi* public" exception, that the *Leo Sheep* Court apparently did not consider. In *Missouri, Kansas and Texas Railway* a private individual claimed title to certain railroad sections by right of preemption, even though his actual entry upon the lands in question had occurred after the enactment of the railroad's land grant. He claimed that title to the granted lands could only be perfected by the railroad after a survey had located the actual lands to be conveyed, since at common law a conveyance was ineffective unless it contained a sufficient description of

72. Leo Sheep Co. v. United States, *supra* note 14, at 678 (citing 12 Stat. 492).
73. *Id.* at 679.
74. *Id.* at 683 (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).
75. Dubuque & Pac. R.R. Co. v. Litchfield, 64 U.S. (23 How.) 66, 88 (1859) (emphasis in original). *See also* United States v. Union Pac. R.R. Co., 353 U.S. 112 (1957); Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604 (1978).
76. *Supra* note 3, at 497.

the lands conveyed. Obviously the application of this common law rule of property would have raised havoc with the railroad's ability to pass good and uncontested title to its grantees, thereby crippling the land sale program which was supposed to generate the necessary funds to build the railroad itself. Thus the Court held that Congress had intended to pass title to the granted lands *in praesenti* in order to aid the construction of the railroad and "[t]hat intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private individuals."[77]

The problem with extending this exception to the *Leo Sheep* situation is that the Court never identified any specific intent or purpose of Congress which would have been threatened by the application of the common law to solve this particular problem of access. The purpose of Congress in making these grants was "to aid in the construction of [a] road by a gift of lands along its route."[78] Today the railroads have long since been built, the majority of granted lands have passed by one means or another into the hands of private individuals and apparently the primary purposes of the grants have been fulfilled. While a similar exception to the general rule of construction for federal land grants has been applied in cases involving land grants to the states for the support of public education,[79] the purpose of Congress in making these school grants was to provide a permanent trust fund to help meet the continuing expenses and needs of providing public education. Absent such a continuing need, the courts should not hesitate to return to the general rule of construction, insofar as a private "company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it is clear that it was so intended."[80] Thus the strict necessity standard

77. *Id.* at 496-97. *See supra* note 56 and accompanying text.
78. Missouri, Kan. & Tex. Ry. Co. v. Kansas Pac. Ry. Co., *supra* note 3, at 497.
79. Wyoming v. United States, 255 U.S. 489 (1921); Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979), *appeal dismissed per stip.*, Nos. 79-2307 & 79-2308 (10th Cir. 1980).
80. Dubuque & Pac. R.R. Co. v. Litchfield, *supra* note 75, at 88 (citing Gildart v. Gladstone, 1 East. 675).

adopted in *Leo Sheep* imposes an unexpected and unjustifiable burden upon the public interest in securing the reasonable use of interlocked public lands.

2. Access for Recreation: A Question of Lawful Use As Opposed to "Intended" Use

The *Leo Sheep* Court held that access to public lands across private lands for recreational use could not be used to support a claim of necessity, since such an intrusion on the rights of private landowners could not have been intended or even contemplated by Congress at the time of the original land grant.[81] The Court appears to be saying that implied easements can only be claimed to serve a use of the land presently in existence at the time of the grant or conveyance. Rather than consider whether an implied easement might be necessary for any use of the retained public lands in the "checkerboard", the Court began and ended its inquiry by attempting to divine what specific uses the government and the railroads impliedly considered. The essential fallacy of this approach becomes patently obvious when one considers that in 1862 the lands in question were largely wilderness and had not been put to any use whatsoever.[82] Certainly a better rule in light of the general policy favoring the full utilization of land would allow "the scope of the easement by necessity [to] be such as to enable the dominant owner to enjoy his land for all lawful purposes, so long as the necessity continues."[83] The problem of access is inherent in the "checkerboard" pattern. No way of access exists to reach the interlocked public lands for any purpose. The physical realities of this situation, and not the proposed use, creates the necessity. The Court lost sight of this essential point when it chose to examine only the proposed use.

Furthermore, while admittedly" public recreation was probably not even an issue in 1862, by 1973 outdoor recrea-

81. Leo Sheep Co. v. United States, *supra* note 14, at 679.
82. Simonton, *supra* note 45, at 583. Interestingly, the case of Higbee Fishing Club v. Atlantic City Elec. Co., 78 N.J. Eq. 434, 79 A. 326 (1911), was described by Simonton in 1925 as the only American case which had adopted the rule that implied easements should be limited to uses in existence at the time of the original grant. Simonton, *supra* note 45, at 583 n.50.
83. *Id.* at 583.

tion had become a major industry and Americans were turning to the public lands in unparalleled numbers.[84] The public interest in hunting and fishing on the public lands had been expressly recognized by the Taylor Grazing Act,[85] and in 1976, three years before *Leo Sheep* was handed down, Congress had declared that the public lands were to be managed to "provide for outdoor recreation" as well as the more traditional uses, such as mineral development, timber and grazing.[86] Certainly Congress believed that recreation was an appropriate and lawful use of the public lands, at least in the modern context. However, since the use was not "historic", the Court chose instead to ignore it almost without explanation.

3. Necessity and the Sovereign Right of Eminent Domain

The *Leo Sheep* Court also cited the federal government's power of eminent domain to demonstrate that an implied easement simply was "not actually a matter of necessity" under the facts of this case.[87] The Court endorsed a general proposition that "eminent domain and easements by necessity are alternate ways to achieve the same result."[88] However, a brief survey of the authority cited by the Court in support of its conclusion reveals once again that the issues involved are more complex than the Court indicates.

The Court begins by considering the analogous power of a private landowner to declare a private road across his neighbor's lands by the authority of so-called private eminent domain statutes.[89] While some cases have held that the enactment of such statutes abrogated common law remedies entirely,[90] substantial authority has held that the remedy of private eminent domain should be interpreted in light of the overall public policy favoring land use to expand, rather than limit, the ability of a landowner to

84. Comment, *supra* note 33, at 149.
85. 43 U.S.C. § 315 (1976).
86. *Id.* § 1701(a) (1976).
87. Leo Sheep Co. v. United States, *supra* note 14, at 679-80.
88. *Id.* at 680.
89. *E.g.*, WYO. STAT. §§ 24-9-101 to -104 (1977).
90. Simonson v. McDonald, *supra* note 63; Alcorn v. Reading, *supra* note 52.

secure access to landlocked lands.[91] The Court's reliance on *Snell v. Ruppert*[92] to support its position has been proven premature. In 1980 the Wyoming Supreme Court recognized the continuing vitality of the common law way of necessity doctrine as an alternative avenue of relief to the private eminent domain statute for a properly situated landowner.[93] Indeed, to hold that the statutory remedy totally negates any issue of necessity under the common law "would carry the doctrine of necessity far beyond that announced in any . . . case and would destroy the principal that where one grants property to another he thereby grants him the reasonable and necessary means to enjoy it, whether expressed or not."[94]

The Court's analysis then turned to the issue of whether a sovereign government with inherent powers of eminent domain should be barred from claiming rights of access under the common law. The conclusion was a resounding "yes." Two state court decisions were then cited for support in lieu of any detailed analysis of either the issues or the result.[95] While the courts in both cases were clearly concerned with the potential difficulties that might follow a decision to enforce a way of necessity "where the unity of title on which [the easement] rests can be found only in the sovereign,"[96] the decisions were not based simply upon the ability of a sovereign government to exercise powers of eminent domain.[97] Moreover, the *Leo Sheep* Court never stopped to consider whether eminent domain proceedings

91. Hellberg v. Coffen Sheep Co., 66 Wash. 2d 664, 404 P.2d 770, 773 (1965); Horner v. Heersche, 202 Kan. 250, 447 P.2d 811, 817 (1968).
92. Leo Sheep Co. v. United States, *supra* note 14, at 680 (citing Snell v. Ruppert, 541 P.2d 1042 (Wyo. 1975)).
93. McGuire v. McGuire, 608 P.2d 1278 (Wyo. 1980); Walton v. Dana, 609 P.2d 461 (Wyo. 1980). *See generally* Note, *Property Law—Acquiring Access to Private Landlocked Tracts: Wyoming's Statutory Right of Way*, 16 LAND & WATER L. REV. 281, 288-89 (1981).
94. Adamson v. Brockbank, *supra note* 52, 185 P.2d at 273.
95. Leo Sheep Co. v. United States, *supra* note 14, at 680.
96. State v. Black Bros, *supra* note 62, 297 S.W. at 218; Pearne v. Coal Creek Mining & Mfg. Co., *supra* note 57, 18 S.W. at 404. *See also* Bully Hill Copper Mining and Smelting Co. v. Bruson, 4 Cal. App. 180, 87 P. 237 (1906).
97. *State v. Black Bros.* was based upon the failure of the state to "plead or prove any right to a way of necessity" as well as upon the state's power of eminent domain. 297 S.W. at 219. *See supra* note 62 and accompanying text. *Pearne v. Coal Creek Mining & Mfg. Co.* did not involve a sovereign entity; therefore, despite certain suggestive dicta, the issue of sovereign rights under common law easement doctrines was not even before the court.

actually provide a truly adequate remedy to the unique problem of obtaining access to thousands of individual sections of interlocked public lands throughout the west.

The willingness of the *Leo Sheep* Court to rely upon the federal government's power of eminent domain to obtain any "necessary" access to the public lands can also be questioned if one accepts the Court's invitation to "recur to the history of the times" in order to understand the congressional intent behind a particular grant.[98] A part of any such historic review must include an examination of the general state of the law as it existed at the time in question. The exercise of eminent domain to condemn a public right of way to serve federal proprietary lands arguably would not have been possible in 1862.

The United States Constitution gives Congress authority over federal property in two separate clauses—the Jurisdiction Clause[99] and the Property Clause.[100] These clauses were initially interpreted to grant substantially different powers. Under the Jurisdiction Clause, Congress could exercise full sovereign authority over the District of Columbia and other federal enclaves to the extent that such authority had been ceded or consented to by a particular state.[101] Under the Property Clause, the Congress could exercise sovereign power to regulate the use of federal public lands in the territories,[102] but upon the admission of a territory as a sovereign state "all powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and to the people."[103] Title

98. Leo Sheep Co. v. United States, *supra* note 14, at 669 (citing United States v. Union Pac. Ry. Co., 91 U.S. 72, 79 (1875)).
99. Congress shall have the power:
> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.

U.S. CONST. art. I, § 8, cl. 17.
100. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States. . . ." U.S. CONST. art. IV, § 3, cl. 2.
101. Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885).
102. United States v. Gratoit, 39 U.S. (14 Pet.) 526 (1840).
103. Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 667, 737 (1836).

to the public lands remained in the hands of the federal government,[104] but, in the words of one commentator, the United States held such lands "as a proprietor, and not as a government," and therefore was only "entitled to the same relief as any private landowner for waste committed against federal property, both at law and in equity."[105] Thus at the time of the great railroad land grants the "property power" of the federal government could hardly be considered the equivalent of full sovereign authority.[106] True, the land granted to the railroads was largely located in the territories and thus was subject to the full immediate authority of Congress. But it cannot be doubted that Congress fully believed that with the coming of the railroads statehood for these territories would surely follow, forever altering the relationship between the federal government and the retained lands.

The "property power" did not remain static over time. During the last half of the nineteenth century the Supreme Court recognized that the federal power over the public lands in the various states had to be expanded to protect the national interest in these lands. "A different rule would place the public domain completely at the mercy of state legislation."[107] A later Court concluded "[t]he power over the public lands thus entrusted to Congress is without limitations. 'And it is not for the courts to say how the trust shall be administered.' "[108] Finally, in 1976, the once accepted distinction between Congress's powers under the Jurisdiction Clause and the Property Cluase all but disappeared when the Court wrote:

> Congress exercises the powers both of a proprietor and of a legislature over the public domain. Although the Property Clause does not authorize "an exercise of a general control of public policy in a state," it does permit "an exercise of the complete

104. Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845).
105. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 309 (1976).
106. Before the Civil War the United States did not use eminent domain to acquire real property. *Id.* at 297 n.54.
107. Camfield v. United States, *supra* note 27, at 526.
108. United States v. San Francisco, 310 U.S. 16, 29 (1939) (quoting Light v. United States, 220 U.S. 523, 537 (1910)).

> power which Congress has over particular public property entrusted to it."[109]

Thus, Congress's present authority to exercise the sovereign power of eminent domain to gain access to the public lands entrusted to its management cannot be seriously doubted. But when the same question is considered from the perspective of the limited property power recognized in the mid-nineteenth century, the *Leo Sheep* Court's belief that a Congress sitting in 1862 would have felt that the federal power of eminent domain was an "obvious [device] for ameliorating disputes" over access lacks historic credibility.

4. Buford v. Houtz and Camfield v. United States: Distinguished, Dismissed and Dismembered by Leo Sheep

The federal government attempted to support its claim to an implied easement or a way of necessity by citing a line of earlier decisions, exemplified by *Buford v. Houtz* and *Camfield v. United States*, which had upheld the right of the general public to enter upon interlocked public lands in the "checkerboard" in order to partake of the available resources.[110] The *Leo Sheep* Court distinguished and dismissed these cases as irrelevant to the issue at hand without any indication of its reflection upon the fact that the private landowners in this case had found yet another way to exploit the "checkerboard" pattern and create a vast monopoly over a lawful use of the public lands for individual profit. In *Buford*, and again in *Camfield*, private attempts to stake out similar monolopies had been denied and condemned. In *Leo Sheep*, the practice received the highest official sanction available today—approval by a unanimous Supreme Court.

In *Buford*, the Supreme Court concluded that the public enjoyed an "implied license" to use federal public lands interlocked with private lands.[111] The particular use at stake was the right to graze animals on open, unenclosed public lands, which at the time was perhaps the only rec-

109. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) (citation omitted).
110. *See supra* notes 24-32 and accompanying text.
111. Buford v. Houtz, *supra* note 24, at 326.

ognized use of such lands. However, broadly read, the case served notice that the claim of a private landowner to enjoy the exclusive use of interlocked public lands would neither be recognized nor enforced by the courts, where "under the pretense of owning a small proportion of the land which is the subject of controversy, [the landowner obtains] the monopoly of this valuable privilege."[112] In *Leo Sheep* the Court distinguished *Buford* on the grounds that grazing, unlike recreation, was "a century old custom".[113] Imposing such a limitation is nonsense, for in effect the Court would be limiting the development of the public lands in the "checkerboard" to a single, historic use, until and unless the government has secured some right of access through eminent domain or negotiation. Such a conclusion promises only further problems for government agencies which have been charged with multiple use management of the public lands. The tradition of open grazing may have strengthened the case for access in *Buford*, but it should not be used now to deny similar rights of access for other lawful uses of these lands.

In *Camfield* the Supreme Court rejected a constitutional challenge to the Unlawful Inclosure of Public Lands Act, which allowed the government to enjoin and abate fences and other forms of inclosures that prevented general entry upon the public lands without claim or color of title to such lands. The Court noted that the government "would be recreant to its duties as trustee for the people of the United States to permit *any* individual or private corporation to monopolize them for private gain. . . ."[114] The defendants argued that the government ought to bear the burden of any inconvenience which resulted from its own "improvidence and carelessness" in granting the "checkerboard" lands so that any system of fencing the interlocked private lands would necessarily embrace some public land as well.[115] The Court quickly denied this claim as being "but an ill

112. *Id.* at 332.
113. Leo Sheep Co. v. United States, *supra* note 14, at 687 n.24.
114. Camfield v. United States, *supra* note 27, at 524 (emphasis added).
115. *Id.* at 526. The defendants in *Camfield* had illegally fenced over 20,000 acres of public lands with a series of fences constructed solely on private lands.

return for the generosity of the Government in granting [the railroads] half its lands to claim that it thereby incidentally granted them the benefit of the whole."[116] The government's power to dispose of or use its retained lands would not be obstructed, embarassed or denied by the craft or wile of individuals who sought private benefit at public expense.

In *Leo Sheep*, the Court dismissed the Unlawful Inclosure of Public Lands Act as an isolated "response to the 'range wars' " which plagued the American west during the late nineteenth century, and held that *Camfield* simply did not support a right of access to public lands.[117] However, at least one other court realized quite early that the problem of access was intimately related to the purposes of the Unlawful Inclosure of Public Lands Act. In 1889 the Wyoming Supreme Court wrote as follows:

> 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 will the public then have than if the fence had remained? . . . When reduced to its last and true analysis, the point in controversy is, shall the United States have a way over the defendant's land.[118]

The essential issue in *Camfield* clearly involved the public's right to cross legal property lines as well as illegal fence lines in order to permit entry upon the public lands for settlement or other lawful uses. Yet the *Leo Sheep* Court simply refused to recognize the inherent connection between the Act and the problem of public access. Thus, while a fence can be removed for illegally inclosing public lands, under *Leo Sheep* such lands remain locked behind property lines without any assured right of access for any use.

*The Impact of Leo Sheep*

In conclusion, the Supreme Court justified its holding in *Leo Sheep* by noting that "[g]enerations of land patents

116. *Id.*
117. Leo Sheep Co. v. United States, *supra* note 14, at 683-85.
118. United States v. Douglas-Willan Sartoris Co., 3 Wyo. 287, 22 P. 92, 97 (1889). *See* Comment, *supra* note 33, at 152-59.

have issued without any express reservation of the right now claimed by the government. Nor has a similar right been asserted before."[119] The Court was "unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation."[120] Ironically the simplistic approach of the Court introduced new uncertainties concerning the rights of private landowners within the "checkerboard" to enjoy access to their interlocked lands insofar as no mention of such rights appears in any of the railroad land grant acts. If the common law could not be applied in favor of the sovereign, could it be said with any certainty that it would be applied to its detriment?

As alternatives to the common law easements denied by this decision, the Court expressed its faith in the ability of "negotiation, reciprocity considerations and the power of eminent domain,"[121] as well as the "ordinary pressures of commercial and social intercourse,"[122] to provide a solution to any reasonable problem of access. The faith is misplaced. The power of eminent domain simply is inadaquate to the task of securing access to public lands in the "checkerboard" simply because of the scale of the problem.[123] Reciprocity is a factor considered by the courts in determining whether to enforce an implied easement at common law.[124] However, the Supreme Court's decision to deny public rights of access to public lands in the "checkerboard" undercuts potential private rights of access by destroying the legal basis for enforceable reciprocal rights. Thus only negotiation remains as a means of striking some accord between the public and private interests. Both groups hold the power to deny the other the use of its lands. However, such drastic stategies ought to be avoided if the policy favoring the use of land is to remain vital. Furthermore, although the government clearly "has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession

119. Leo Sheep Co. v. United States, *supra* note 14, at 687.
120. *Id.* at 687-88.
121. *Id.* at 681.
122. *Id.* at 686.
123. *See supra* notes 87-109 and accompanying text.
124. RESTATEMENT OF PROPERTY § 476(f) & comments (1944).

and prosecute trespassers,"[125] any blanket action on the part of the federal government to deny any access across public lands would be sure to invite dispute, retaliation and charges of unconstitutional takings.

## MONTANA WILDERNESS ASSOCIATION V. UNITED STATES FOREST SERVICE: A TWENTIETH CENTURY APPROACH TO THE PROBLEM OF PRIVATE ACCESS

*Leo Sheep* left one question notably unanswered: could a private landowner in the "checkerboard" claim either an implied easement or a way of necessity against the government? In 1979, the issue arose in connection with certain railroad lands which were interlocked with National Forest lands in Montana. It was not until 1981 that the courts finally settled the issue of access without any reference to the common law whatsoever. In order to understand this result, a brief summary of the underlying facts and the several court opinions spawned by this case may be of some assistance.

### *Private Access: Yet Another Clash of Interests*

In 1979, Burlington Northern, Inc. applied to the United States Forest Service for a permit to build a road across National Forest lands in Montana. The road was necessary to allow Burlington Northern to conduct timber harvesting operations on a section of land which had originally been granted under the terms of the Northern Pacific Land Grant Act of 1864. The permit was initially granted.

However, in 1977 the public lands surrounding this section had been declared a Wilderness Study Area,[126] and the prospect that such a road would impair the wilderness characteristics of the entire area spurred the Montana Wilderness Association (MWA) to seek declaratory and injunctive relief against the Forest Service and its decision to grant this permit. The Forest Service then revoked the permit and requested an opinion from the Attorney General of the United States in order to resolve certain questions

125. Camfield v. United States, *supra* note 27, at 524.
126. Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (1977).

about the rights of private individuals to claim access to private lands surrounded entirely by public lands.

The Attorney General concluded *inter alia* that, although a common law easement by necessity could not arise in the context of a grant of lands by the United States, "a right to access may nonetheless be implied by reference to particular grants."[127] Thus a grantee of public lands could claim a right to "reasonable access across Government land to use his property for the purposes for which the land grant was made, if such an access right either expressly or impliedly arises from the act authorizing the land grant."[128] The Forest Service then reissued its permit to Burlington Northern on the grounds that the railroad held an implied right of access under the Northern Pacific Land Grant Act. Construction of the access road soon began, and the MWA once again sought judicial relief.

At trial, the court held in favor of the Forest Service and Burlington Northern on the issue of access. Specifically, it stated that Burlington Northern enjoyed a present right of access to its "checkerboard" lands by implied grant as well as by way of necessity.[129] The private inholder's position was distinguished from the position of the government in *Leo Sheep*, because such inholders could not claim any right of eminent domain against the government in order to secure necessary access to their lands.[130]

The MWA appealed to the Ninth Circuit Court of Appeals, and on May 14, 1981 the court reversed the trial

127. Rights-of-Way Across National Forests, 43 Op. Att'y Gen. No. 26, at 20 (June 23, 1980).
128. *Id.* at 18.
129. Montana Wilderness Ass'n v. United States Forest Service, 496 F. Supp. 880, 885, 888 (D. Mont. 1980). The court found all three requirements of the way of necessity doctrine satisfied in this case. There was original unity of title in the United States; the title had been severed by a conveyance; and the easement was reasonably necessary to allow the grantee to use and enjoy his land. The court also held that an implied grant of a right of way existed on the strength of *Leo Sheep's* rule of liberal construction in the context of railroad land grants, together with the clear and accepted congressional intent to allow the railroads to sell or otherwise develop the granted lands. *Id.*
130. *Id.* at 884.

court's decision.[131] The court held that in light of the *Leo Sheep* decision, the trial court had been wrong to recognize a private claim of access either by implication under the railroad land grant legislation or by way of necessity.[132] The court was particularly concerned that if it upheld the trial court on the issue of access, private landowners, who had acquired title to sections which had been retained originally by the government under the terms of the railroad land grants, would be subject to neighboring landowners' claims to common law rights of access across these sections without enjoying any reciprocal rights themselves. The court acknowledged Congress's purpose to further the settlement and development of the western territories by means of these grants, but held that "[i]f the congressional purpose of settlement and development may be served without implied easements for the owners of even-numbered sections, as *Leo Sheep* holds, it may also be served without implied easements for the railroads and their successor owners of odd-numbered sections."[133] Congress did not intend in 1864 to create two classes of land within the "checkerboard" with vastly different rights regarding the issue of mutual access, and this court was not about to do so in 1981. The court felt that *Leo Sheep* required it to turn its back on the common law doctrines applied by the trial court. Instead, it could only refer the parties to "the customary process of negotiation", endorsed by *Leo Sheep*,[134] thereby leaving the question of relative rights of access to "checkerboard" lands to the vagaries of personal accommodation rather than settled principles of law.

The Circuit Court also denied Burlington Northern's claim to a right of access under the terms of the recently enacted Alaska National Interest Lands Conservation Act (ANILCA).[135] Section 1323(a) of the act provides that:

131. Montana Wilderness Ass'n v. United States Forest Service, No. 80-3374 (9th Cir. May 14, 1981) [hereinafter cited as *Montana Wilderness Ass'n I*]. This opinion was originally published at 11 ENVTL. L. REP. (ENVTL. L. INST.Q 20521. However, it was later removed, when the court issued its second opinion, dated August 19, 1981. *See supra* note 19.
132. *Id.*
133. *Id.*
134. *Id.*
135. Pub. L. No. 96-487, 94 STAT. 2371 (1980) [hereinafter cited as ANILCA].

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof: *Provided,* That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.[136]

Burlington Northern asserted that, unlike any other provision of ANILCA, section 1323 applied nationwide to provide a guarantee of access to its private inholdings surrounded by National Forest lands in Montana. The only problem with this argument was the simple fact that "the term 'National Forest System' [was] not specifically defined in the Act."[137] Thus in order to resolve this claim, the court had to look beyond the terms of the Act itself and consider the available legislative history.

The court ultimately concluded that section 1323(a) should be "limited in its application to the state of Alaska," and therefore was irrelevant to the present case.[138] First, Title V of the Act was entitled "National Forest System" and dealt solely with National Forest units located in Alaska. Second, the court and the parties both agreed that section 1323(a) ought to be read *in pari materia* with section 1323(b), which used similar language to provide rights of access to nonfederal lands over "public lands" managed by the Department of Interior under the terms of the Federal Land Policy and Management Act. The term "public lands" was defined separately in ANILCA to include only "lands situated in Alaska."[139] Third, the Senate Energy

136. *Id.* § 1323(a). Subsection (b) uses essentially the same language to charge the Secretary of Interior with the same responsibility to provide access to nonfederally owned lands surrounded by "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976. . . ." *Id.* § 1323(b).
137. *Montana Wilderness Ass'n I, supra* note 131, at 20522.
138. *Id.* at 20524.
139. ANILCA, *supra* note 135, § 102(3).

Committee Report,[140] which contained a section by section analysis of the Act, was not held to be conclusive on the issue, for like the Act itself, the report used "indiscriminately terms defined in the Act as applying only to Alaskan lands . . . and terms not so defined. . . ."[141] Fourth, despite the fact that ANILCA had been one of the most hotly debated issues to face Congress in years, there was a singular lack of comment on section 1323 and the question of its proper scope.

The court concluded that while there was evidence of a possible difference of interpretation within the legislative record, such evidence was "not nearly sufficient to overcome the actual language of the statute, which we believe is more naturally read as applying only to Alaska."[142] Finally, the court held that nationwide application of section 1323 would repeal by implication the provisions of the Wilderness Act of 1964 dealing with access to private inholdings in wilderness areas and giving the government the option of exchanging lands to eliminate such inholdings.[143] The court felt that the scanty and inconclusive legislative history surrounding section 1323 simply did not demonstrate a clear congressional intent to repeal the access provisions of the earlier statute.[144] In short, the court categorically rejected each and every legal basis offered by Burlington Northern

140. S. REP. NO. 413, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5070, 5254. The sectional analysis of section 1323 provides in pertinent part:

> This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (*Utah v. Andrus* et al., C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney-General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and Interior. . . .
>
> The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access. National Forest and public land, subject, of course, to reasonable rules and regulations [sic]. *Id.*

141. *Montana Wilderness Ass'n I, supra* note 131, at 20523.
142. *Id.* at 20524.
143. 16 U.S.C. § 1134(a) (1976).
144. *Montana Wilderness Ass'n I, supra* note 131, at 20524.

to support its claim to an enforceable right of access under ANILCA.

This decision did not stand, for a short three months later the same panel of judges reconsidered their first opinion and came to an entirely different conclusion on the issue of the applicability of section 1323 to Burlington Northern's access problems in Montana. This abrupt turnabout was mandated in the court's opinion by the discovery of "subsequent legislative history," which had not been argued at the earlier hearing.[145]

The opinion begins with a general rehash of the arguments discussed in the first decision. The court then turns its attention to the Colorado Wilderness Act, which had been passed by Congress three weeks after ANILCA.[146] In the course of reconciling different House and Senate versions of this Act, a conference committee chose to delete a provision which provided access to nonfederal lands within wilderness areas in Colorado. In the words of the conference report, "[t]he conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act."[147] The Circuit Court was particularly impressed with the membership of this conference committee, noting the presence of several individuals who could be charged with "an intimate knowledge of the Alaska Lands Act."[148] Thus, in the face of its own inability to come to grips with the legislative history of section 1323, this court placed its faith in the opinion of a handful of influential and informed Congressmen. As a result, Burlington Northern's right of access to its property could not now be denied.[149]

This second opinion is also notable for the number of issues which it specifically reserves. The proper scope of section 1323(b) is left undecided. However, given the parallel phrasing between this section and section 1323(a),

145. *Montana Wilderness Ass'n II, supra* note 19, at 957.
146. Pub. L. No. 96-560, 94 Stat. 3265 (1980).
147. *Montana Wilderness Ass'n II, supra* note 19, at 957 (quoting H.R. REP. No. 1521, 96th Cong. 2d Sess. (1980).
148. *Id.*
149. *Id.*

the two sections should probably still be read *in pari materia*, despite the fact that the use of the defined term "public lands" would arguably limit section 1323(b) to Alaskan lands. Furthermore, the Senate Energy Committee's sectional analysis did not distinguish between the two sections, but rather said that the entire provision was "intended to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access. National Forests and public land, subject, of course, to reasonable rules and regulations [sic]."[150]

The court also reconsidered the effect that nationwide application of section 1323 would have on the access provisions of the Wilderness Act. Instead of an implied repeal of the earlier Act, the court now only saw "a facial problem of tension" between the two statutes.[151] Since this case involved only wilderness study lands, the access provisions of the Wilderness Act were not operative and thus the issue of conflict between section 1323 of ANILCA and section 1134(a) of the Wilderness Act was simply not raised by the facts of this case.

Finally, the court totally withdrew its first conclusion that Burlington Northern and other landowners within the "checkerboard" could not claim relief under the doctrines of implied grant and way of necessity. Access under section 1323(a) was sufficient to dispose of the present case, and that was as far as this court was prepared to go.[152]

*Looking Behind the Words: A Subjective Inquiry Into the Meaning of Montana Wilderness Association v. United States Forest Service*

The second *Montana Wilderness* opinion cites *Leo Sheep* only once,[153] a significant contrast to the first opinion. There the court had held *Leo Sheep* to be controlling, rejecting any distinction between the government's right of access to its retained lands in the "checkerboard" and the private landowner's right of access to granted lands.[154]

150. S. REP. No. 413, *supra* note 140, at 5254.
151. *Montana Wilderness Ass'n II*, *supra* note 19, at 957 n.12.
152. *Id.* at 958 n.13.
153. *Id.* at 952 n.1.
154. *Montana Wilderness Ass'n I*, *supra* note 131, at 20524-20525.

The reason for the difference between the first and second *Montana Wilderness* decisions is quite simple. The second opinion rests entirely upon an issue of statutory construction. By finding a right of access under the terms of ANILCA, the court was able to avoid the sticky issues raised by application of the common law after *Leo Sheep*. In contrast, the first opinion had reached the question of whether a common law easement should be implied to permit Burlington Northern to enjoy its property. The court concluded that it was constrained by the *Leo Sheep* decision to deny private landowners in the "checkerboard" the same reasonable access that the Supreme Court had denied to the government and the public.

The initial *Montana Wilderness* opinion marked an abrupt break from the general policy of law favoring the reasonable use of land. This policy had been one of the basic premises behind the common law doctrines of implied easements and easements by necessity, but the *Leo Sheep* analysis apparently eliminated common law precedence, at least in the context of the railroad land grants. Thus the court was simply without a remedy for the needs of landowners within the "checkerboard", and instead could only impose a stalemate where no one landowner could claim access over the lands of his neighbors as a matter of right.

When the case returned for a rehearing, the court seized upon section 1323(a) of ANILCA in order to provide a legal remedy despite the admitted confusion concerning the intended scope of the statute. The court admitted that "a subsequent conference report is not entitled to the great weight given to subsequent legislation," but under the particular circumstances of this case, it felt that the conference report on the Colorado Wilderness Act should tip the balance in favor of a broad, nationwide application of section 1323(a) at least, so that Burlington Northern would not suffer a total loss of any reasonable opportunity to use its lands.[155] Thus the court was able to avoid the *Leo Sheep* trap this time, and thereby fashion a remedy within the

155. *Montana Wilderness Ass'n II, supra* note 19, at 957.

principle that the law should not leave land without access or a landowner without the use of his land.

The court may have had to stretch a bit in order to extend section 1323(a) to solve an access problem in Montana.[156] Certainly the decision to apply section 1323(a) nationwide will effect "a major change in current law,"[157] one that will have a tremendous impact upon relations between the federal government and local landowners. As explained below, public rights in public lands may bear the burden.

First, the authority of the Secretary of Agriculture, and arguably of the Secretary of the Interior as well,[158] to manage wilderness study areas has certainly been weakened. The government's authority to pursue a policy of land exchanges under section 1134(a) of the Wilderness Act is now open to question.[159] In the future, whenever Congress designates an area for wilderness study, nonfederal inholders will be able to enforce their access rights under section 1323(a) and possibly subsection (b) as well, even though such roads and other attendant activities of these landowners may destroy the wilderness characteristics of a much broader area of federal lands. Thus, a handful of individuals may be able to exploit their position as inholders to frustrate, either intentionally or otherwise, important policies of federal land management.

Secondly, by eliminating any remaining discretion of the Secretary of Agriculture concerning the question of access to nonfederal lands surrounded by federal lands, the section leaves the government without a basis upon

156. The decision in *Montana Wilderness Ass'n II* was extremely close, despite the apparent unanimity of the panel. The court's efforts to distinguish the two subsections of section 1323, the retreat from the prior holding that an owner of nonfederal lands in the "checkerboard" could not claim an implied grant of access against the government or its successors, and the unwillingness of the court to address the admitted tension between section 1323 applied nationwide and important provisions of the Wilderness Act of 1964, all bespeak a court that, while perhaps not entirely satisfied with all parts of its decision, nevertheless was willing to accept the result in order to avoid a legal stalemate.

157. *Montana Wilderness Ass'n I, supra* note 131, at 20524.

158. *See supra* notes 136 & 150 and accompanying text.

159. Similar issues may also arise concerning the Secretary of Interior's often challenged authority to regulate uses of lands located in Wilderness Study Areas committed to his care under section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(c) (1976).

which to negotiate with private landowners for public access. The effect on public access issues in the "checkerboard" will be particularly hard insofar as negotiation was just about the only method of obtaining public access, short of full blown eminent domain proceedings, surviving the aftermath of *Leo Sheep*. If private landowners enjoy a right of access to their lands, what can the government offer in negotiation?

## THE FUTURE OF ACCESS IN THE "CHECKERBOARD"

The issue of access within the "checkerboard" will continue to arise in several situations. How well do the *Leo Sheep* and *Montana Wilderness Association* decisions contribute to the resolution of those issues?

First, extensive portions of the "checkerboard" have passed entirely into private hands by this time. Roughly half of the land traces title to the railroad land grants, while the other half passed either under one of the other land acts or by purchase from the government. In the first *Montana Wilderness Association* case, the court explicitly noted the potential problems that would result from creating two classes of land within the "checkerboard", one favored with common law rights of access and the other lacking them.[160] Although private eminent domain statutes will probably provide a sufficiently secure right of access in the majority of cases, there remains the possibility that the owner of an original railroad section could claim an implied right of access under the terms of one of the railroad land grants. The Attorney General acknowledged that such claims might be enforceable against the government; they may be equally enforceable against the government's grantees. The second *Montana Wilderness Association* opinion carefully avoided the issue. If the common law arguably provides a cost effective means of obtaining access which otherwise would be conditioned on the payment of compensation, eventually someone will put it to the test.[161]

160. *See supra* notes 132-34 and accompanying text.
161. *See* Adamson v. Brockbank, *supra* note 52, 185 P.2d at 274.

Secondly, future courts will have to consider whether *Leo Sheep* represents a general denial of common law rights of access to the federal government for all purposes, or whether it actually represents a fairly special case which should be largely limited to its facts. The BLM may have injured its case by deciding to open the road first and seek a judicial determination of its rights later, after it had already "invaded" the property rights of the private landowner. The decision may also be limited to the issue of access for recreational purposes, leaving the issue of access by the federal government to fulfill its management duties to be decided in another case. However, the analysis lends itself well to a broad denial of access rights, especially in light of the Court's repeated references to the extensive federal powers of eminent domain.[162]

A third type of case involving access to "checkerboard" lands may also arise concerning the development of school land grant sections interlocked with federal public lands as well as private lands. Under *Montana Wilderness Association* such sections clearly enjoy a statutory right of access over surrounding National Forest lands, and probably over BLM lands as well. Moreover, these sections also can claim an implied grant of access to fulfill the purposes for which the school land grants were originally made.[163] However, under *Leo Sheep* the state could not claim access over private lands under the common law since the state is a sovereign entity with the power of eminent domain. Thus, the state's ability to develop its school sections and thereby fulfill the primary purpose of these grants may be severely compromised.

## CONCLUSION

In *Leo Sheep*, the Supreme Court adopted a simplistic solution to a very difficult problem. By concentrating upon the imperfectly recorded intent of a Congress which sat

162. Such a distinction may conflict with the BLM's responsibilities under the Federal Land Policy and Management Act of 1976, which does not distinguish between recreational uses of the public lands and other more traditional uses. *See* 43 U.S.C. § 1701 (1976).
163. *See* Utah v. Andrus, *supra* note 79.

more than one hundred years ago, the Court was able to dismiss the entire issue of public access to public lands for recreation and possibly other purposes as not being within the cognizance of that Congress, and no one today can conclusively say that it was not so. In choosing this easier route, the Court failed to entirely consider the effects of time and attendant changes of circumstances upon the duties and responsibilities of the federal government as a landowner. Instead the Court has left the federal agencies which must manage these lands with only the narrow option of pursuing an action in eminent domain in order to insure that the public lands truly remain public. Access is a fundamental property right. Land without access is land without value. The Court's excessive reliance on eminent domain will certainly make it more difficult for the BLM and the National Forest Service to manage their "checkerboard" lands. Public use of these lands will certainly be curtailed, for "[r]equiring compensation when a conflict among competing users is resolved in favor of diffuse-interest holders [such as the public], and not when it is resolved against them, inevitably skews the political resolution of conflicts over resource use and discriminates against public rights."[164]

In *Montana Wilderness Association*, the court narrowly avoided a legal stalemate which would have left Burlington Northern without any means to secure reasonable access to its interlocked lands. While the court may have reserved too many questions by choosing to base its decision solely upon its interpretation of a single statute, at least it recognized and avoided the sterile logic of *Leo Sheep*. The opinion may not have fully discussed the public interest in preserving a potential wilderness area nor fully considered the impact of Burlington Northern's road upon the proposed uses of the surrounding federal lands, but at least the court found a legal remedy to one aspect of the overall problem of access within the "checkerboard".

Burlington Northern was fortunate to uncover enough additional information to document, at least to the satisfac-

164. Sax, *supra* note 59, at 160.

tion of one court, a congressional intent to guarantee adequate access to nonfederal inholdings. Private landowners in the "checkerboard" can now rest assured of reasonable access to their interlocked lands after years of litigation, legislation and confusion. Unfortunately, the public cannot claim a similar right to use or enjoy the public lands in the "checkerboard" without running afoul of the traditional taking doctrine, requiring a commitment of resources and a volume of litigation that would tax the mightiest of federal agencies.

GEORGE E. POWERS, JR.