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Storm over Red Rim: Private Property Rights Collide with the Unlawful Inclosures Act

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COMMENT

Storm Over Red Rim: Private Property Rights Collide With The Unlawful Inclosures Act.

Winter came hard to southern Wyoming in late November of 1983. Soon thereafter, the national and local news media were calling attention to the plight of a large antelope herd in an area south of Rawlins, Wyoming known as Red Rim. A fence blocked the animals' migration to their winter range, the only area where forage was readily available. Many animals were dying of starvation compounded by the extremely harsh weather conditions.[1]

The public outcry was deafening. The controversy involved a fence which inclosed an area of checkerboard land.[2] Mr. Taylor Lawrence had erected the fence, and he owned or leased slightly more than half of the land within. Although the fence was located almost entirely on private land owned by Mr. Lawrence, almost half of the area inside of the fence was public land.[3]

In response to the public outcry, the Governor of Wyoming arranged a meeting between Mr. Lawrence and the Wyoming Game and Fish Department. An agreement was reached allowing the Department to lower portions of the fence during the winter and to rebuild the fence the following spring.[4] The next winter (1984-85) a similar agreement was reached. The fence was lowered in the fall and raised again the next spring.[5] The agreements had been negotiated one at a time and no permanent agreement was ever concluded by the parties. The lack of a permanent agreement precipitated a lawsuit.[6]

The United States brought the action alleging that Mr. Lawrence violated the Unlawful Inclosures Act.[7] The suit was filed in United States District Court for the District of Wyoming. The Wyoming Wildlife Federation and the National Wildlife Federation then became parties to the suit as plaintiff intervenors.[8] Plaintiffs asked the court to declare the fence

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1. KTWO Television, Casper, Wyoming, (Nov. 29, 1983) showed the first account in the electronic media. NBC Nightly News (Dec. 6, 1983) also showed footage of starving antelope.

2. It was the custom of Congress to grant land to railroads in alternating one square mile sections. The resulting surface ownership pattern appears as a checkerboard when viewed on a map. For a more detailed explanation of the checkerboard land grants and the rationale behind them, see Leo Sheep Co. v. United States, 440 U.S. 668, 669-78 (1979).

3. Complaint of United States at Exhibit 1, United States v. Lawrence, No. C85-0136 (D. Wyo. filed April 11, 1985) [hereinafter cited as Complaint].

4. Answer of Defendant, Taylor Lawrence at 4, United States v. Lawrence, No. C85-0136 (D. Wyo. filed May 6, 1985) [hereinafter cited as Answer].

5. *Id.*

6. United States v. Lawrence, No. C85-0136 (D. Wyo. complaint filed April 11, 1985).

7. Complaint, *supra* note 3, at 3. The Unlawful Inclosures of Public Lands Act, 43 U.S.C.A. §§ 1061-1066 (West 1964 & Supp. 1985) [hereinafter cited as Unlawful Inclosures Act].

8. *See* 43 U.S.C.A. § 1062 (West 1964 & Supp. 1985) (the act specifies that the United States attorney has the duty to prosecute violations of the Unlawful Inclosures Act when a citizen files an affidavit with him alleging a violation of the act).

unlawful and sought a mandatory injunction compelling the removal or modification of the fence to allow free and unobstructed access of pronghorn antelope to the public land within the fence.[9]

After a full hearing on the merits, the intervenors were awarded injunctive relief on October 21, 1985.[10] The district court ordered Mr. Lawrence to remove the fence or modify it so that antelope can pass through it.[11] District court Judge Brimmer issued a bench order based on findings that the defendant had unlawfully inclosed public lands, that the defendant was in violation of the Unlawful Inclosures Act, and that the fence was a nuisance which would cause irreparable harm if not abated.

This comment will discuss the legal issues that were in controversy in the trial of the Red Rim case.[12] These legal issues, which may be reviewed upon appeal, are:

(1) Whether the Unlawful Inclosures Act prohibits the exclusion of antelope from the public domain.

(2) Whether a fence may be erected around private property to protect private interests even if public land is inclosed by the fence.

(3) Whether grazing rights granted by Section 3 of the Taylor Grazing Act exempt a party from the Unlawful Inclosures Act.

(4) Whether the goverment is estopped from prosecuting the owner of the fence for unlawfully inclosing public land.

BACKGROUND

One hundred years ago, Congress enacted "An Act to Prevent the Unlawful Occupancy of the Public Lands."[13] Today this act is known as the Unlawful Inclosures Act (UIA).[14] The act makes it unlawful for a party to erect or maintain an inclosure around or to assert the exclusive use of any public land unless the party has good faith claim or color of title to the property under the public land laws of the United States.[15]

When the UIA was passed in 1885, the policy of Congress was to dispose of the vacant public lands. That objective was promoted through legislation.[16] Congress also allowed free grazing on the open range of the public domain. This was the custom of the day in 1885, and Congress sanc-

9. Complaint, *supra* note 3, at 3.

10. Telephone interview with counsel for intervenors at National Wildlife Federation, Rocky Mountain Natural Resources Clinic, Boulder, Colorado (Oct. 23, 1985).

11. Casper Star-Tribune, October 22, 1985, at 1.

12. Answer, *supra* note 4. The issues chosen for discussion are the defenses asserted in defendant's answer.

13. Ch. 149, 23 Stat. 321 (1885).

14. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 684 (1979).

15. 43 U.S.C.A. § 1061 (West 1964 & Supp. 1985).

16. *See* Buford v. Houtz, 133 U.S. 320, 326-27 (1890) (discussion of the laws of the United States relating to public lands). The court noted that title to public land could easily be obtained for a very low price.

tioned it by acquiescence.[17] The United States Supreme Court acknowledged and endorsed this custom in 1889.[18]

Conflicts over the public domain arose against this background. The first users on much of the land were graziers. Conflicts surfaced when these "cattle barons" started fencing the public lands for their own uses.[19] Because the fencing out of settlers conflicted with the national policy of settling the West, the UIA was passed to give potential settlers a legal remedy for being excluded from the public domain.[20] The government had a duty to prosecute those who were monopolizing the range, and it did so on many occasions. Yet conflicts continued as long as graziers and settlers were competing for the public domain.[21]

The Taylor Grazing Act,[22] passed in 1934, ended most of these disputes over vacant public lands. It accomplished this in two ways. First, public lands were withdrawn from entry to homesteaders.[23] This eliminated the competition for public lands between settlers and graziers. Secondly, the act changed the grazing on public land from a commons to a permit system regulated by the government. Those who were grazing stock in 1934 were given a preference right to use the public lands to the exclusion of others.[24] This eliminated the competition for public grazing land among the graziers.

The first United States Supreme Court opinion defining the public's right to access to public lands was *Buford v. Houtz*.[25] Plaintiffs in that case were cattle graziers who owned about one-third of the lands in a checkerboard area. They were seeking to enjoin sheep-raisers from bringing their herds onto the area. The Supreme Court saw no equity in barring the sheepmen from the public land located within the checkerboard. The denial of an injunction was upheld.[26] The decision was based upon the Supreme Court's conclusion that there was an implied license to graze livestock on the public lands. This license, the court reasoned, grew out of the one-hundred year old custom of grazing public land.[27] *Buford*

17. *Id.*

18. *Id.* at 326. The Court noted: "We are of the opinion that there is an implied license . . . 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 the government forbids this use."

19. Camfield v. United States, 167 U.S. 518, 524-25 (1897).

20. *Id.*

21. There is a long line of reported cases beginning with United States v. Brighton Ranch Co., 25 F. 465 (1885), that document prosecutions for violations of the Unlawful Inclosures Act.

22. 43 U.S.C.A. §§ 315-315r (West 1964 & Supp. 1985) (as amended).

23. The withdrawal of lands from the public domain was not in the Taylor Grazing Act itself. In order to carry out the purposes of the Act, the President, by an Executive Order of November 26, 1934, No. 6910 withdrew vacant public land from entry to settlement. *See* Red Canyon Sheep v. Ickes, 98 F.2d 308, 311 (1938).

24. The Taylor Grazing Act authorized the formation of grazing districts and authorized the Secretary of the Interior to issue permits for the grazing district "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range. . . ." *See* § 3, 48 Stat. 1270 (1934); 43 U.S.C.A. § 315b (West 1964 & Supp. 1985).

25. 133 U.S. 320 (1890).

26. *Id.* at 332.

27. *Id.* at 326.

demonstrates that courts will protect access to facilitate a lawful use of public lands within a checkerboard area.

DISCUSSION

Are Antelope Protected?

In the Red Rim lawsuit, Taylor Lawrence asserted as a defense that the UIA does not prohibit the exclusion of antelope from public land.[28] The wording of the act seemingly supports this assertion. Section 3 of the Unlawful Inclosures Act states in part: "No person . . . shall prevent or obstruct . . . *any person* from peaceably entering upon . . . any tract of public land . . . or shall prevent or obstruct free passage or transit over or through the public lands. . . ."[29] At first glance, this seems to suggest that the UIA prohibits only the exclusion of persons from public land. A study of the case law, however, indicates that courts have applied a broad meaning to the term "any person" in order to protect public interests.

The case of *Stoddard v. United States*[30] clearly illustrates how courts broadly interpreted the term "any person." In *Stoddard,* the defendant was convicted of violating the UIA by fencing livestock off of public land. On appeal he maintained that the UIA did not forbid the obstruction of free passage or transit of livestock over or through the public lands. The federal circuit court of appeals responded by stating:

> The act, in our opinion, was intended to prevent the obstruction of free passage or transit for *any and all lawful purposes* over public lands. It is a well-known fact that the free herding and grazing of cattle on the public lands is a legitimate use to which they may be put, and we think Congress must have had the preservation and protection of this use in mind in the enactment under consideration.[31]

This holding, while defining what interests will be protected by the UIA, demonstrates that congressional intent is the touchstone for that determination. *Leo Sheep Co. v. United States*[32] illustrates that modern courts also look at congressional policy in determining the reach of a public land law. Justice Rehnquist, writing for a unanimous Supreme Court, concluded that Congress did not intend that the UIA give the government the authority to impose a public right-of-way across private property without compensation. He noted that at the time the UIA was passed, the norm was open range, open to settlement and free grazing.[33] He reasoned that the incidental intrusion of settlers and livestock was the only

28. Answer, *supra* note 4, at 8-9.
29. 43 U.S.C.A. § 1063 (West 1964 & Supp. 1985)(emphasis added).
30. 214 F. 566 (8th Cir. 1914).
31. *Id.* at 568-69 (emphasis added).
32. 440 U.S. 668 (1979).
33. *Id.* at 685.

imposition upon private property that Congress intended under the UIA.[34] Even though *Leo Sheep Co.* considered an intrusion upon private property, the analysis proceeded from the same basis as *Stoddard.* Both courts looked to congressional intent to determine the scope of the Unlawful Inclosures Act.

The obvious argument would be that Congress, in 1885, did not intend to protect against exclusion of antelope from public lands. The policy in 1885 was to promote the exploitation of natural resources, including wild animals, found on the public lands.[35] But it can be argued more persuasively that Congress has recently brought antelope and other wild animals under the protection of the UIA.

The Federal Land Policy and Management Act of 1976 (FLPMA)[36] is persuasive evidence that antelope are protected by the UIA. FLPMA was a comprehensive revision of all public land laws. It officially established the modern policy of retaining the public lands in government ownership and mandated that they be affirmatively managed under multiple-use principles.[37] FLPMA repealed some of the public land laws,[38] amended others.[39] and left many essentially intact.[40] It did not alter or amend the Unlawful Inclosures Act.[41] Instead, the UIA was left in place. Congress apparently believed that the UIA was an appropriate tool for affirmative multiple-use management of the public lands mandated by FLPMA.

Antelope must be a natural resource that Congress intended to protect under FLPMA. To exclude them would render the UIA meaningless. There are no longer homesteaders to protect nor are there graziers with unregulated legal access to the open range. Congress must have intended to protect natural resources such as antelope when it left the UIA untouched.[42]

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34. *See id.* at 684-88. The Court seemed to be basing its holding on an intrusion analysis. The intrusion analysis comes from "taking" cases. *See* Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979). Under this test, when a government agency imposes a right-of-way across fee land, it is considered a physical invasion that constitutes a taking, whereby the government must compensate the landowner. In *Leo Sheep,* Justice Rehnquist apparently saw the government's actions in the case as a taking. His discussion, however, implies that the incidental passage of settlors and livestock over private land was an "incursion" imposed by the UIA which was not substantial enough to be considered a taking. The "incursion" of antelope on private property may be subject to this intrusion test on appeal.

35. Buford v. Houtz, 133 U.S. 320, 326-27 (1890).

36. 43 U.S.C.A. §§ 1701-1784 (West Supp. 1985).

37. *Id.* § 1701(a)(7).

38. *See* P.L. 94-579, Title VII, § 702, 90 Stat. 2787 (1976) (FLPMA repealed the homesteading laws).

39. *See* 43 U.S.C.A. §§ 1751-1753 (West 1964 & Supp. 1985) (FLPMA amended the Taylor Grazing Act).

40. *See* 30 U.S.C.A. §§ 21-50 (West 1971 & Supp. 1985); 43 U.S.C.A. §§ 1712, 1714, 1732 (West Supp. 1985) (the Mining Law of 1872 was virtually unchanged by FLPMA).

41. *See* 43 U.S.C.A. §§ 1061-1066 (West Supp. 1985) where it is shown that the Unlawful Inclosures Act was not modified by FLPMA. Section 1062 was amended by Congress in 1984. The 1984 amendment changed a procedural provision of the act. Otherwise, the UIA is substantially the same today as when it was passed one hundred years ago.

42. *Id.*

Antelope should certainly fall under the protection of the UIA under the intrusion test used in *Leo Sheep Co.* Antelope are no more of an intrusion on private property than cattle or sheep were when settlers were homesteading the public domain. It would be difficult to argue that wild animals are more intrusive upon private property than bands of sheep were in the days of unlimited open grazing on public land. Further, Congress was certainly aware that antelope would sometimes intrude upon private lands when it refused to repeal the Unlawful Inclosures Act.

The government should prevail on the issue of whether antelope are protected by the UIA. Precedent demonstrates that courts will apply a broad meaning to the term "any person" to protect public interests. Congressional intent is also on the side of the government. FLPMA clearly indicates that Congress wants natural resources such as antelope protected on public land.

Can a Landowner Fence His Own Land?

The fence at issue in the Red Rim case is approximately twenty-eight miles long. It borders about seven miles of public land along the perimeter of the area it incloses. None of the fence is located on public lands.[43] Mr. Lawrence asserts that the UIA neither prevents nor limits the fencing of the lands he owns or controls by lease. The case law, however, is to the contrary.[44]

The United States Supreme Court addressed this issue in *Camfield v. United States.*[45] The defendants erected a fence around two townships of checkerboard land.[46] No portion of the fence was located on public land. Upon prosecution for violating the UIA, the defendants asserted that it was unconstitutional for the government to enjoin fences located on private property. The Court found that the fence interfered with legitimate uses of public land and ruled that it was an appropriate use of police power for Congress to abate the erection of fences on private lands through the UIA.[47]

This rule, however, does not resolve the controversy. Mr. Lawrence also contends that he has the right to protect grass seedings on his private property.[48] The Court in *Camfield* conceded that a landowner has the right to protect interests on private property with fences. The holding in *Camfield* was qualified with this statement:

> So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of

43. Answer, *supra* note 4, at 2-3. Defendant agreed to move a short section of fence located on public land to private land.
44. *See* Camfield v. United States, 167 U.S. 518 (1897).
45. *Id.*
46. Two townships cover approximately forty-six thousand acres.
47. *Camfield,* 167 U.S. at 525-26.
48. Answer, *supra* note 4, at 3.

> enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large.[49]

This statement caused much confusion in the lower courts. The Ninth Circuit Court of Appeals subsequently held that the government must prove intent to inclose public lands to successfully prosecute a party for violating the UIA.[50] The ninth circuit based this holding on the reasoning in *Camfield.* Yet the Eighth Circuit Court of Appeals held that intent was irrelevant; if public land was in fact inclosed, the UIA had been violated.[51]

The conflict between the circuit courts was understandable. The Supreme Court in *Camfield* plainly indicated that a party's intent is relevant in determining whether that party is in violation of the UIA. On the other hand, the Court was affirming a lower court's decree which expressly stated that intent was not open to judicial inquiry.[52] The better view is that intent is relevant in determining a violation of the UIA because of the landowner's right to protect his private property interests with fences. Prosecutions under the UIA are suits brought in equity, and a court must necessarily weigh private property rights against the public interests at risk.[53]

In *Leo Sheep Co. v. United States*[54] the Court also spoke of a landowners right to fence his property. Justice Rehnquist found that, if all the landowners in a checkerboard area fenced their private land, access to public land would be obstructed. As Justice Rehnquist explained:

> In fact, the Court [in *Camfield*] affirmed the grantee's right to fence completely his own land. . . . Obviously, if [the privately owned sections] are individually fenced, the access to [the government owned sections] is obstructed. Yet the Camfield Court found that this was not a violation of the Unlawful Inclosures Act.[55]

This statement demonstrates that landowners have a right to protect their own property with fences. It also shows, however, that they must have a legitimate interest to protect when they do so. Justice Rehnquist pointed out that when a checkerboard area was developed or settled, landowners would necessarily need to protect their private property. He qualified his statement by noting that when development occurs, it occurs in a parallel fashion on the adjoining public land. He reasoned that

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49. *Camfield,* 167 U.S. at 528.
50. Golconda Cattle Co. v. United States, 214 F. 903, 906-07 (9th Cir. 1914).
51. Homer v. United States, 185 F. 741, 745-46 (8th Cir. 1911).
52. *Id.* at 746.
53. Cameron v. United States, 148 U.S. 301, 304 (1893).
54. 440 U.S. 668 (1979).
55. *Id.* at 685-86.

social and commercial intercourse would create access roads so that access would no longer be an issue.[56]

This discussion in *Leo Sheep Co.* does not fit the fact pattern of the Red Rim case. The Red Rim area is still open range unserved by public access roads.[57] *Leo Sheep Co.* does affirm Mr. Lawrence's right to protect his private property, but it does not allow him to ignore public interests on the public lands affected by his actions.

The defense of protecting private property interest in the Red Rim case raises the issue of Mr. Lawrence's intent. The district court apparently found that Mr. Lawrence proceeded with the intention of inclosing federal land when he erected the fence at Red Rim. It must have also found that he had no legitimate interest to protect by doing so.[58] Unless the court committed reversible error in making these findings, the government should prevail on this issue on appeal. *Camfield* dictates that a landowner can inclose public land only if the purpose is to protect a legitimate private property interest. If the purpose of a fence is solely to inclose public land, there is a violation of the UIA.[59]

Does a Public Grazing Right Grant an Interest in Public Land?

The UIA exempts those who occupy public land under color of title.[60] In the Red Rim case, the defense asserted that federal grazing rights on the inclosed lands at Red Rim grant Mr. Lawrence a leasehold color of title to the lands.[61] If this assertion is correct as a matter of law, he is exempt from prosecution under the UIA, and the district court may be reversed.

Mr. Lawrence possesses a federal grazing permit on the public lands in the Red Rim area. This permit was granted under Section 3 of the Taylor Grazing Act.[62] The question before the court will be whether an interest in the public land attaches with the issuance of the federal grazing permit. If the court finds such an interest, the grazier can escape prosecution for violating the UIA.

First, it is necessary to examine why Congress included the claim of right exemption in the UIA. Homesteading was the custom when the UIA was passed. To gain patent to a parcel of land under the homestead laws it was necessary to occupy that parcel for a requisite period of time.[63] An exemption to the UIA was included so that settlers could legally occupy

56. *Id.* at 686.
57. Answer, *supra* note 4, at 9.
58. *See* Casper-Star Tribune, Oct. 22, 1985, at 1. Judge Brimmer asked defendant's counsel if the real purpose of the fence was to prevent a governmental determination that the Red Rim area was unsuitable for coal mining because it was antelope winter range.
59. 167 U.S. 518, 528 (1897).
60. 43 U.S.C.A. § 1061 (West 1984 & Supp. 1985).
61. Answer, *supra* note 4, at 6.
62. Telephone interview with BLM personnel from Rawlins District (Sept. 20, 1985).
63. *See* 43 U.S.C.A. §§ 161-164 (West 1964 & Supp. 1985) (repealed in lower forty-eight states by FLPMA in 1976)

their homesteads and inclose them with fences. The color of title granted by the homestead law made the occupancy of public lands lawful if the purpose was to homestead.[64] An exception also applied to those occupying lands for the purpose of satisfying mining claims.[65]

There are no reported case concerning public grazing rights and prosecution under the UIA. There are cases, however, that define the scope of grazing rights granted under Section 3 of the Taylor Grazing Act.[66] The first case defining the scope of a Section 3 grazing right was *Red Canyon Sheep Co. v. Ickes.*[67] The Court of Appeals for the District of Columbia ruled that, if a livestock operator qualified under the regulations promulgated under the Taylor Grazing Act, he was in a preferred class and was entitled as of right to grazing permits as against others who did not qualify.[68] Subsequent courts narrowed this rule through further qualifications.[69]

This narrowing is illustrated by the case of *McNeil v. Seaton.*[70] The Court of Appeals for the District of Columbia followed the rule from *Red Canyon Sheep Co.* but with the qualification that, "[i]t is clear that a permittee as against the United States may acquire no 'right, title, interest, or estate in or to the lands' as section 3 provides, and the Government for its own use may without payment of compensation withdraw the permit privilege."[71] This ruling established that a livestock grazier's permit was not protected as of right from the government but was still protected as of right against other parties.[72]

The nature of the right acquired by a homesteader who had occupied public land under a color of title clearly differs from the right one acquires under the Taylor Grazing Act. A settler in 1885 could occupy public land for the purpose of securing patent to the land occupied. This lawful occupation conferred color of title to the potential patentee. In contrast, the Taylor Grazing Act merely allows the permittee of such a right to graze public lands lawfully. The Taylor Grazing Act itself expressly states that a permittee acquires no "right, title, interest or estate in or to the land."[73] The case law confirms that a grazing permittee of public land possesses no claim to title of the land.[74] No court has ever held that a Section 3 grazing permit grants a leasehold interest in the land. Mr. Lawrence has only a slim chance of prevailing on this issue in the Red Rim case.

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64. *See* 43 U.S.C.A. § 161 (West 1964 & Supp. 1985).
65. *See* 30 U.S.C.A. § 26 (West 1971 & Supp. 1985).
66. *See* Ragsdale, Section 3 Rights Under the Taylor Grazing Act, 4 LAND & WATER L. REV. 399 (1969) for a thorough treatment of grazing rights granted by Section 3 of the Taylor Grazing Act.
67. 98 F.2d 308 (D.C. Cir. 1938).
68. *Id.* at 314.
69. Ragsdale, *supra* note 66, at 408.
70. 281 F.2d 931 (D.C. Cir. 1960).
71. *Id.* at 934.
72. *See* Ragsdale, *supra* note 66, at 420-22.
73. 43 U.S.C.A. § 315b (West 1964 & Supp. 1985).
74. McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960).

Can the Government be Estopped?

In the Red Rim case Mr. Lawrence asserts that agents of the government approved the building of the disputed fence.[75] That allegation, if true, raises the issue of whether the government may be estopped from enjoining the fence. Unfortunately for the defendant, it is very difficult to assert estoppel against the government successfully. The basic rule, as set forth by the Supreme Court in *Utah Power & Light Co. v. United States,*[76] is that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do . . . what the law does not sanction or permit."[77] The policy behind this rule is that when the interests of the public are at stake, the government should not be estopped on principles of equity despite any statements or conduct of government agents.[78] Therefore, courts generally insure that agents of the government do not waive or revise laws through improper actions.[79]

The harshness of the rule barring estoppel has been tempered in some situations. In determining whether to allow an assertion of estoppel against the government, courts often distinguish between the government's sovereign capacity and its proprietary capacity.[80] Courts are much less reluctant to estop the government when it is acting in a proprietary capacity.[81] This is because public interests are usually not at risk in proprietary transactions.

Although courts are also reluctant to estop the government when it is performing a sovereign function, in some situations the estoppel defense will be allowed. In *United States v. Lazy FC Ranch,*[82] the government sued to recover payments improperly made under the Soil Bank Act. The defendants had relied on misrepresentations made by government agents. The court held that the government was estopped in the interest of justice and fair play.[83] It is important to note, however, the court's finding that the government received the full benefit of the contract it made with the defendants.[84] Thus, estoppel will be allowed against the government if justice and fair play will be served, but only if the underlying government policies will not be undermined.

The government has been held estopped in two cases in which interests in public land were in dispute. In *Brandt v. Hickel,*[85] the Department of Interior had voided a competitive lease bid application for non-compliance with formal regulatory requirements. The government was held estopped

75. Answer, *supra* note 4, at 7-8.
76. 243 U.S. 389 (1916).
77. *Id.* at 409.
78. *Id.*
79. United States v. Browning, 630 F.2d 694, 702 (10th Cir. 1980).
80. Annot., 27 A.L.R. FED. 702, 709-12 (1976).
81. *Id.* at 722-24.
82. 481 F.2d 985 (9th Cir. 1973).
83. *Id.* at 988-90.
84. *Id.* at 90.
85. 427 F.2d 53 (9th Cir. 1970).

from denying the application after it was determined that the applicant had relied on erroneous information given by a government employee.[86] In *Oil Shale Corporation v. Morton*,[87] the government was estopped from denying a patent application. In attempting to perfect the patent, the claimants had acted for over thirty years in reliance on government policies.[88] The court reasoned that it was merely holding the government to its word, not sanctioning illegal conduct by the defendants.[89] Both of these cases arose in situations in which a claimant's interests were being challenged for failure to follow administrative rules when the claimants had relied on the action or words of the government. This is distinguishable from the situation in which a party is in direct violation of a statute designed to protect public interest.

If a court determines that the UIA forbids the exclusion of antelope from public lands, it follows that the court believes antelope are a public resource protected by the government. In this context, it would be difficult to assert estoppel successfully against the government. First, it is almost impossible to prevail against the government when it acts in its sovereign capacity. Second, as stated in *Utah Power & Light Co. v. United States*, the government will not be estopped to permit conduct not sanctioned by law.[90]

It is unlikely that an appeal court will overturn the district court in the Red Rim case on this issue. If antelope are a public interest, the government is acting in its sovereign capacity in protecting them. This makes it very difficult for a private party to assert estoppel. And, if estoppel would permit Mr. Lawrence to violate the UIA, no court is going to allow the estoppel defense.

CONCLUSION

The government stands in a good position to prevail in the Red Rim case on appeal. It must first be accepted as a matter of law that pronghorn antelope come within the protection of the Unlawful Inclosures Act. The Federal Land Policy and Management Act supports this conclusion. FLPMA is convincing evidence of Congress' intent to protect antelope on public land.

The most difficult issue for the government is whether the erection of fences on private property can be abated. The language in *Leo Sheep Co.* indicates that a private landowner has the right to fence his own property. But that language must be read in the context in which it was made. The Supreme Court was affirming *Camfield* when it spoke of this property owner's right. *Camfield* clearly states that public land cannot be inclosed without a valid purpose. The district court did not find such a purpose. The government's position is strong but not infallible on this issue.

86. *Id.* at 56-57.
87. 370 F. Supp. 108 (D. Colo. 1973).
88. *Id.* at 124.
89. *Id.* at 126.
90. 243 U.S. 389, 409 (1916).

The government must also convince the appellate court that federal grazing rights confer no interest in public land to the holders of those rights. The government stands on a firm legal basis on this issue because the Taylor Grazing Act expressly withdraws any interest in the land attached to a grazing right. In addition, no court has ever recognized that an interest in public grazing land arises by virtue of Section 3 of the Taylor Grazing Act.

The appellate court will not need to address the estoppel issue in order to reverse the district court. If the district court erred in finding a violation of the UIA, it will be reversed on those grounds. If the district court correctly found a violation, it will not be reversed on the estoppel issue. The rule is that the government will not be estopped when acting in its sovereign capacity, if the estoppel would permit unlawful conduct.

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