8-26-2008

# Backman v. Lawrence Appellant's Brief Dckt. 35151

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

BOB BACKMAN and RHONDA BACKMAN, husband and wife,

Plaintiffs-Counterdefendants-Appellants,

vs.

THOMAS L. LAWRENCE and DEBRA A. LAWRENCE, husband and wife,

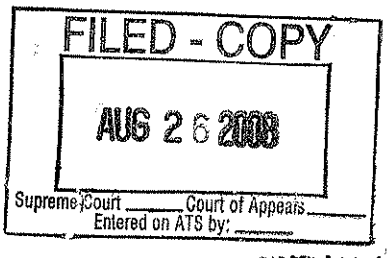
Defendants,

and

JAMES A. SPAGON and LINDA I. SPAGON, husband and wife, *et al.*,

Defendants-Counterclaimants-Respondents.

**SUPREME COURT NO. 35151**




# APPELLANTS' BRIEF

**Appeal From The District Court Of The First Judicial District**
**In And For The County Of Bonner**
**District Court Case No. CV 2006-365**

**The Honorable Charles W. Hosack, District Judge, Presiding**

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## I.
## STATEMENT OF THE CASE

### A. Nature of the Case.

Bob and Rhonda Backman ("Backmans") own a piece of property in Bonner County that is not accessible by any public road or easement of record; it is legally landlocked. This property is more particularly described as the S 1/2 of the NW 1/4 and the S 1/2 of the NW 1/4 of the NW 1/4 of Section 8, Township 57 North, Range 2 West, Boise Meridian (the "Backman Property"). While legally landlocked, the record in this matter reflects that the Backman Property has been accessible via roadways across the adjacent Section 7 since at least the 1950s.

Presently, the properties through which these roadways pass in Section 7 are owned by Defendants-Counterclaimants-Respondents, who collectively belong to the Pend Oreille View Owners' Association, Inc. ("POVE") (Defendants-Counterclaimants-Respondents and POVE are collectively referred to as "Defendants"). In April 2005, POVE recorded a Declaration of Non-Access that stated the roads through Section 7 were "private" and deemed that there is "absolutely no right" to use the roads to access property located in Section 8.

With this litigation, Backmans seek access to their legally landlocked property. Backmans claim a right to access their property pursuant to condemnation of a private roadway, an easement by necessity, a prescriptive easement, or some combination of these theories.

### B. Proceedings Before The District Court.

On February 24, 2006, Backmans filed a Complaint against Defendants Spagon, Rogers, Lloyd, Johnson, Lawrence, Schrader, Millward and POVE, asserting a right to cross over Defendants' property to gain access to the Backman Property. R. Vol. I, p. 19. Backmans asserted three theories pursuant to which they were entitled to cross over Defendants' properties

to access the Backman Property: Prescriptive easement, court declaration of a public road and private condemnation. *Id.* As discovery progressed, Backmans dismissed their claim seeking declaration of a public road. R. Ex. Post-Trial Brief filed September 26, 2007[1/], p.3.

On August 21, 2006, Backmans filed a First Amended Complaint adding additional Defendants over whose property Backmans needed to cross to access the Backman Property. R. Vol. I, p. 44. The additional Defendants included Gregory and Theresa Zirwes, Christopher Bessler, Robert and Lynn Walsh, and Patrick and Michelle McKenna. *Id.* The First Amended Complaint alleged new causes of action for access to the Backman Property based upon the theory of easement by necessity, as the recorded documents reflected previous common ownership between Section 7 and Section 8, and that the partition of Sections 7 and 8 left the Backman Property landlocked. *Id.* Prior to trial, Victoria Rogers granted an easement to Backmans to access the Backman Property over and across her property, and was dismissed from the litigation. R. Ex. Post-Trial Brief filed September 26, 2007, p. 3. Dr. and Mrs. Lawrence also conveyed an easement over and across their property to the Backman Property. *Id.*[2/]

At the time of trial, Defendant Schrader sought to file a cross-claim against the other Defendants. R. Vol. I, p. 173. Schrader is the owner of twenty (20) acres that is adjacent to the Backman Property and that Randy Powers ("Powers") and all other previous owners had commonly owned with the Backman Property. *Id.* The District Court permitted Schrader's

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1/ All references to "Post-Trial Brief filed September 26, 2007," refer to the brief filed by Plaintiffs following the District Court trial of this matter, and which Brief is also an exhibit to the Clerk's Record on Appeal.

2/ Based upon a stipulation between the parties, as is referenced in the District Court's Memorandum Opinion (R. Vol. II, p. 263), a parcel of property owned by the City of Sandpoint ("City") and located between Baldy Mountain Road and Defendants' properties was excluded from the lawsuit because the City has granted access over its property to all parties subject to certain restrictions common to all parties.

cross-claim against the Defendants to obtain access under the same legal theories, along the same routes, and for the same purposes as Backmans. R. Vol. II, p. 259-60.

Trial was held from September 4 to September 7, 2007. R. Vol. II, p. 260. In the post-trial briefs, Backmans stated that they "seek a judgment from this Court granting access to their Property for use by one (1) residence on each of the twenty (20) acre parcels owned by Backmans, for a total of five (5) residences." R. Ex. Post-Trial Brief filed September 26, 2007, p. 4. Backmans limited their access claims to the roads named Turtle Rock Road/Syringa Creek Road, and three of their extensions referred to as the Upper Road, the Middle Road and the Lower Road. R. Vol. II, p. 264.[3/] Backmans claimed access based upon the following theories:

1. A prescriptive easement east over Turtle Rock Road/Syringa Creek Road from the City property, north over Turtle Rock Road/Syringa Creek Road, and east over either the Upper, Middle or Lower Road into Section 8;

2. A privately condemned easement east over Turtle Rock Road/Syringa Creek Road, north over Turtle Rock Road/Syringa Creek Road, and east over either the Upper, Middle or Lower Road into Section 8, with just compensation to the landowners;

3. An easement by necessity east over Turtle Rock Road/Syringa Creek Road, north over Turtle Rock Road/Syringa Creek Road, and east over either the Middle or Lower Road into Section 8; or

4. An easement by necessity north of the Lawrence property on Turtle Rock Road/Syringa Creek Road, and east over either the Middle or Lower Roads, coupled with either a prescriptive easement or privately condemned easement over Turtle Rock Road/Syringa Creek Road between the City property and the Lawrence property.

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[3/] A map of the roads at issue is attached to Appellants' Brief as Exhibit A and is the map referenced as part of the District Court's Memorandum Opinion. R. Vol. II, p. 299.

R. Ex. Post-Trial Brief filed September 26, 2007, p. 4.

The District Court filed its Memorandum Opinion on November 14, 2007. R. Vol. II, p. 258. The District Court denied Backmans' claims for prescriptive easement, easement by necessity, and to condemn a private roadway over Defendants' properties, and declined to combine the theories to provide access to the Backman Property. R. Vol. II, p. 297-98.

The District Court entered its Judgment on January 2, 2008, denying Backmans' claims for a prescriptive easement, easement by necessity and to condemn a private roadway, and dismissed Backmans' and Schrader's claims with prejudice. R. Vol. II, p. 300-02. The District Court awarded Defendants their costs on March 10, 2008. R. Vol. II, p. 367-68. Backmans appeal the District Court's decision denying the Backmans legal access to their landlocked property.

## C. Statement Of Facts.

Backmans own one hundred (100) acres of landlocked property in Bonner County, Idaho. R. Ex. Post-Trial Brief filed September 26, 2007, p. 1. McKenna, Bessler, Lawrence, Zirwes, Johnson, Lloyd, Grant, Millward, Spagon and Schrader all own property in Section 7 through which Backmans seek a right of access. Plaintiffs' Exhibit 46.[4/]

Prior to 1904, all of the properties at issue in this dispute in Sections 7 and 8 were owned by the United States Government. The property adjoining the Backman Property to the west in Section 7 was patented by the United States Government in individuals from 1904 through 1907. (Haroldson in December 1904 [Plaintiffs' Exhibit 30]; Gould in May 1905 [Plaintiffs'

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[4/] All references to "Plaintiffs' Exhibit . . ." refer to those Exhibits offered by Plaintiffs and admitted into evidence at the District Court trial of this matter, and which Exhibits are also exhibits to the Clerk's Record on Appeal.

Exhibit 31]; and Fobert in May 1907 [Plaintiffs' Exhibit 20].) Since the time the Backman Property was patented by the United States Government, it has been landlocked. *Id.*

On September 11, 1907, the United States Government patented the Backman and Schrader Properties to McKenna. Plaintiffs' Exhibit 2. On August 20, 1908, McKenna conveyed the Backman Property to the Humbird Lumber Company ("Humbird"). Plaintiffs' Exhibit 3. Until 1943, Humbird owned the Backman and Schrader Properties, as well as portions of Section 7. Plaintiffs' Exhibit 22. In 1943, Humbird conveyed its property in Section 7 to Modig. *Id.* The Modig parcel consists of the properties currently owned by Lawrence, Johnson, Lloyd, Grant and Millward. Plaintiffs' Exhibit 46. Upon Humbird's conveyance of the properties in Section 7 to Modig, the Backman Property remained landlocked. The only access to a public road at the time of that severance was through Section 7. Plaintiffs' Exhibit 42.

The chain of title to the Backman Property in Section 8 is more particularly set forth in Exhibit B attached hereto and incorporated herein by this reference.

The Backman Property is located near Syringa Creek, which drains in a southerly direction from Section 7 into Section 8, down a mountainside. R. Vol. II, p. 260. Syringa Creek crosses a small portion of the southwestern corner of the Backman Property as it descends into the Pend Oreille River. Plaintiffs' Exhibit 49.

The Backman Property is steep. An examination of the 1968 United States Geological Survey topographical map presented at trial reveals elevation variations of approximately 1,000 feet within the Backman Property. Plaintiffs' Exhibit 49. Compared to the property to the west of Syringa Creek, the Backman Property to the east is steeper and more rugged. R. Vol. II, p. 266.

Historically, the Backman Property, as well as the property located in Section 7 to the east of the Backman Property were used for logging. R. Vol. II, p. 260. Logging operations created roads that crossed Syringa Creek from the west in Section 7 to the higher ground east of Syringa Creek in Section 8. R. Vol. II, p. 266. The record reflects that roads through Section 7 provided access to the Backman Property in Section 8 since at least 1933. Plaintiffs' Exhibit 42; Tr. p. 342, L. 10-13.

Turtle Rock Road has been in existence since the 1930s; its exact location over Section 7 has changed only slightly over the years. Plaintiffs' Exhibit 42. Originally, Turtle Rock Road entered Section 7 from Baldy Mountain Road further to the southwest, but was later relocated to its current location in the 1950s. *Id.* Turtle Rock Road runs from the public Baldy Mountain Road east across a portion of property owned by the City, and continues east through the McKenna, Bessler, Zirwes and Lawrence properties. Plaintiffs' Exhibit 46. Turtle Rock Road then turns north across the Johnson, Lloyd, Millward, Grant, Spagon and Rogers properties. *Id.* The portion of Turtle Rock Road travelling north from the Millward property to the intersection with Inspiration Way and the Upper Road (discussed below) is what the District Court referenced as the old Syringa Creek Road. R. Vol. II, p. 266.

Heading east into Section 8 from three points along Turtle Rock Road are three branch roads that historically provided access to Section 8. Plaintiffs' Exhibits 42, 46. These roads are designated as the Lower, Middle and Upper Roads. The Lower Road runs northwest from Turtle Rock Road over the Lloyd, Johnson and Grant properties into the Backman Property in Section 8. *Id.* The Middle Road runs east from Turtle Rock Road across the Millward and Grant properties into the Backman Property in Section 8. *Id.* The Upper Road runs from the

intersection of Inspiration Way and the old Syringa Creek Road east over the Rogers and Schrader properties into the Backman Property in Section 8. *Id.*

Redtail Hawk Road runs off of Turtle Rock Road to the north at an intersection near the borders of the Bessler and Zirwes properties. Plaintiffs' Exhibit 46. Redtail Hawk Road was constructed some time between 1981 and 1992. Tr. p. 338, L. 17-19. Redtail Hawk Road appears in the real property records in 1994 with the recording of a Record of Survey. Plaintiffs' Exhibit 27. Redtail Hawk Road intersects with Inspiration Way on the Gillespie property, and then heads northeast through the Harris, Marley and Spagon properties. Plaintiffs' Exhibit 46. Inspiration Way connects to the Upper Road at the intersection with the old Syringa Creek Road on the Rogers property. Redtail Hawk Road and Inspiration Way are private roads under the ownership and control of POVE. Plaintiffs' Exhibits 36, 39.

Between 1958 and 1975, and 1992 and 1998, Turtle Rock Road and the Upper, Middle and Lower Roads were used to access the Backman Property for logging. Plaintiffs' Exhibit 42. From 1994 to 2004, Turtle Rock Road and the Upper, Middle and Lower Roads were used to access the Backman Property for monitoring erosion control and timber growth, hunting, camping and other recreational pursuits. Tr. p. 225-27, 261-67.

Powers purchased the Backman Property in 1994 (Plaintiffs' Exhibit 11), and extensively logged the Backman Property from 1994 to 1996, using Turtle Rock Road/Syringa Creek Road and the three extensions for access. R. Vol. II, p. 271. Powers continued to maintain and use the subject roads in Section 7 after 1996. R. Vol. II, p. 271-73. Powers testified that he used the subject roads to remove certain wooden bridges used in his logging operations. Tr. p. 221, L. 18 - p. 222, L. 10. Powers installed a culvert on the Middle Road. Tr. p. 222, L. 17 - p. 223,

L. 25. Powers performed "driving maintenance" and periodically graded the roads. Tr. p. 224, L. 1-5. He also built a skid trail off of the Middle Road. Tr. p. 224, L. 14-16.

After 1996, Powers used the Backman Property for recreational purposes, such as hunting and camping, continuing to use the subject roads in Section 7 for access. R. Vol. II, p. 273; Tr. p. 225, L. 21 - p. 227, L. 14. Powers continued to use the subject roads until he sold the Backman Property to Backmans in 2005. R. Vol. II, p. 261-62.

By the 1990s, logging activities declined and landowners in Sections 7 and 8 were selling their property to individuals and developers for the purpose of building residences. R. Vol. II, p. 267. The property to the west of Syringa Creek in the east half of Section 7 is divided into ten (10) and twenty (20) acre parcels with a single residence on most parcels. Plaintiffs' Exhibit 46. The Backman Property and other land in Section 8 remains undeveloped.

Backmans purchased the Backman Property in 2005 desiring to duplicate the type of residences existing in Section 7. R. Vol. II, p. 259. Backmans subdivided the 100-acre Backman Property into five (5) separate parcels of twenty (20) acres each. *Id.*; Plaintiffs' Exhibit 16.

Backmans purchased the Backman Property believing they had legal access. Backmans purchased a title policy insuring access. R. Vol. II, p. 287. Backmans commenced this litigation after they were prohibited from using the roads in Section 7 to access the Backman Property in Section 8, and after their discovery that there was no deeded, recorded legal access to the Backman Property.

Attached hereto as Exhibit A is a map depicting the roads and properties at issue in this case. The map is a copy of a portion of Plaintiffs' Exhibit 46. Backmans' counsel has identified the roads on the map to aid this Court in its analysis.

## II.
## ISSUES PRESENTED ON APPEAL

**A. Easement By Necessity.**

Should this Court overturn the Court of Appeals' decision in *Roberts v. Swim*, 117 Idaho 9 (Ct.App. 1989), and hold that common ownership in the United States Government satisfies the requirement of unity of title for the purpose of establishing a right to an easement by necessity?

**B. Private Condemnation.**

Did the District Court err by ruling Backmans were not entitled to condemn an easement over and across an existing road on Defendants' property to access the Backman Property?

**C. Prescriptive Easement.**

Did the District Court err by improperly applying obsolete "presumptions" and "burden shifting analysis" to Backmans' prescriptive easement claims?

**D. Combination Of Easement By Necessity, Private Condemnation And/Or Prescriptive Easement.**

Did the District Court err in declining to combine easement by necessity, private condemnation and/or prescriptive easement theories to provide Backmans access to the landlocked Backman Property?

**E. District Court's Award Of Costs To Defendants.**

Did the District Court err by awarding Defendants their costs of litigation?

## III.
## ARGUMENT

### A. This Court Should Overrule *Roberts v. Swim*, 117 Idaho 9 (Ct.App. 1989), And Hold That Common Ownership In The United States Government Satisfies The Unity Of Title Element For An Easement By Necessity Claim.

At trial, Backmans sought an easement by necessity to gain access to the Backman Property. In denying Backmans' claim, the District Court made the following rulings:

> The parties agree that, without some access afforded through this lawsuit, the one-hundred twenty (120) acres in question in the northwest quarter in the northwest quarter of Section 8 are legally landlocked. The term "legally" means that the one-hundred twenty (120) acres is not served by any public road and has no written right of easement access. The one-hundred twenty (120) acres is surrounded by ground held in other ownerships.
>
> * * *
>
> At the time of the U.S. Patents, the north half of the northeast quarter of Section 7 was within a U.S. Patent of 1905. The southwest quarter of the southeast quarter in Section 7 was part of a second separate U.S. patent of 1904. The Modig parcel and the one-hundred twenty (120) acres in the northwest quarter of Section 8 (the Humbird property as of 1943) were in two (2) patents as of 1907, separate from the 1904 and 1905 patents. Therefore, but for the original common ownership of the United States, there has never been a unity of title of common ownership for the original Humbird Lumber property in question (the 1907 patents for the Modig parcel, and for the one-hundred twenty (120) acres in the northwest quarter of section 8) and for either the property now owned by Spagons (in the southwest quarter of the northeast quarter of the northeast quarter of Section 7; a part of the 1905 patent) or the property now owned by McKenna's and Besslers (in the southwest quarter of the southeast quarter of Section 7; a part of the 1904 patent). Defendant Exhibit KK.
>
> Plaintiffs candidly acknowledge existing Idaho case law indicating that unity of title cannot be established by relying upon the original ownership of the United States. Roberts v. Swim, 117 Idaho 9 (Ct.App 1989). Backmans set forth a reasonable legal argument as why another rule of law might be better (at least for their purposes

> in this case). However, this Court will follow existing Idaho case law. Easement by necessity as a "stand alone" legal theory, simply does not apply, because unity of title is lacking as to the properties covered by the entire length of the road access necessary to physically connect the Backman parcel to Baldy Mountain Road.

R. Vol. II, p. 282-83 (emphasis added).

The District Court ruled that Backmans established unity of title in the United States along the entire length of Turtle Rock Road/Syringa Creek Road, and the three extensions, sufficient for an easement by necessity; however, the District Court determined that it was bound by the Court of Appeals' decision in *Roberts v. Swim* and for that reason denied Backmans' claim.

This Court should overrule the Court of Appeals' decision in *Roberts v. Swim*; hold that common ownership in the United States satisfies the unity of title element for an easement by necessity; hold that Backmans are entitled to an easement by necessity; and, remand the case back to the District Court for a determination as to the scope of the easement.

### 1. Common Ownership in the United States is Sufficient to Satisfy the Unity of Title Element of an Easement by Necessity Claim.

A party claiming an easement by necessity over another's land must prove: 1) unity of title followed by separation of the dominant and servient estates; 2) necessity of the easement at the time of separation; and 3) great present necessity for the easement. *Hughes v. Fisher*, 142 Idaho 474, 483 (2006). An implied easement by necessity is grounded in the "sound public policy that lands should not be rendered unfit for occupancy or successful cultivation." *Cordwell v. Smith*, 105 Idaho 71, 79 (Ct.App. 1983) (quoting *Burley Brick & Sand Co. v. Cofer*, 102 Idaho 333, 335 (1981)). Idaho has long recognized the principle that where a tract of land is conveyed that is separated from the highway by other lands of the grantor or surrounded by his

lands or by his and those of third persons, there arises by implication, in favor of the grantee, a way of necessity across the grantor's property to the highway. *Id.*

An easement by necessity does not depend on use of roadways existing at the time of separation. *Cordwell*, 105 Idaho at 79. An easement by necessity may arise where no roads exist across the grantor's property at the time of separation. *Id.* "Thus, a remote grantee of land not being used at the time of severance . . . may nevertheless, when the use becomes necessary to the enjoyment of his property, claim the easement under this remote deed." *Id.*

> A way of necessity arises from public policy considerations. It is, literally, a creature of necessity. The necessity must exist at the time of the severance by the common owner, and the person claiming such an easement must also show there is a present necessity for it. Once established, a way of necessity exists only so long as the necessity lasts, for it is the policy of the law not to burden a servient estate more or longer than is necessary.

*Id.* An easement by necessity arises by implication to protect and promote the dominant estate owner's use and enjoyment of his or her property. Idaho's public policy is against landlocking property and in favor of the occupation, cultivation, and full beneficial use and enjoyment of land. *Hughes*, 142 Idaho at 482-83; *Burley Brick & Sand Co.*, 102 Idaho at 335; *Cordwell*, 105 Idaho at 79.

> One justification for the easement by necessity is that the grantor is "presumed to have intended" to retain or to have conveyed to grantees "a means of access to the property in question, so that the land may be beneficially utilized." It arises "by implied grant" when property is severed in a way that leaves part of it landlocked. Another, and perhaps the better, justification is that public policy prohibits land from being conveyed away in a manner that renders it useless, and the easement by necessity arises to cure that problem. The public policy justification for the way of necessity often contravenes the intent of the original grantor or grantee; it

> "arises 'to meet a special emergency . . . in order that no land be left inaccessible for the purposes of cultivation. . . .'"

[Emphasis added; citations omitted.] Thompson on Real Property, § 60.03(b)(5)(i).

In *Roberts,* the case relied on by the District Court to deny Backmans' claims, the Court of Appeals dismissed Roberts' claim for an easement by necessity on the grounds that Roberts could only prove unity of title in the public. The *Roberts* court remanded the case to the district court to craft more particularized findings with respect to Roberts's prescriptive easement claim. *Roberts*, 117 Idaho at 15. In dismissing Roberts's easement by necessity claim, the Court of Appeals stated without any analysis that "Roberts has established only that the land was at one time originally under public ownership. Original ownership by the public or state is not sufficient to constitute the necessary unity of ownership." *Id.* (quoting Annot., Unity of Title for Easement by Implication or Way of Necessity, 94 A.L.R.3D 502, 517-18 (1979)). The Court of Appeals did not explain its citation to the ALR, nor did it give any analysis for its decision. The Court of Appeals' statement in *Roberts* should be overruled.

First, the Court of Appeals' decision in *Roberts* was *dicta*; it was not necessary to a resolution of the case. The court remanded the case to determine if a prescriptive easement existed and should never have addressed the easement by necessity issue. If a prescriptive easement existed, or was found to exist on remand, the "necessity" required for an easement by necessity would not exist and the issue of easement by necessity moot. Therefore, the *Roberts* court never needed, and should not have, ruled on the issue of unity of title until the district court ruled on the prescriptive easement issue on remand.

Second, Idaho's public policy calling for the full use of lands and sound legal analysis favors allowing the unity of title element to be satisfied by a showing of common ownership in the United States Government.

Several courts, based on sound legal analysis, have held that common ownership by the United States is sufficient to satisfy the unity of title element. *Kellogg v. Garcia*, 102 Cal.App.4th 796, 799 (Cal.Ct.App. 2002); *Utah v. Andrus*, 486 F.Supp. 995, 1002 (D.Utah 1979); *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978). 4 Powell on Real Property agrees with the holding in those cases as sound public policy.

> The public policy favoring land utilization applies to cases where ownership was in the state as well as where the original unity of ownership was in a private person. Similarly, the bases for attributing to the parties a fictional intent to create such an easement are no less present when one of the parties was the government.

4 Powell on Real Property, § 34.07 at 34-59 (2000).

In *Kellogg v. Garcia,* the court held that the unity of title element of an easement by necessity claim could be proved with evidence of common ownership in the government. *Kellogg*, 102 Cal.App.4th at 799. The court explained that "current case law holds that the federal government may be the common owner of the properties whose conveyance gives rise to the strict necessity that justifies an easement by way of necessity." *Id.* In that case, the plaintiff was entitled to an easement by necessity to access its private property where the unity of title element was proved with evidence of common ownership by the government. *Id.* at 811. The court reasoned that:

> Since an easement by way of necessity is based on the presumption that a conveyance seeks to transfer whatever is necessary for the beneficial use of that property, there is absolutely no reason to impute a different intention to the

> federal government when conveying western lands (failing an expression of intent to the contrary). After all, particularly in the 19th century-when the West was being settled- the federal government has no reason to render the land it conveyed unfit for occupancy or cultivation. Quite the opposite.

*Id.* at 807 (internal citations omitted) .

The court in *Kellogg* also addressed the arguments against unity of title being proved with government ownership. The court noted that:

> The opposing concern is that an easement by necessity over former federal land would permit every remote grantee of a portion of the public domain to have an easement by way of necessity over surrounding lands. This argument overlooks the special terminability aspect of easements by necessity upon a change of circumstances. The changed circumstances effectively eliminate the necessity.

*Id.* at 808 n. 5 (internal citations omitted). The court found that the public policies and rationales behind easements by necessity would not be served by the creation of a "categorical exception" for ownership by the federal government. *Id.* at 808.

As the court noted in *Kellogg*, proving unity of title in the government serves the purposes of easements by necessity. In addition, the proverbial floodgates will not open if government ownership satisfies the unity of title element of an easement by necessity claim. An easement by necessity exists only so long as the necessity exists. Even where government ownership satisfies the unity of title element of an easement by necessity claim, a claimant will not be entitled to an easement by necessity where there is no need for such easement (*i.e.*, where the claimant has other legal access to the subject property). A claimant still must prove the other required elements for an easement by necessity: Necessity at the time of separation of the dominant and servient estates, and great present necessity for the easement.

In *Utah v. Andrus*, the United States District Court for the District of Utah held that an easement for access could arise by implication upon a grant of land by the federal government. 486 F.Supp. at 1002. There, the court examined whether access could be had to school trust land that was granted by the federal government to the State of Utah, but landlocked by other federal property. *Id.* at 999. The court found that the purpose of school trust lands granted by the federal government to the states was to provide the states with a revenue source from which to support public schools. *Id.* at 1002. The court reasoned that "unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend." *Id.* The court noted that traditional property law theories supported a finding of access to the school trust lands. *Id* The court stated that "under the common law it was assumed that a grantor intended to include in the conveyance whatever was necessary for the use and enjoyment of the land in question." *Id.* Therefore, in consideration of the revenue-producing purpose of school trust lands and the common law policies supporting the cultivation and use of landlocked property, the court ruled that the State of Utah and its lessees had access to the school trust lands. *Id.* at 1011.

The Tenth Circuit Court of Appeals has also held that the transfer of a patent by the United States may give rise to an implied easement for access. *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978).

This Court should also hold that the unity of title element for an easement by necessity may be proved with evidence of common ownership by the government. Such a holding would promote Idaho's "sound public policy that lands should not be rendered unfit for occupancy or successful cultivation." *Cordwell*, 105 Idaho at 79 (quoting *Burley Brick &*

*Sand Co.*, 102 Idaho at 335). Such a holding would not open the floodgates to every property owner seeking an easement by necessity. On the contrary, a claimant would still need to prove necessity for the easement at the time of the separation of the dominant and servient estates, as well as great present necessity. *Hughes*, 142 Idaho at 483. Moreover, an easement by necessity would only exist as long as there is adequate necessity for the easement.

**2. <u>There is Necessity For the Easement Claimed by Backmans</u>.**

Backmans proved, and the District Court found, that the properties relevant to this litigation were commonly owned by the United States. R. Vol. II, p. 282. If this Court holds that common ownership by the United States is sufficient to establish unity of title, then the examination turns to whether necessity for an easement existed at the time of severance and whether there is a great present necessity for the easement.

As noted, above, the District Court made a factual finding that the Backman Property is legally landlocked and has always been legally landlocked. R. Vol. II, p. 268. Backmans submit that the District Court's findings are sufficient to establish the "necessity" element for an easement by necessity.

In *Cordwell*, the Court of Appeals examined the burden of proof for establishing the elements of necessity at the time of severance and great present necessity. The court stated that a claimant must "establish by competent evidence that the [proposed] route . . . was at the time of severance - and still is - the only reasonable means of access to" the claimant's property. 105 Idaho at 81. The court explained that this burden entailed proof that another route at issue in the case "was not reasonably adequate." *Id.* Mere inconvenience is not sufficient. *Id.* The court stated that in its analysis, "substantial inconvenience may be an important factor, but it must be

weighed against the inconvenience and possible damage that could result to the [servient estate owners] as a result of imposing an easement across their property." *Id.*

Backmans proved their property has always been "legally landlocked" and set forth an existing route that had been used for over seventy (70) years to access the Backman Property. Backmans proved there has never been legal access to the Backman Property since the date the Backman Property was first patented by the United States Government. The District Court found the Backman Property was historically and is presently landlocked, and that unless the District Court ordered access, the Backman Property would remain landlocked. R. Vol. II, p. 268. This Court should hold that Backmans' proof and the District Court's factual findings are sufficient to establish the "necessity" element and hold that Backmans are entitled to an easement by necessity over and across Turtle Rock Road/Syringa Creek Road, and the three extensions, onto the Backman Property and remand to the District Court to determine the scope of the easement.

**B. <u>The District Court Erred In Denying Backmans' Private Condemnation Claim</u>.**

At trial, Backmans sought legal access to their landlocked property through private condemnation. The District Court denied Backmans' claim on the grounds that access to the Backman Property was not "reasonably necessary" and that there was evidence of other "physical" routes – not legal or available routes – to the Backman Property. R. Vol. II, p. 291-93. The District Court's rulings were in error and the case should be remanded.

In Idaho, there is a two part test to determine if access can be condemned by a private party. *Erickson v. Amoth*, 99 Idaho 907, 910 (1979). First, a party must establish that the condemnation is for a public purpose. Second, condemnation of an access must be ***reasonably necessary***, in that there are no other reasonably convenient and adequate routes that

can be used to access the property. *Id.* If these elements are satisfied, the court should determine the scope of access to be condemned and compensation.

Article I, Section 14 of the Idaho Constitution provides that private property may be taken for a public use, which includes any "use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use and subject to the regulation and control of the state." [Emphasis added.] The Idaho Legislature adopted Idaho Code § 7-701 defining, pursuant to the Idaho Constitution, the public uses for which condemnation could and should be utilized. Idaho Code § 7-701 provides that the "right of eminent domain may be exercised in behalf of the following public uses: . . . Byroads, leading from highways to residences and farms." [Emphasis added.] Idaho Code § 7-701(5). Idaho courts have specifically endorsed a private party's right to condemn a right-of-way from a public highway to landlocked residences and farms. *Erickson v. Amoth*, 99 Idaho 907 (1979) ; *McKenney v. Anselmo*, 91 Idaho 118 (1966); *Eisenbarth v. Delp*, 70 Idaho 266 (1950); *Cordwell v. Smith*, 105 Idaho 71 (Ct.App. 1983) .

Idaho Code § 7-704 states that before a taking of a right of access can occur, the access must be necessary. Idaho courts have interpreted this statute to mean that a condemnor owning other properties abutting public roads must prove strict necessity for the access. *Cordwell*, 105 Idaho at 80. On the other hand, a condemnor whose property is legally ***landlocked*** must prove only the requested access is reasonable necessity for a taking. *Id.*; *Erickson*, 99 Idaho at 910.

In this case, the District Court ruled that condemning access to the Backman Property so that one (1) residence (house) could be built on each of the five (5) 20-acre parcels was not reasonably necessary. R. Vol. II, p. 297. In making that ruling, the District Court confused the

stated two part test and improperly focused on whether the intended use of the Backman Property was "reasonably necessary" – not whether access to the Backman Property was reasonably necessary for the public purpose. This was in error.

Idaho law unequivocally provides that if the use of the property for which access is sought is for *residences,* it is a public purpose. Idaho Code § 7-701(5). The District Court should have focused on whether ***access was reasonably necessary to get to the proposed residences*** – not whether the use of the Backman Property for residences was necessary. The District Court should have only decided whether there was any other access into the property that would preclude condemnation of an easement.

In finding that Backmans' proposed development is not "reasonably necessary," the District Court noted that the Backman Property is currently vacant land and that Backmans desired to build more than one (1) residence on the Backman Property. R. Vol. II, p. 291-92. Idaho Code § 7-701(5) , however, is not limited to providing access to existing residences. In fact, such a limitation would be illogical. A claimant is not able to build a residence without access. To limit Idaho Code § 7-701(5) to permit access to only existing residences would be to condone trespass for the purposes of building residences on vacant property. Further, Idaho Code § 7-701(5) states that byroads to "residences," not the singular "residence," is a public use justifying condemnation. Backmans' proposed use of the Backman Property is no more invasive and no more dense than the use of Defendants' properties in Section 7; both Section 7 and Section 8 would contain single family residences on ten (10) to twenty (20) acre parcels.

Idaho public policy supports the cultivation and occupancy of lands and is against leaving properties landlocked. *Cordwell*, 105 Idaho at 79 (quoting *Burley Brick & Sand Co.*,

102 Idaho at 335). Backmans proved that they intended to utilize their property for residences, an acknowledged public purpose, and sought an easement for that purpose. Their stated purpose is allowed under Idaho law. The only question left for the District Court to decide was whether there was alternative access, compensation – which the District Court never reached – and the scope of the easement – which the District Court never reached.

**1. <u>There Are No Alternative Routes Available to Access the Backman Property</u>.**

The District Court also denied Backmans' claim to condemn an easement because it characterized Redtail Hawk Road/Inspiration Way as an "available alternate route." R. Vol. II, p. 294. The District Court erred in determining that Redtail Hark Road/Inspiration Way is an alternative route that is available to Backmans because the record conclusively establishes that the route is not available to Backmans.

As is set forth above, a condemnor must prove that alternative means of access are not available or are not reasonably adequate or sufficient for the condemnor's purposes. *Erickson*, 99 Idaho at 910. Idaho courts have denied condemnation claims based on available alternate routes where a condemnor had a license to use an alternate route, *Erickson*, 99 Idaho at 910; where a condemnor had a legal right-of-way for ingress and egress that was "reasonably convenient," *Eisenbarth*, 70 Idaho at 270; and where a condemnor did not have an easement over two alternative existing roads, but had never been denied the right to use them, *McKenney*, 91 Idaho at 122.

In *Cordwell*, an easement by necessity case, the court analogized the standard used for establishing necessity in an easement by necessity case to the standard employed in cases seeking private condemnation. *Cordwell*, 105 Idaho at 80. The court in *Cordwell* quoted from *Erickson*, 99 Idaho at 910, in stating that "the burden of proving necessity for taking land is

upon the condemnor, but he need only prove a reasonable and not an absolute, [sic] necessity.... It was then incumbent upon [claimants] to prove that the alternative means of access were not available to them or that such means of access were not reasonably adequate or sufficient for their purposes." *Id.* In *Cordwell*, the court found that the claimant had reasonable alternative access justifying the court's denial of claimant's easement by necessity claim. 105 Idaho at 81. There, the alternative access consisted of a series of public roads that circumvented the property the claimant sought to condemn. *Id.* at 81.

In all of the cases discussed above, alternative access was legally available to the claimant. In this case, however, the uncontroverted evidence was that Backmans are barred from using Redtail Hawk Road. Defendants have not advocated, and do not advocate, Redtail Hawk Road as an available alternative access to the Backman Property. The evidence produced at trial was that Defendants maintained Redtail Hawk Road as a private road. Plaintiffs Exhibits 36, 39. The Defendants owning property along Redtail Hawk Road who testified at trial all testified that Redtail Hawk Road and Inspiration Way are private roads. Tr. p. 301, L. 17-25, p. 302, L. 1-3; p. 453, L. 9-23, p. 463, L. 9-25, p. 562, L. 15-25, p. 563, L. 1-5, p. 617, L. 11-21. Moreover, Defendants have explicitly prohibited Backmans' use of Redtail Hawk Road by recording instruments in the public record and by sending correspondence to Backmans. Plaintiffs' Exhibits 36-41.

This Court has never characterized access that a claimant is barred from using as "reasonable alternative access." Such a holding would contravene the strong public policy of the State of Idaho against landlocked property. Thus, the District Court's characterization of Redtail Hawk Road as available alternative access is a misapplication of Idaho law.

## C. At Trial, The District Court Erred As A Matter Of Law By Misapplying "Presumptions" Not Relevant to Backmans' Prescriptive Easement Claim.

Backmans presented evidence to the District Court sufficient to satisfy the elements of a prescriptive easement claim. Backmans proved that Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, was open and notorious, continuous and uninterrupted, adverse and under a claim of right, with the actual and imputed knowledge of the owners in Section 7 for over five (5) years. The District Court correctly recognized the basic elements of a prescriptive easement claim, but misapplied numerous presumptions not relevant to the facts in the record and denied Backmans' prescriptive easement claim.

### 1. This Court Disfavors the Use of "Presumptions" and "Burden Shifting" in Prescriptive Easement Cases.

This Court recently decided two prescriptive easement cases in which certain "presumptions" were applied. *Beckstead v. Price,* ID S.Ct. June 17, 2008 (*see*, Addendum, Tab 1); *Hughes v. Fisher*, 142 Idaho 474 (2006) . In both *Beckstead* and *Hughes,* this Court emphasized a need for courts to focus "simply on whether the five prescriptive easement elements have been satisfied based on the facts before them," rather than focusing on whether certain presumptions applied, burdens shifted, and whether burdens were met considering the application of multiple presumptions. *Beckstead*, p. 6; *Hughes*, 142 Idaho at 481. Thus, rather than engaging in a cumbersome analysis of various presumptions that may arise in light of the evidence, the Court in *Beckstead* and *Hughes* simply considered whether the elements of a prescriptive easement had been proved.

As in *Beckstead* and *Hughes*, the District Court in this case engaged in a cumbersome analysis utilizing several presumptions to reach its decision. As is set forth herein, the District Court improperly applied those presumptions and improperly shifted the burden of

proof. This Court, therefore, should remand the District Court's decision to the District Court for a decision as to whether Backmans presented evidence sufficient to prove the elements of a prescriptive easement claim without resort to obsolete "presumptions."

2. **The District Court Erred in Characterizing Powers's Use of the Roadways in Question After 1996 as "Public."**

The District Court ruled that Powers (Backmans' predecessor-in-interest) conducted an "extensive and fairly continuous logging operation" on the Backman Property from 1994 through 1996 by way of access from Turtle Rock Road/Syringa Creek Road, and the three extensions. R. Vol. II, p. 273-274. The District Court, however, characterized Powers's use of the roadways in question after 1996 as "public" and, therefore, not "open and notorious." *Id.* While not stated in the District Court's decision, the District Court appears to apply the "public use exception." The District Court, however, did not make any findings that persons besides Powers used the subject roadways after Powers's purchase of the Backman Property in 1994. The District Court made no finding that the "public" was using the roadways in question. The District Court's findings were in error.

In *Hughes*, the Court reviewed the district court's application of the "public use exception" to a prescriptive easement claim. *Hughes*, 142 Idaho at 481. The *Hughes* Court explained that the "public use exception" pertains to the prescriptive easement element that the owner of the servient estate has actual or imputed knowledge of the claimant's use. *Id.* The Court quoted *Hall v. Strawn*, 108 Idaho 111, 112 (Ct.App. 1985):

> Where, as here, the same degree of use upon which the adverse claim is based has been exercised indiscriminately by the general public, individual acquisition of prescriptive easements has generally been held impossible. In such a case, the claimant must perform some act whereby the adverse nature of the claim is clearly indicated to the owner of the servient estate.

*Id.* The Court reasoned that a claimant must somehow differentiate its use of the claimed easement from the use made of the easement by the general public as a matter of common sense and fairness. *Id.* The Court explained that "[w]hen the claimant is using the land along with members of the general public, it would simply be unfair to impute knowledge to the landowner that the claimant is making an adverse claim." *Id.*

The Court noted the testimony at trial that evidenced that use of the claimed prescriptive easement by the public was "common knowledge," "common practice," and that "everybody did it." *Hughes v. Fisher*, 142 Idaho at 481-82 (2006). The easement was regarded as "neighborhood access" to a ski mountain. *Id.* at 482. The Court held that "the district court's finding that there was public use of the path was based on substantial and competent evidence. . ." The Court reasoned that once public use of the easement is established, a claimant must present evidence of some "independent act signifying the adverse claim to the owner." *Id.* at 482.

Here, the District Court erred in characterizing Powers's use of Turtle Rock Road/ Syringa Creek Road, and the three extensions, after 1996 to get to his own private property as use by the "public." The District Court incorrectly focused on Powers's use of his property and not his use of the easement. There was no evidence presented of any person other than Powers using the roadways after 1994. Thus, there was no evidence of any "public use" to which the District Court could compare Powers's use in determining whether or not Powers's use was, in fact, of a public nature.

As the Court's analysis in *Hughes* directs, application of the public use exception must be predicated upon some findings as to the use of the subject property by members of the

general public. *Hughes*, 142 Idaho at 481-82. It is only upon a finding of use by the general public that corresponds with the claimant's use that the burden then shifts to the claimant to prove some independent act indicating to the owner that the claimant is making an adverse claim to the subject property. *Id.* at 482. In the case at hand, there is an absence of any evidence, let alone evidence that could be characterized as substantial and competent, supporting the District Court's finding that Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, was "public" or that the "public" used the road.

Further, even if evidence of use by the public had been presented, the uncontroverted evidence regarding Powers's use proves that, unlike members of the public at large, Powers used Turtle Rock Road/Syringa Creek Road, and the three extensions, in a unique manner – to access his private property, now the Backman Property. In *Hughes*, members of the public had used the path to access property that was open to the public – the ski mountain. *Hughes*, 142 Idaho at 481-82. There was no evidence in the record that members of the general public were using the subject roads to access someone else's private property or any public property.

The District Court improperly focused on the nature of Powers's use of the Backman Property, rather than his use of Turtle Rock Road/Syringa Creek Road and the three extensions. The public use exception applies to the requirement that a servient owner have actual or imputed knowledge of a claimant's adverse claim.[5/] *Hughes*, 142 Idaho at 481. The test for establishing a prescriptive easement can focus only on the use a claimant makes of the servient owner's property, not his own property. To hold otherwise would impose a burden on a

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5/ As noted, above, the District Court appears to have applied the public use exception to the open and notorious element of a prescriptive easement claim. R. Vol. II, p. 273-74. Later in the Memorandum Opinion, however, the District Court applied the public use exception to the elements of notice to the servient owner and adverse and hostile use. R. Vol. II, p. 274.

servient owner to discover activities occurring outside the boundaries of his or her property. Powers's use of his own property is relevant only to the determination of the scope of the prescriptive easement once it has been held to have been created. *Gibbens v. Weisshaupt*, 98 Idaho 633, 638 (1977). The District Court's consideration of Powers's end use of the Backman Property to make a finding concerning Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, was in error.

### 3. The District Court Erred in Applying the Wild and Unenclosed Lands Presumption in Finding That Use of Turtle Rock Road/Syringa Creek Road, and the Three Extensions, Prior to Powers's Ownership Was Permissive.

Under Idaho law, if a claimant establishes use that is open, notorious, continuous and uninterrupted for the statutory period, even without evidence of how the use of a claimed easement began, the use by the claimant is presumed adverse. *Wood v. Hoglund*, 131 Idaho 700, 702-03 (1998). The District Court ruled that use of the claimed easement by Powers and his predecessors was permissive. The District Court made that finding not by looking at any evidence of ***how*** the use of the roadways in question began, but by applying presumptions that were not applicable.

The District Court ruled that "at least prior to the 1990s, the Court finds that the relevant portions of the Syringa Creek drainage consisted of wild and unenclosed land." R. Vol. II, p. 278. Thus, the District Court applied the rebuttable presumption that use of wild and unenclosed land is permissive. *Id.* Applying this presumption, the District Court stated:

> Because the land in question was essentially open to anyone, and was freely and openly used by members of the general public; and because a logging operation, in and of itself, and particularly in wild and unenclosed timberlands, does not establish an adverse use; there is insufficient evidence in this record of independent, decisive acts indicating separate and

> exclusive use of Syringa Creed Road by owners of the one-hundred twenty (120) acres in Section 8 sufficient to rebut the presumption of permissive use.

*Id.* The District Court's focus on the use of Turtle Rock Road/Syringa Creek Road, and the three extensions, prior to 1994 – prior to Powers's ownership of the Backman Property – is in error. The fact that the lands in Sections 7 and 8 were wild and unenclosed prior to the 1990s is irrelevant to the determination as to whether Powers's use from 1994 satisfied the elements of a prescriptive easement claim.

Where an alleged easement crosses wild and unenclosed lands, there is a rebuttable presumption that use of such lands is permissive, and the burden of proving adversity with evidence of "independent, decisive acts" shifts to the claimant. *Hodgins v. Sales*, 139 Idaho 225, 232 (2003). Here, the District Court applied the wild and unenclosed lands presumption and found that any use prior to Powers's use was permissive. The District Court limited its finding, however, stating that the wild and unenclosed lands presumption would only apply prior to the 1990s. R. Vol. II, p. 278. After the 1990s, Section 7 was being privately developed and was not wild and unenclosed. Thus, when Powers bought the Backman Property in 1994, the wild and unenclosed lands presumption would not apply.

The District Court relied upon its finding that the relevant lands in the Syringa Creek drainage were wild and unenclosed prior to the 1990s to hold that Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, commenced as a permissive use. Such reliance is in error. Use of Turtle Rock Road/Syringa Creek Road, and the three extensions, after 1990 cannot be presumed to be permissive. This Court should reverse the District Court's decision and remand the case for a determination as to whether Powers's use of

the subject roads after 1994 satisfied the elements of a prescriptive easement claim, free of the application of any presumptions.

**4. The District Court Erred in Applying the Common Use Rule in Determining That Use of Turtle Rock Road/Syringa Creek Road, and the Three Extensions, Prior to Powers's Use Was Permissive.**

The District Court erred in applying the common use rule to determine that any use of Turtle Rock Road/Syringa Creek Road, and the three extensions, was permissive prior to Powers's purchase of the Backman Property in 1994. The District Court cited *Melendez v. Hintz*, 111 Idaho 401 (Ct.App. 1986), for the proposition that "where a road has been built on the servient estate, and then used by the dominant estate, such common use is not adverse." R. Vol. II, p. 279. The District Court's application of the common use rule on the facts of this case is in error.

The *Melendez* reasoning does not apply to the facts of this case. *Melendez* involved a neighbor's claim for a prescriptive easement over the owner's driveway. 111 Idaho at 138. The Court of Appeals cited to *Simmons v. Perkins*, 63 Idaho 136 (1941), for the proposition that "the rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission." *Id.* at 140. The Court of Appeals in *Melendez* explained this presumption of permissive use in an effort to define the limits of its application. The Court of Appeals reasoned:

> There should be no presumption that the use originated adversely to the owner unless the use itself constitutes some invasion or infringement upon the rights of an owner. Where one person merely uses a roadway in common with his neighbor, without damage to the roadway, without interfering with the neighbor's use of the roadway, and where the neighbor has established and maintained the roadway on his

> property for his own purposes, only the most minimal intrusion is made into the owner's dominion over his property.

*Id.* at 141 (emphasis added) .

Here, there is no evidence that the owners in Section 7 constructed the roads in Section 7 for their own benefit. The District Court did not make any findings as to the original purpose for the construction of the roads in Section 7. In fact, the District Court stated that "the history of the spur road construction is vague," and that "whether the roads were built to log Section 7 first and then extended to Section 8 is a logical assumption, but only an assumption." R. Vol. II, p. 279. The common use finding that gives rise to a presumption of permissiveness is predicated upon a finding that an owner has constructed roads for its own convenience on its own property. *Melendez*, 111 Idaho at 140. Although the District Court stated that it may be "logical" to assume that the roads were built to log Section 7 first, and thus for the convenience of Section 7 first, such a finding would be merely an assumption. Thus, the opposite could be true; that the roads were built first to log Section 8. The fact that Turtle Rock Road/Syringa Creek Road, and the three extensions, may have later been used by owners in Section 7 and Section 8 are not sufficient facts that give rise to application of the rule that common use is presumptively permissive use. Rather, there must be a finding that the roads were established first for the convenience of the owner of the servient estate.

For these reasons, the District Court's finding of common use is unsupported by the evidence in the record. This Court should reverse the District Court's decision and remand the case for a determination as to whether Backmans proved the elements of their prescriptive easement claim, free of the application of any assumptions.

**5. Backmans Proved the Elements of Their Prescriptive Easement Claim.**

The record contains ample evidence to support a finding that Powers's use of Turtle Rock Road/Syringa Creek Road, and the extensions, was open and notorious, continuous and uninterrupted, adverse and under a claim of right, with the actual and imputed knowledge of the owners in Section 7 for at least five (5) years.

Powers's use was open and notorious. The requirement that use be "open and notorious" serves to afford the owner of the servient estate reasonable notice to challenge the use of the servient estate owner's property. 4 Powell on Real Property, § 34.10[2][f] (2000). The use must be sufficiently open and notorious that a reasonable person would have discovered its occurrence. *Id.*

Following the initial logging operation (which the District Court did find was open and notorious [R. Vol. II, p. 16]), Powers continued to maintain and use the roads accessing the Backman Property. Powers testified that he did a lot of "driving maintenance" on the roads and periodically graded them. Tr. p. 224, L. 1-5. The State of Idaho required Powers to remove the wooden bridges over Syringa Creek from the Lower and Middle Roads. In order to pull the bridges out, Powers hauled in a backhoe. Tr. p. 221, L. 20 – p. 222, L. 10. Powers also planted willows in the slide area. He testified that for approximately one year, he would use the roads twice a week to access the Backman Property to water the willows. Tr. p. 226, L. 14-17.

Powers also installed a culvert on the Middle Road after the end of the initial logging operation. Powers testified that he installed the culvert because "I wanted to be able to drive onto the property through that middle road." Tr. p. 223, L. 24-25. Approximately one and one-half year after the initial logging operations, Powers built a skid trail off of the Middle Road into the northeast corner of his property. Tr. p. 224, L. 14-16. He testified that he brought in his

bulldozer to build this skid trail from the Middle Road all of the way into Section 8. Tr. p. 224, L. 14 – p. 225, L. 3.

Powers testified that he used the roads to access the Backman Property to burn slash piles and to monitor erosion control measures he had implemented. Tr. p. 226, L. 11 - p. 277, L. 14. Beyond logging, Powers continued to use Turtle Rock Road/Syringa Creek Road, and the three extensions, to access his property for recreational pursuits until he sold it. Tr. p. 261. L. 18 – p. 264, L. 23. Powers routinely picked berries, hunted on the property and also camped on the property on at least two occasions. T. p. 225, L. 17 – p. 226. L. 10. He testified that from 1996 to 2004 he hunted white-tail deer on the Backman Property. Tr. p. 262, L. 16 - p. 262, L. 13. He also hunted grouse on the property intermittently during late fall each year. Tr. p. 263, L. 14-17. Powers testified that from 1998 to 2004, he would visit the Backman Property at least once per month. Tr. p. 264, L. 18-23.

The same evidence supporting characterization of Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, as open and notorious supports a finding that Powers's use was continuous and uninterrupted for the statutory period. "For a use to be 'continuous' does not mean that it must be 'constant.' . . ." 7 Thompson on Real Property, § 60.03(b)(6)(viii) at 477 (1994). "Continuity requires use often enough to provide notice to the potential servient owner, and 'uninterrupted' means that the use is not 'interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right.'" *Id.* Powers's testimony supported the continuity of his use of Section 7 to access the Backman Property and that his use was not interrupted for over five (5) years.

The evidence in the record also supports a finding that Powers's use was adverse and under a claim of right. Adverse use "under a claim of right" refers to "use without

recognition of the rights of the owner of the servient estate." *West v. Smith*, 95 Idaho 550, 557 (1973). In *Hodgins*, the Supreme Court stated that the analysis must focus on the nature of the claimant's use of the subject property. *Hodgins*, 139 Idaho at 231-32. Powers's trial testimony regarding his use of Turtle Rock Road/Syringa Creek Road, and the three extensions, supports a finding that this use was without recognition of the right of the owners in Section 7. Powers believed he had a right to use the roads in Section 7 and acted accordingly.

The owners in Section 7 had actual and imputed knowledge that Powers claimed a right to use Turtle Rock Road/Syringa Creek Road, and the three extensions. The actual or imputed knowledge of the owner of the servient estate requirement is closely related to the requirement that the use be open and notorious. In essence, the owner must either have "knowledge and acquiescence" or the use must be sufficiently "open, notorious, visible, and uninterrupted that knowledge will be presumed." 7 Thompson on Real Property, § 60.03(b)(6)(viii) at p. 445 (1994). Indeed, the District Court seemed to analyze jointly whether Powers's use was open and notorious, with the actual or imputed knowledge of the owner of the servient estate.

Powers testified that he told Dr. Lawrence that he would be bringing in equipment when he started working on the roads in Section 7. Tr. p. 255, L. 12-19. Powers unloaded all of the heavy equipment he used for road work and logging on Dr. Lawrence's property. Tr. p. 213, L. 15 – p. 215, L. 15. Powers also introduced himself to Mr. Sowders, who lived near Syringa Creek Road in the northern part of Section 7. Tr. p. 253, L. 8-14. These owners certainly had actual knowledge of Powers's use of the roads in Section 7. Regarding Powers's use of land in Section 7 owned by others, the record contains sufficient evidence to impute knowledge based on Powers's extensive use and maintenance of the roads across Section 7. Again, the evidence

showing that Powers's use was open and notorious should also be applied to find that Powers's use of Turtle Rock Road/Syringa Creek Road, and the three extensions, was with the actual or imputed knowledge of the owners in Section 7.

For the reasons set forth herein, this Court should remand the case to the District Court with instructions that it refrain from applying any presumptions and determine whether the evidence in the record supports a finding that Backmans proved the elements of their prescriptive easement claim.

### D. The District Court Erred In Failing To Combine Easement By Necessity, Private Condemnation And/Or Prescriptive Easement Theories To Provide Access To The Landlocked Backman Property.

The District Court erred in declining to combine easement by necessity, private condemnation and/or prescriptive easement theories to provide Backmans with access to the landlocked Backman Property. The District Court did not cite to any authority prohibiting the combination of legal theories to provide access. The District Court stated simply that "the Court declines to apply a combination of the three theories of the plaintiff to provide an access where no access can be established under a single theory." R. Vol. II, p. 297-98. The District Court erred in declining to combine easement by necessity and prescriptive easement theories because, contrary to the District Court's reasoning, such a combination would not impermissibly expand the scope of either theory. In addition, the District Court erred in analyzing only whether Backmans could combine the theories of prescriptive easement and easement by necessity. The District Court should have also considered private condemnation, and whether that theory could be combined with an easement by necessity to provide the best and most reasonable access to the Backman Property.

The Backman Property was landlocked when the United States Government patented the land and remained landlocked when Humbird owned the Backman Property and sold its adjacent lands. In 1943, Humbird conveyed its lands in Section 7 to Modig. Plaintiffs' Exhibit 22. The District Court stated that "[a]ll parties agree that, at the very most, the easement by necessity claim for Section 8 is limited to crossing the Modig parcel (in the east half of the east half of Section 7). Because of the unity of title requirement, easement by necessity fails as to the McKenna and Bessler properties in the southwest quarter of the southeast quarter of Section 7." R. Vol. II, p. 295-96. Thus, the District Court found that there was unity of title in the Modig parcel in Section 7 and the Backman Property in Section 8 until Humbird sold the Modig parcel in 1943. As the District Court notes, the McKenna and Bessler properties were never included within the Modig parcel. Therefore, an easement by necessity premised on the unity of title in Humbird would not afford access across the properties presently owned by Defendants Bessler and McKennas. However, access across these properties could be provided by either a prescriptive easement or by private condemnation.

In declining to "bridge the gap" between the Modig parcel and the public Baldy Mountain Road with a prescriptive easement, the District Court cited to *Roberts v. Swim* for the proposition that "easement by necessity is based upon the severance of a parcel from a common ownership parcel that deprives the severed parcel of legal access to a public road." R. Vol. II, p. 296 (citing 117 Idaho 9 [Ct.App. 1989]). The District Court continued by stating that "[w]hen Humbird sold the Modig parcel in 1943, the Modig parcel did not have direct access upon a public road. The access out to Baldy Mountain Road would only be prescriptive, and, on this record, for logging only." R. Vol. II, p. 296. The District Court appears to have declined to combine an easement by necessity over the old Modig parcel with a prescriptive easement over

the McKenna and Bessler properties based on its determination that such combination would improperly expand the scope of both theories. *Id.* Easement by necessity would be improperly expanded because there was no public road providing access to the Modig parcel. Prescriptive easement would be improperly expanded because a prescriptive easement, if it existed, would be limited to logging, and Backmans claimed a prescriptive easement for access to residences.

First, the District Court's refusal to combine easement by necessity and prescriptive easement theories is in error. The District Court's citation to *Roberts* does not accurately state the law applicable to easements by necessity. A public road need not exist at the time of severance of the dominant and servient estates. The portion of *Roberts* cited by the District Court cites to *Cordwell v. Smith*, 105 Idaho 71 (Ct. App. 1983) . *Cordwell* stated that:

> [T]he existence of a way of necessity does not depend upon what use the common owner was making of the roads existing at the time of severance. Such easement could arise even if at the time of severance there was no road across the grantor's property to the part conveyed. Thus, a remote grantee of land not being used at the time of severance-as in the present case-may nevertheless, when the use becomes necessary to the enjoyment of his property, claim the easement under this remote deed.

105 Idaho at 79 (emphasis added) . Easement by necessity does not depend on the existence of access from the Modig parcel to a public road. Therefore, combination of easement by necessity with a prescriptive easement over the McKenna and Bessler properties would not impermissibly expand the scope of an easement by necessity. For the reasons set forth in the section analyzing Backmans' prescriptive easement claim, whether the facts in the record support Backmans' prescriptive easement claim, as well as the scope of such easement, would be determined upon remand of the case to the District Court.

Second, the District Court erred in failing to consider whether a combination of easement by necessity and private condemnation would provide the best and most reasonable access to the Backman Property. For the reasons set forth, above, the District Court could find an easement by necessity over the old Modig parcel. Private condemnation is reasonably necessary as the Backman Property is landlocked. Based upon the trial testimony of Dr. Folsom and the Backman Roads Investigation, there was no historical access road to the Backman Property, except through Section 7. Plaintiffs' Exhibit 42. For the reasons set forth in the section analyzing Backmans' private condemnation claim, there is no alternative access available to Backmans.

Defendants did not present and the District Court did not cite any authority requiring access to property to be confined to a single legal theory. A combination of legal theories to provide access would not be unprecedented as people frequently travel some combination of public roads, private roads, easements and licenses to reach their properties. This Court should reverse the District Court's decision declining to combine the theories of easement by necessity, prescriptive easement and/or private condemnation, and hold that combining theories to provide access is permissible. The case should then be remanded to the District Court for a determination as to the theories that should be used and the scope of the access based on the facts and circumstances of this case.

## IV.
## CONCLUSION

The Backman Property is landlocked and at the mercy of the adjacent landowners who have refused to grant Backmans an easement. Public policy in Idaho supports the use of property. The District Court erred in denying Backmans' easement by necessity, private condemnation and prescriptive easement claims. The District Court also erred in declining to combine such theories to provide access to the Backman Property. This Court should reverse the District Court's decision and hold that Backmans are entitled to a prescriptive easement or easement by necessity, or to condemn an easement to access their landlocked property.

**RESPECTFULLY SUBMITTED** this 26th day of August 2008.

MEULEMAN MOLLERUP LLP

By: _____
Jeff R. Sykes
Attorneys For Appellants
Bob Backman and Rhonda Backman

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on the 26th day of August 2008, true and correct copies (2) of the foregoing document were served ***via*** **United States First-Class Mail** upon each of the following parties:

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**ADDENDUM OF CASES**
**[Pursuant To Idaho Appellate Rule 35(f)]**

1. *Beckstead v. Price*, Pocatello, April 2008 Term, 2008 Opinion No. 84, Filed June 17, 2008

2. *Kellogg v. Garcia*, 102 Cal.App.4th 796, 125 Cal.Rptr.2d 817 (2002)

3. *Kinscherff v. United States,* 586 F.2d 159 (1978)

4. *Utah v. Andrus*, 486 F.Supp. 995 (1979)

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**Docket No. 33473**

| | |
|---|---|
| **M. DALE BECKSTEAD and GAYLE BECKSTEAD, husband and wife,** | |
| **Plaintiffs-Counterdefendants- Respondents,** | **Pocatello, April 2008 Term** |
| **v.** | **2008 Opinion No. 84** |
| **BLAINE PRICE, JOANN PRICE, LAZY E., LLC, an Idaho limited liability company, and JOHN DOES 1-10,** | **Filed: June 17, 2008** |
| **Defendants-Counterclaimants-Appellants.** | **Stephen W. Kenyon, Clerk** |

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Oneida County. Hon. Don L. Harding, District Judge.

District court order on prescriptive easement, affirmed in part, vacated in part and remanded.

Lowell N. Hawkes, Chtd., Pocatello, for appellants. Lowell N. Hawkes and Ryan Scott Lewis argued.

Maguire & Kress, Pocatello, for respondents. David R. Kress and Matthew Luke Kinghorn argued.

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BURDICK, Justice

Appellants Blaine Price, JoAnn Price, Lazy E., LLC, and John Does 1-10 (collectively the Prices) appeal a district court order which decrees the existence of a prescriptive easement over their land in favor of Respondents M. Dale and Gayle Beckstead. On appeal, the Prices raise several issues including whether the district court erroneously concluded the Becksteads have a prescriptive easement, whether the determination of the scope of the easement was erroneous, and whether the Prices' right to due process was violated. We affirm in part, vacate in part, and remand.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The Becksteads own approximately 760 acres of land (the Beckstead Property) in Oneida County. The Becksteads purchased the Beckstead Property in 1996. The Prices own two parcels

of property: the Price Property and the Frederickson Property. Off of the paved highway, there is a road that runs across the Price Property and the Frederickson Property and then connects to the Beckstead Property. The road is not a driveway, but leads to a fork in the road that turns right into the driveway going to the Prices' residence or left up to the Beckstead Property.

The Becksteads and the Prices had a friendly relationship until about 2001. After some contentious encounters and trouble with gates that the Prices placed on the road, the Becksteads initiated a quiet title suit. After a three-day court trial, the district court ruled the Becksteads met the prescriptive easement requirements. The Prices appeal.

## II. STANDARD OF REVIEW

A determination that a claimant has established a prescriptive easement involves entwined questions of law and fact. *Hughes v. Fisher*, 142 Idaho 474, 479, 129 P.3d 1223, 1228 (2006). When this Court reviews a lower court's decision, it determines whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Anderson v. Larsen*, 136 Idaho 402, 405, 34 P.3d 1085, 1088 (2001). "A trial court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact." *Id.* Findings of fact based on substantial and competent evidence will not be overturned on appeal even in the face of conflicting evidence. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Id.*

"[W]e exercise free review over the lower court's conclusion of law to determine whether the trial court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Anderson*, 136 Idaho at 406, 34 P.3d at 1089.

## III. ANALYSIS

The Prices argue that the Becksteads failed to establish they acquired a prescriptive easement and that the scope of the easement granted is excessive. The Prices also argue the district court erred by failing to award them contribution and by ordering the locking and removal of various gates. The Prices further argue they were denied due process and that the district court entered an erroneous order when considering the Becksteads' second contempt motion. Both parties assert they are entitled to an award of attorney fees on appeal. We address each issue in turn.

**A. Existence of the Prescriptive Easement**

After the district court's grant of summary judgment to the Becksteads, the Prices moved for reconsideration. The district court decided it would consider the information submitted during the trial before ruling on the motion for reconsideration. After the three-day court trial, the court made written factual findings and concluded as a matter of law that based on those findings, the Becksteads had a prescriptive easement. The Prices contend the facts do not support a conclusion that the Becksteads have established any of the prescriptive easement elements.

The requirements for a prescriptive easement have been clearly established in Idaho:

> A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." *Hodgins v. Sales,* 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). The statutory period in question is five years. I.C. § 5-203; *Weaver v. Stafford,* 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000). A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use." *Hodgins,* 139 Idaho at 230, 76 P.3d at 974. Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. *Wood v. Hoglund,* 131 Idaho 700, 702-03, 963 P.2d 383, 385-86 (1998); *Marshall v. Blair,* 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. *Wood,* 131 Idaho at 703, 963 P.2d at 386; *Marshall,* 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." *Hodgins,* 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. *Id.* at 231-32, 76 P.3d at 975-76.

*Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005). "A prescriptive right cannot be obtained if the use of the servient estate is by permission of the landowner." *Brown v. Miller*, 140 Idaho 439, 443, 95 P.3d 57, 61 (2004) (quoting *Wood*, 131 Idaho at 702, 963 P.2d at 385).

The Prices assert the district court should have only considered the continuous and uninterrupted use of the roadway by Dale Beckstead; the Prices argue Gayle is not an owner of the property and that her use or the use of any other nonowners cannot be used to establish the

prescriptive easement. However, this argument ignores the extensive body of Idaho law that considers various users of the easement to the degree they show the easement was being used by the landowner. *See, e.g.*, *Benninger*, 142 Idaho at 490, 129 P.3d at 1239 (use by visitors and emergency service providers); *Anderson*, 136 Idaho at 406, 34 P.3d at 1089 (use by neighbor and his grandson, who were hired to cut grass on the property).

An easement "is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Luce v. Marble*, 142 Idaho 264, 273, 127 P.3d 167, 176 (2005) (quoting *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991)) (internal quotations omitted). The district court found the Becksteads used the land for recreational purposes, for grazing cattle, and for making improvements to the Beckstead Property. Those types of uses will naturally include ingress and egress for visitors and people hired to perform work on the property. Thus, the district court did not err by considering the use of nonowners to the degree those nonowners showed use of the easement by the landowner.

The district court found that the Becksteads continuously used the property each year from 1996 through 2005, that the Becksteads at no time sought permission to use the road, and that nearly all the use of the road can be observed from the Prices' residence. It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238. Here, the judge's weighing of evidence and judgment on the credibility of the witnesses resulted in a favorable judgment for the Becksteads. Though the Prices presented conflicting evidence, there is trial testimony that sufficiently supports the district court's findings. Therefore, we hold the district court's factual findings were supported by substantial and competent evidence. Next, we must determine whether the factual findings support the conclusions of law.

The district court concluded the Becksteads established they had a prescriptive easement "for the purpose of ingress and egress to the Beckstead Property." "A party seeking to establish the existence of an easement by prescription 'must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period.'" *Akers*, 142 Idaho at 303, 127 P.3d at 206 (quoting *Hodgins,* 139 Idaho at 229, 76 P.3d at 973).

The factual findings support a conclusion that the Becksteads' use of the road was open and notorious, continuous and uninterrupted,[1] with the actual knowledge of the Prices, and for the statutory period. Thus, the Becksteads raised the presumption their use was adverse. *See id.* The burden then shifted to the Prices to show that the Becksteads' use was permissive, or by virtue of a license, contract, or agreement. *See id.* (citing *Wood,* 131 Idaho at 703, 963 P.2d at 386; *Marshall,* 130 Idaho at 680, 946 P.2d at 980). The district court determined the Prices failed to present any "credible evidence that any person ever obtained or received permission from [the Prices] . . . ." It was for the district court to determine the credibility of the witnesses, *Benninger*, 142 Idaho at 489, 129 P.3d at 1238, and there is substantial and competent evidence in the record to support a determination that the Becksteads never asked for nor received permission to use the road. The factual findings by the district court sufficiently support its conclusion that the Becksteads acquired a prescriptive easement.

The Prices nonetheless put forth other theories to support their contention that the Becksteads did not show their use was adverse and under a claim of right.

1. The *Hunter* Rule

First, the Prices argue there was evidence the Becksteads' predecessors used the road by permission. The Prices assert once there is permissive use, the use continues to be presumed permissive unless there is unequivocal conduct which gives the servient estate owner notice of hostile and adverse use and cite to *Hunter v. Shields*, 131 Idaho 148, 152, 953 P.2d 588, 592 (1998). We need not get to *Hunter* because here there was no evidence the Becksteads' predecessors used the road by permission.

Shirlee Ward and her husband (the Wards) owned the Beckstead Property from 1980 to 1996. The Wards accessed the Beckstead Property from 1980 to 1985 without any leased interest on land surrounding the Beckstead Property and without asking or receiving permission. Between 1985 and the early 1990s the Wards leased the Price Property; the Wards never leased the Frederickson Property. The Wards stopped leasing the Price Property in 1993 but continued to access the Beckstead Property.

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[1] The Prices claim because the Becksteads' use was only seasonal, it was not continuous and uninterrupted. First, the cases cited by the Prices do not support their contention because they are factually dissimilar. *See Brown,* 140 Idaho at 443, 95 P.3d at 61; *Anderson*, 136 Idaho at 406, 34 P.3d at 1089. Second, it is generally accepted that the "continuous and uninterrupted" element does not require daily use or even monthly use. 25 Am. Jur. 2d *Easements*

Thus, there is evidence that during the time of the lease, the Wards had permission to use the road to access the Price Property. However, prior to the lease, during the lease, and after the lease, the Wards also owned the Beckstead Property and used the road to access that parcel of land. There is no evidence showing the lease of the Price Property gave them permission to use the road to access the Beckstead Property. Nor was there evidence that the road running through the Price Property and the Frederickson Property was ever used permissively to access the Beckstead Property. There is only evidence that there was permission to use the road to access the Price Property, and here the Price Property is not the dominant estate. Hence, this evidence does not show the claimant's use was permissive.

2. Use in Common

Second, the Prices argue that the Becksteads' use was merely in common with the Prices and thus, a permissive use presumption arises rather than an adverse use presumption. In Idaho, the adverse use presumption has been rebutted by evidence of "use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use . . . ." *Marshall*, 130 Idaho at 680, 946 P.2d at 980 (quoting *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941)) (emphasis removed); *see also Hughes v. Fisher*, 142 Idaho 474, 481, 129 P.3d 1223, 1230 (2006).

A second exception to the adverse use presumption has been applied in Idaho: when "a landowner 'constructs a way over [the land] for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of . . . permission.'" *Hughes*, 142 Idaho at 481, 129 P.3d at 1230 (quoting *Simmons*, 63 Idaho at 144, 118 P.2d at 744) (alteration in original). In *Hughes*, the parties cited these exceptions and argued over whether the presumptions applied, whether the burdens shifted, and whether the latter exception applies when the owner did not construct the way over the land. *Id.* This Court held those two rules were simply an approach to determining whether the claimant had met the elements for a prescriptive easement by clear and convincing evidence. *Id.* The Court stated a desire to "disentangle Idaho prescriptive easement law" and "emphasize[d] the need for courts to streamline their analysis by focusing simply on whether the five prescriptive easement elements have been satisfied based on the facts before them." *Id.* Here, the district court found that the

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*and Licenses* § 61 (2004). The acquisition of a prescriptive easement requires continuous use "according to the nature of the use and the needs of the claimant." *Id.*

Becksteads did not seek or obtain permission from the Prices to use the road and that the Prices recognized the Becksteads' right to use the road. There was evidence the Becksteads' use of the road was adverse and under a claim of right. To the degree there was conflicting evidence, it was the province of the district court to weigh that evidence. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238. The district court's findings are supported by substantial and competent evidence.

Therefore, we hold the district court correctly concluded based on the facts before it that the Becksteads met all of the prescriptive easement elements, and we affirm the district court's conclusion that the Becksteads have a prescriptive easement.[2]

**B. Scope of the Easement**

The Prices argue the scope of the easement is excessive as to uses and number of people. The Prices argue the easement does not cover the use of certain types of vehicles, that the easement does not extend to people invited by the Becksteads to the Beckstead Property, and that Gayle Beckstead does not own the property and thus, cannot have a prescriptive easement.

Recognizing that "[p]rescription acts as a penalty against a landowner[,]" this Court has stated prescriptive rights "should be closely scrutinized and limited by the courts." *Gibbens v. Weisshaupt*, 98 Idaho 633, 638, 570 P.2d 870, 875 (1977). The scope of a prescriptive easement is fixed by the use made during the prescriptive period. *Elder v. Northwest Timber Co.*, 101 Idaho 356, 359, 613 P.2d 367, 370 (1980); *Gibbens*, 98 Idaho at 638, 570 P.2d at 875 (quoting *Bartholomew v. Staheli*, 195 P.2d 824, 829 (Cal. Dist. Ct. App. 1948)). The holder of the prescriptive easement "may not use it to impose a substantial increase or change of burden on the servient tenement." *Gibbens*, 98 Idaho at 638, 570 P.2d at 875 (quoting *Bartholomew*, 195 P.2d at 829).

As to use, the Prices assert that during the prescriptive period there was no continuous use of the various means of transportation named in the Becksteads' complaint: trucks, campers, livestock trailers, four-wheelers, pedestrian traffic, and heavy equipment needed to improve the

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[2] Thus, it is unnecessary to decide whether the district court's grant of summary judgment to the Becksteads was procedurally proper. Below, the court granted summary judgment to the Becksteads as to the existence of the prescriptive easement. However, after the Prices' motion to reconsider, the court allowed the issue to go to trial and, based on findings made after the trial, the district court concluded the Becksteads established the existence of a prescriptive easement. We affirm the decision the district court made after the trial; consequently, the issue of whether summary judgment was procedurally proper is moot. *See Webb v. Webb*, 143 Idaho 521, 524, 148 P.3d 1267, 1270 (2006) (holding an issue is moot when a favorable judicial decision would not result in any relief).

Beckstead Property. In the past, this Court has not required the scope of the easement specify particular vehicles or types of vehicles that can use the easement; rather, we have characterized easement uses as residential, agricultural, or recreational. *See Brown*, 140 Idaho at 443-44, 95 P.3d at 61-62. Thus, the scope of the easement should include any reasonable means of transportation for the character of use made during the prescriptive period.

The district court found the Becksteads used the easement during the prescriptive period for recreational purposes, for grazing purposes, and for making improvements to the Beckstead Property. This conclusion is supported by substantial and competent evidence in the record. Though the district court gave specific examples of which vehicles might use the road for the purposes of recreation, grazing cattle, and making improvements, it did not express an intention to limit the scope to those means of travel. We affirm the district court's finding that the easement can be used for recreational purposes, grazing purposes, and for making improvements. Furthermore, we clarify that the use of the easement is not limited to any specific vehicles or types of vehicles and that the easement covers the use of any vehicles that would reasonably be used to access the Beckstead Property for egress and ingress, recreating, grazing cattle, or making improvements.

As to number of people, the Prices argue the district court erred by stating the easement "extends to all of the Plaintiffs [sic] invitees . . . ."[3] Instead, the Prices believe the district court should have ordered the Becksteads to give the names of everyone that will visit the Beckstead Property.

There is a difference between easements appurtenant and easements in gross. *West v. Smith*, 95 Idaho 550, 556, 511 P.2d 1326, 1332 (1973). An easement appurtenant is attached to a dominant tenement. *Id.* A person does not hold an easement in gross by virtue of ownership in a particular parcel of land; rather, an easement in gross is a personal right to use the land of another. *Id.* An easement in gross is not assignable and applies to specific people and not to guests or assignees. *Id.* Contrarily, an easement appurtenant "serves the owner of the dominant estate in a way that cannot be separated from his rights in the land." *Hodgins*, 139 Idaho at 230,

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[3] A review of the trial transcript shows that "invitee" was used broadly by the district court and the parties throughout trial to indicate any person the Becksteads invite to their property, whether to perform work or as a social guest. Therefore, the easement extends to guests of the Becksteads coming to the property for recreational purposes, grazing purposes, or to improve the property, and it is unnecessary to remand in order to determine whether the easement applies to invitees and licensees as defined by law.

76 P.3d at 974. When such an easement is created, "it becomes fixed as an appurtenance to the real property, which is subject to the prescriptive use and may be claimed by a successor in interest." *Id.* "In cases of doubt, Idaho courts presume the easement is appurtenant." *Id.*

Here, the easement the Becksteads acquired is not personal but is an easement appurtenant that serves the owner of the dominant estate in a way that cannot be separated from his rights in the land—it provides access to the Beckstead Property. Therefore, it is not necessary that the district court name specific people who can use the roadway to access the Beckstead Property. The quantity of people using the easement to access the Beckstead Property is not limited by names of people, but is limited by the scope of the easement. To the degree the use of the easement may begin to exceed the use made during the prescriptive period, the parties can then litigate whether there has been an unlawful increase in the use of the easement. As described in the district court's order, the declared scope of the easement does not exceed the use made during the prescriptive period.

Therefore, it is not necessary that the district court name the individuals that will use the easement, nor is it necessary that this Court "reverse the prescriptive easement granted to Gayle Beckstead." The evidence the Becksteads presented established a prescriptive easement; the prescriptive easement is appurtenant to the Beckstead Property and, thus, is attached to the land and not to individuals.[4]

Nonetheless, because the district court did not set out the width and length of the easement, we remand the case back to the district court. "[I]t is well settled under Idaho law that any judgment determining the existence of an easement must also specify the character, width, length and location of the easement. This Court does not hesitate to remand cases because of an inadequacy in the district court's description of an easement." *Schneider v. Howe*, 142 Idaho 767, 774, 133 P.3d 1232, 1239 (2006) (internal citations omitted). On remand it will not be necessary for the district court to specify the character of the easement, since it has already done so. The determination of the width and length of the easement should take into account the factual findings already made by the district court as those findings are supported by substantial and competent evidence. Those findings include that during the prescriptive period the

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[4] Moreover, regardless of whether Gayle is an actual owner of the Beckstead Property, we note that Dale clearly owns the land and, thus, had standing to bring the quiet title suit. *See Tungsten Holdings Inc., v. Drake*, 143 Idaho

Becksteads used the easement for trucks, camper trailers, livestock trailers, four-wheelers, and transportation of necessary equipment and materials to make improvements on the Beckstead Property and to the Frederickson road including a dump truck and grader.

In conclusion, we hold the district court did not err in pronouncing the scope of the easement to be used for recreational purposes, grazing cattle purposes, and to make improvements on the Beckstead Property. We also hold it is not necessary that the district court order the Becksteads to provide names of everyone that will use the easement to access their property. Finally, we remand the case to the district court for the limited purpose of setting out the width and length of the easement.

**C. Contribution for Maintenance**

The Prices counterclaimed for contribution for their maintenance of the roadway. On appeal, the Prices contend the district court erred in failing to consider their contribution claim and that they are entitled to an award of contribution.

The owner of the servient estate does not have a duty to maintain the easement. *Walker v. Boozer*, 140 Idaho 451, 455, 95 P.3d 69, 73 (2004). The owner of the dominant estate has the duty to maintain the easement even when the servient estate landowner uses the easement. *Id.* at 456, 95 P.3d at 74. "That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate." *Id.* However, the dominant estate owner's duty to maintain does not require the dominant estate "to maintain and repair the easement for the benefit of the servient estate." *Id.* When a servient estate owner seeks contribution they must show the dominant estate owner's maintenance created an additional burden or an interference that would damage the servient estate. *Id.*

> [A]bsent a showing that the easement owners' maintenance of the easement created an additional burden or interference with the servient estate, the servient estate cannot dictate the standard by which the easement should be maintained, expend funds to maintain it to the level desired by the servient estate and then seek reimbursement for those expenditures and contribution for future expenditures from the easement owners.

*Id.*

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69, 72, 137 P.3d 456, 459 (2006) ("Only the owner of the dominant estate has standing to quiet title to an easement appurtenant to that estate.").

There was evidence presented throughout the trial that the Prices expended money to maintain the road. However, the Prices fail to make any arguments or point the Court to any evidence showing the Becksteads' maintenance or lack thereof created an additional burden or an interference causing damage to the Prices' land. The district court found the Becksteads maintained the road and this is supported by testimony given throughout the trial.[5] Since the Prices fail to show the Becksteads' maintenance of the road created an additional burden or interference with the servient estate causing the Prices to then perform maintenance, we hold the Prices are not entitled to contribution for their maintenance of the road.

**D. Gates**

The Prices argue the district court erred in ordering the Prices to replace their wire gates with metal swing gates, in ordering the locking of the front gate, and in ordering that a certain gate be removed.

This Court has affirmed district court orders preventing the servient estate from constructing or maintaining gates in a way which interferes with or limits the use of the prescriptive easement by the dominant estate. *See Lovitt v. Robideaux*, 139 Idaho 322, 328-29, 78 P.3d 389, 395-96 (2003); *Gibbens*, 98 Idaho at 640, 570 P.2d at 877. In *Gibbens*, this Court held it was proper to impose on the dominant estate owners the expense of constructing and maintaining gates necessary to protect the easement. *Id.* at 640, 570 P.2d at 877. However, *Gibbens* does not require that all expenses associated with gates on the easement be absorbed by the dominant estate owners. Rather, *Gibbens* looked at the specific facts of the case. *See id.* ("It would seem proper in this case to require" the dominant estate to construct and maintain the necessary gates). In *Lovitt*, this Court looked at whether the district court's order preventing the servient estate from limiting the use of the easement by a locked gate was reasonable. 139 Idaho at 328, 78 P.3d at 395. The Court noted the servient estate owner may choose to construct a gate across an easement but "[u]se of a gate, or any other method of regulating an easement, by the owner of the servient estate must, however, be reasonable." *Id.* There, the district court's

[5] Thus, the Prices' contention that the Becksteads have not maintained the easement lacks merit. Furthermore, there is no support for the Prices' contention that maintenance of an easement requires the dominant estate owners to insure or pay taxes on the easement. *See Sinnett v. Werelus*, 83 Idaho 514, 520, 365 P.2d 952, 955 (1961) (it is necessary to pay taxes in order to adversely possess land, but paying taxes is not necessary in order to acquire an easement).

finding of reasonableness was affirmed when it was supported by substantial and competent evidence. *Id.* at 329, 78 P.3d at 396.

The district court's order includes the following:

> The Court does recognize that the [Prices] do have a right to protect and use their property, and as such the [Prices] may construct those gates which are necessary for the use of the [Prices'] land. However, based on the facts, it is evident that the gate the [Prices] have placed near the gate leading to the Beckstead Property has no purpose but to harass and make it more difficult for the [Becksteads] to access their property. As such the [Prices] [are] hereby ORDERED to remove the gate.
>
> Furthermore, it is evident that the high tension wire gates with the spikes in the posts that the [Prices] have placed on the road serve no purpose other than to harass and prevent the [Becksteads] from accessing their land and since there has been no showing that a high tension wire gate is better than a metal swing gate, it is ORDERED that these wire gates be removed and metal swing gates be placed in their stead. Also the [Prices] may not lock these gates unless they provide a key to the [Becksteads].
>
> Finally, in order to prevent access or use of the road by those who are not parties or invitees of the parties, the parties shall at shared expense place a gate at the place where the road leaves the public highway, with a combination lock, which will remain locked at all times. The parties may share the code with their invitees.

Though the order does not specify which party must replace the high tension wire gates with metal swing gates, apparently the Prices understood it was their responsibility to do so and complied with the order. On appeal, the Prices argue they should not have had to bear the expense of replacing the gates. However, the district court based its directive on finding that the Prices' placed the high tension wire gates on the road in order to harass the Becksteads and prevent them from using the easement to access their land. There is substantial and competent evidence to support this finding. Therefore, we hold ordering the Prices to replace the high tension wire gates with swing gates was reasonable.

The Prices contend that the district court's order that "the gate the [Prices] have placed near the gate leading to the Beckstead Property" be removed was based on post-trial facts and thus, was not an issue at trial. Blaine Price acknowledges this gate was constructed just a few days after the trial was completed. The existence of the gate was brought to the district court's attention in the Becksteads' written proposed findings of fact and conclusions of law. This memorandum was filed June 30, 2006, after the Prices filed their proposed findings of fact and conclusions of law. However, the Prices filed supplemental findings of fact and conclusions of

law on July 12, 2006, as well as a written closing argument. Though the Prices address issues surrounding gates, they did not respond to the Becksteads' allegation that they had constructed a new gate after trial. Below, the Prices failed to raise the issue of whether the district court should consider the post-trial allegation that they built a new gate. Therefore, they have waived the right to raise this issue on appeal. *See Combs v. Kelly Logging*, 115 Idaho 695, 698, 769 P.2d 572, 575 (1989) (issues cannot be raised for the first time on appeal).

Finally, the Prices argue the district court erred in ordering that the gate placed where the road leaves the public highway be locked at all times. The Prices assert this order is erroneous because no party asked that those gates be locked at all times and because in the winter it is difficult to open and close the gates and thus, preferable to leave the gate open. The district court's order regarding this gate and that it remained locked does not indicate on which factual findings it is based. There is no evidence in the trial transcript indicating the parties had problems with people using the road that were not invited by either the Prices or the Becksteads. Therefore, we vacate the portion of the order stating that this gate must remain locked at all times.

**E. Due Process**

The Prices assert the easement claimed by the Becksteads is void as an unlawful taking in violation of due process. The Prices argue that because there was a taking, they are entitled to compensation.

The U.S. Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Texaco, Inc. v. Short*, 454 U.S. 516, 523, n.11 (1982). The Idaho Constitution provides that "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." Idaho Const. art. I, § 14.

The Prices do not assert their property has been taken for public use and the evidence would not support any such assertion. Rather, the Prices quote the Fifth Amendment and state "Defendants contend herein that a private individual has an *even greater right* to be protected by due process from any taking without compensation." There is no support that the acquisition of a private easement as between private parties requires the servient estate owner be compensated, and we do not now adopt any such rule.

The Prices do not make any argument that their due process rights were violated other than by their failure to receive compensation for the easement. Nonetheless, we note that they were afforded an opportunity to be heard in a timely manner. *See Powers v. Canyon County,* 108 Idaho 967, 969, 703 P.2d 1342, 1344 (1985).

**F. Contempt Motion**

The Prices argue the district court's minute entry and order regarding the Becksteads' second contempt motion should be reversed. In September 2006, the Becksteads made a motion to hold the Prices in contempt. At the hearing, the parties stated they had reached a temporary agreement and would pursue mediation. In April 2007, the Becksteads made another contempt motion. In May 2007, the district court entered a minute entry and order stating that it heard testimony on the second motion and that for the time being certain locks were to be removed and that there were to be no rocks or anything else blocking the roadway. The district court then stated that it would go up to the property, view the road, decide whether any gates or fences were to be removed, and render a written decision. It is the May 2007 order mandating that certain locks were to be temporarily removed that the Prices seek to have reversed.

However, in June 2007, the district court entered a subsequent order denying the second motion for contempt. It held that the Becksteads failed to comply with the requirement that their motion for non-summary contempt be supported with an affidavit specifying facts alleging the violations of the court's orders. There is nothing to indicate the May 2007 minute entry and order is still in effect after the district court entered its order ultimately denying the motion. The final order on the Becksteads' April 2007 contempt motion dismissed the motion and, thus, was decided in favor of the Prices. Here, the ultimate order is not adverse to the Prices and, therefore, is not reviewable. *See De Los Santos v. J.R. Simplot Co., Inc.*, 126 Idaho 963, 969, 895 P.2d 564, 570 (1995) (stating this Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error). Additionally, whether the district court erroneously entered the minute entry and order is moot. *See Webb,* 143 Idaho at 524, 148 P.3d at 1270 (noting an issue is moot when a favorable judicial decision would not result in any relief).

Therefore, we decline to consider whether the May 2007 minute entry and order should be reversed.

**G. Attorney Fees on Appeal**

Both the Prices and the Becksteads request an award of attorney fees on appeal pursuant to I.C. § 12-121. That statute allows an award of "reasonable attorney's fees to the prevailing party . . . ." I.C. § 12-121. Attorney fees are awarded to the prevailing party if "the Court determines that the action was brought or pursued frivolously, unreasonably or without foundation." *Baker v. Sullivan*, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999). An award of attorney fees under this statute is appropriate if the appeal simply invites this Court "to second-guess the trial court on conflicting evidence." *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006).

Many of the Prices' arguments are without basis and merely invite this Court to second-guess the trial court on conflicting evidence. However, since we remand the case based on the district court's failure to state the dimensions of the easement, the Prices' appeal was not entirely frivolous. Therefore, we decline to award either party attorney fees on appeal.

## IV. CONCLUSION

We affirm the district court's decision that the Becksteads acquired a prescriptive easement and that the scope of that easement is for the purposes of ingress and egress, recreation, grazing cattle, and making improvements to the Beckstead Property. However, we remand the case to the district court for the limited purpose of determining the dimensions of the easement. Additionally, we hold the Prices were not entitled to contribution for their maintenance of the easement. We affirm the district court's order regarding the Prices' removal and replacement of various gates, but we vacate the portion of the order stating the gate to be placed near the highway always remain locked. We further hold the Prices were not denied due process and decline to address the issue regarding the district court's minute entry. Finally, we decline to award either party attorney fees on appeal. Costs to Respondents.

Chief Justice EISMANN and Justices W. JONES, HORTON and KIDWELL, J., pro tem, **CONCUR.**

THEODORE KELLOGG et al., Plaintiffs and Appellants, v. RONALD GARCIA et al., Defendants and Respondents.
Cal.App.3.Dist.
THEODORE KELLOGG et al., Plaintiffs and Appellants,
v.
RONALD GARCIA et al., Defendants and Respondents.
**No. C037628.**

Court of Appeal, Third District, California.
Oct. 2, 2002.

SUMMARY

Landowners brought a quiet title action against their neighbors, asserting an easement by necessity over defendants' property. The trial court entered judgment in favor of defendants, ruling that an easement of necessity could not arise, since the common owner of the two properties when they were originally conveyed was the federal government. (Superior Court of Calaveras County, No. CV23054, John E. Martin, Judge.)

The Court of Appeal reversed the judgment and remanded with directions to the trial court to enter a new judgment that plaintiffs had an easement by necessity across defendants' property. The court held that plaintiffs established the requisite conditions for an easement by necessity across defendants' property, since they established that there was a strict necessity for the right-of-way, and that the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity. Plaintiffs established that the federal government originally conveyed both parcels of land, and the court held that a way of necessity may arise from lands that were originally owned and conveyed by the federal government. Plaintiffs also established a strict necessity for the right-of-way, since the evidence showed their property was landlocked at the time of the original conveyance, and that the necessity continued to exist at the time of trial. (Opinion by Kolkey, J., with Sims, Acting P. J., and Raye, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Real Property § 2--Definitions--Patent:Words, Phrases, and Maxims-- Patent.
A patent is a grant made by a government that confers on an individual fee simple title to public lands, the official document of such a grant, or the land so granted.

(2) Appellate Review § 145--Scope of Review--Questions of Law and Fact.
Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact on appeal concern the application of a rule to facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry into a mixed question of fact and law requires application of experience with human affairs, the question is predominantly factual, and its determination is reviewed under the substantial evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal, and its determination is reviewed independently.
[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 319.]
(3) Easements and Licenses in Real Property § 6--Easements--Creation--Ways of Necessity.
An easement by way of necessity arises by operation of law when it is established that (1) there is a strict necessity for the right-of-way, as when a claimant's property is landlocked, and (2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity. A way of necessity is of common law origin, and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. A way of necessity is the result of the application of the presumption that, whenever a party conveys property, he or she conveys whatever is necessary for the

beneficial use of that property, and retains whatever is necessary for the beneficial use of land he or she still possesses. The legal basis of a way of necessity is the presumption of a grant arising from the circumstances of the case; this presumption of a grant, however, is one of fact, and whether a grant should be implied depends upon the terms of the deed and the facts in each particular case. The law never imposes an easement by necessity contrary to the express intent of the parties, since it is based on an inferred intent arising from the strict necessity of access for the conveyed property. A way of necessity, having been created by the necessity for its use, cannot be extinguished so long as the necessity exists. An easement by necessity may persist even though the original grantor and grantee no longer own the properties in question.

**(4a, 4b, 4c)** Easements and Licenses in Real Property § 6--Easements-- Creation--Ways of Necessity--Federal Government as Common Original Grantor.
In a quiet title action by landowners against their neighbors, the trial court erred in ruling that plaintiffs' alleged easement of necessity could not arise on the ground that the common owner of the two properties when they were originally conveyed was the federal government. Plaintiffs established the requisite conditions for an easement by necessity across defendants' property, since they established that there was a strict necessity for the right-of-way, and that the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity. A way of necessity may arise from lands that were originally owned and conveyed by the federal government; the public policy underlying easements by necessity is not served by the creation of a categorical exception for the federal government as common grantor. Plaintiffs also established a strict necessity for the right-of-way, since the evidence showed their property was landlocked at the time of the original conveyance, and that the necessity continued to exist at the time of trial.
[See Annot., What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity (1979) 94 A.L.R.3d 502; West's Key Number Digest, Easements ⚷18(1).]
**(5a, 5b)** Easements and Licenses in Real Property § 6--Easements-- Creation--Ways of Necessity--Right Passing to Remote Grantee--Continuing Necessity--Burden of Proof.
In the absence of unusual circumstances, the failure or delay of a grantee to assert or exercise a right-of-way by necessity over the grantor's adjoining premises does not preclude either the original or a remote grantee from subsequently asserting such right. Because an easement by way of necessity is imputed on the basis of the presumption that a party conveys whatever is necessary for the property's beneficial use, and is founded on the policy against permitting land to remain in perpetual idleness, the right to a way of necessity may lie dormant through several transfers of title, and yet pass with each transfer as appurtenant to the dominant estate, and be exercised at any time by the holder of the title. Although a strict necessity at the time of conveyance can create an easement by way of necessity, it does not preserve it for all time. The party proposing that strict necessity for easement no longer exists bears the burden of proof on that issue.

COUNSEL
Law Offices of Kenneth M. Foley and Kenneth M. Foley for Plaintiffs and Appellants. *799
Law Offices of David S. Thomas and David S. Thomas for Defendants and Respondents.

**KOLKEY, J.**
Plaintiffs Theodore and Sylvia Kellogg (the Kelloggs) were gifted a landlocked parcel, which requires that they use a private road that crosses their neighbors' properties in order to gain access to the property. Defendants Ronald and Judith Garcia (the Garcias) deny that the Kelloggs have a right to use the private road that traverses their property for purposes of such access. The Kelloggs sued to quiet title, claiming an implied or express easement over the Garcias' and their other neighbors' properties. Following trial, the trial court ruled in favor of the Garcias.

Under the law, "[a]n easement by way of necessity arises ... when it is established that (1) there is a strict necessity for the right-of-way, as when the claimant's property is landlocked and (2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity." (*Moores v. Walsh* (1995) 38 Cal.App.4th 1046, 1049[45 Cal.Rptr.2d 389](*Moores*).)

Relying on *Bully Hill Copper Mining & Smelting Co. v. Bruson* (1906) 4 Cal.App. 180[87 P. 237](*Bully*

*Hill*), the trial court ruled in this case that an easement by way of necessity cannot arise where the only common owner of the two subsequently conveyed properties was the federal government.

We disagree and shall reverse. Current case law holds that the federal government may be the common owner of the properties whose conveyance gives rise to the strict necessity that justifies an easement by way of necessity. (See *Moores, supra,* 38 Cal.App.4th at p. 1049, fn. 1.) Commentators and courts alike have opined that this conclusion is consistent with the public policy that underlies the establishment of an easement by necessity, which is to promote the productive use of land. Such a policy makes no distinction between landlocked parcels originally owned by a public, rather than a private, party. Accordingly, we conclude that the Kelloggs have established the requisite conditions for an easement by necessity across the Garcias' property so that they can reach their parcel.

Factual and Procedural Background

I. *The Facts*

At the time of trial, the Kelloggs were owners of a property in Calaveras County, known as the Chino Quartz Mine. A road ran north (the north road) ***800** from the Chino Quartz Mine across another property owned by the Kelloggs (known as the Wild Rose Mine), and then over several properties owned by other private parties-the Rollinses, the Walshes, the Stones, and the Garcias-before it reached Jurs Road, a county road. The Garcias own the property adjacent to Jurs Road.

(1) **(See fn. 1.)** The evidence at trial showed that in 1878, the United States conveyed the Chino Quartz Mine by patent to F. Novella. [FN1] The property surrounding the Chino Quartz Mine, including the property currently owned by the Garcias, was federal land-a point that the Garcias concede in their brief. [FN2] Any roads that would have existed in the area-including any road across what is now the property of the Walshes, the Stones, and the Garcias-would have been on land owned by the federal government. No evidence, however, suggested that the north road existed in 1878 or indicated how access was obtained in 1878 from the Chino Quartz Mine to any public road.

FN1 A patent is defined as: "2.a. A grant made by a government that confers on an individual fee-simple title to public lands. b. The official document of such a grant. c. The land so granted." (American Heritage Dict. (3d ed. 1992) p. 1326.)

FN2 The Garcias' brief states: "The CHINO QUARTZ MINE was originally granted to F. NOVELLA by the UNITED STATES government by patent in 1878. At that time, all of the surrounding land, including the land owned at trial by all of the parties[,] was owned by the UNITED STATES government."

In 1944, plaintiff Sylvia Kellogg's parents purchased the Chino Quartz Mine. By 1945, the Kellogg family was using the north road to travel between the Chino Quartz Mine and Jurs Road.

In 1957, the federal government transferred the Wild Rose Mine by patent to Sylvia Kellogg's parents. The Wild Rose Mine surrounded the Chino Quartz Mine.

In 1987, as a result of a gift from Sylvia Kellogg's father, the Kelloggs (with their son, Craig Kellogg) became the owners of the Chino Quartz Mine. And in 1991, the Kelloggs and their son became the owners of the Wild Rose Mine in the same manner. The total property is 42 acres, with the Chino Quartz Mine accounting for 10 acres and the Wild Rose Mine for 32 acres.

II. *The Lawsuit*

The Kelloggs brought a quiet title action, claming a right-of-way easement over the north road from the Chino Quartz Mine to Jurs Road. They ***801** sued all the property owners of the land traversed by that road, except the Rollinses, who had granted the Kelloggs an easement. [FN3]

FN3 The Kelloggs subsequently filed two amended complaints also naming, as additional defendants, property owners lying to the south of their property, as another road runs south from the Chino Quartz Mine to Fay Street, which road crosses property

> owned by the Moores. The trial court found that there was insufficient evidence to impose an easement over the Moores' property under any legal theory. That ruling has not been challenged in this appeal.

At trial, the Kelloggs advanced several theories to support the existence of the easement, including an easement by way of necessity. After a bench trial, the court ruled in favor of the Garcias on all theories, rejecting, among other things, the Kelloggs' claim of an easement by way of necessity.

Because we shall reverse that part of the court's ruling addressing the Kelloggs' right to an easement by way of necessity, we shall only recite the court's findings on that issue. The court made the following factual findings relevant to that theory:

"(1) No evidence was presented as to whether the United States of America [] was the common owner of all of the land between the CHINO QUARTZ MINE parcel and the land where JURS ROAD is now located at the time said mine was granted to F. NOVELLA.

"(2) No evidence was presented as to whether either JURS Road or the north road across the land now owned by defendants WALSH, STONE[,] and GARCIA existed at the time the CHINO QUARTZ MINE was granted to F. NOVELLA.

"(3) No evidence was presented as to where any access to the CHINO QUARTZ MINE was located prior to 1944.

"(4) Evidence was presented to show that the CHINO QUARTZ mine was in active production after the grant from the UNITED STATES OF AMERICA and prior to 1944.

"(5) Apart from the original public ownership by the UNITED STATES, no evidence was presented to show that there was any common ownership of the parcels of real property owned by the plaintiffs and the parcels of real property owned by defendants WALSH, STONE[,] and GARCIA.

"(6) Evidence was presented as to the existence of the north road at the time of the grant of the WILD ROSE MINE to [Sylvia Kellogg's father], but there was no common ownership of the parcel conveyed to [her father] and the parcels owned by defendants WALSH, STONE[,] and GARCIA at the time of that conveyance." ***802**

The court then made its legal conclusions concerning the Kelloggs' failure to establish an easement by way of necessity:

"(2) An easement by necessity can exist when a landowner sells one of two or more parcels and the parcel sold is completely landlocked by the remaining property of the grantor, or partly by the land of the grantor and partly by the land of others. In that case, the law will create an easement across the remaining land of the grantor in order to benefit and provide access to the property conveyed. [Citation.]

"(3) Original ownership by the United States does not constitute the necessary unity of ownership to support an easement by implication or necessity (*Bully Hill* [*supra*, 4 Cal.App. at p. 183], and 94 [A.L.R.3d] 502, 517-518)." [FN4]

> FN4 The full annotation cited by the court is: Annotation, What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity (1979) 94 A.L.R.3d 502, 517-518, § 9[c]. The annotation cites *Bully Hill, supra*, 4 Cal.App. 180.

The court also rejected the Kelloggs' alternative theories for an easement.

The Kelloggs filed a timely appeal from the judgment entered in favor of the Garcias.

## Discussion

### I. *Standard of Review*

(2) The trial court's decision that the Kelloggs did not have an easement by way of necessity presents a mixed question of fact and law for purposes of our review. This requires that we review the court's factual findings under the substantial-evidence test and the court's legal reasoning de novo:

"Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (***803***Crocker National Bank v. San Francisco* (1989) 49 Cal.3d 881, 888[264 Cal.Rptr. 139, 782 P.2d 278](*Crocker*); accord, *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 184[74 Cal.Rptr.2d 825, 955 P.2d 451].)

The trial court's determination that an easement by necessity did not exist because "[o]riginal ownership by the United States does not constitute the necessary unity of ownership to support an easement by ... necessity" presents a legal question. We review it independently. The pertinent inquiry requires critical consideration of legal principles and their underlying values. (*Crocker, supra,* 49 Cal.3d at p. 888; see also *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801[35 Cal.Rptr.2d 418, 883 P.2d 960].)

On the other hand, the trial court's finding that there was no evidence that the federal government was the common owner of all the property between the Chino Quartz Mine and Jurs Road in 1878 is a factual question, which we review to determine if it is supported by substantial evidence. (*Crocker, supra,* 49 Cal.3d at p. 888; 9 Witkin, Cal. Procedure (2002 supp.) Appeal, § 319, p. 87; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571[38 Cal.Rptr.2d 139, 888 P.2d 1268].)

II. *Elements of an Easement by Way of Necessity*

(3) The circumstances for the creation of an easement by necessity in California are well known: "An easement by way of necessity arises by operation of law when it is established that (1) there is a strict necessity for the right-of-way, as when the claimant's property is landlocked and (2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity." (*Moores, supra,* 38 Cal.App.4th at p. 1049; accord, *Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 205-206[249 Cal.Rptr. 743](*Roemer*);*Daywalt v. Walker* (1963) 217 Cal.App.2d 669, 672[31 Cal.Rptr. 899](*Daywalt*);*Reese v. Borghi* (1963) 216 Cal.App.2d 324, 332-333[30 Cal.Rptr. 868](*Reese*).)

A way of necessity " 'is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. *Thus, the legal basis of a way of necessity is the presumption of a grant arising from the circumstances of the case. This presumption of a grant, however, is one of fact, and whether a grant should be implied depends upon the terms of the deed and the facts in each particular case.*' " (***804***Daywalt, supra,* 217 Cal.App.2d at pp. 672-673, italics added by *Daywalt*, citing 17A Am.Jur. (1957) Easements, § 58, pp. 668-669.)

Hence, the law " 'never imposes ... an easement by necessity contrary to the express intent of the parties' " since it is based on an inferred intent arising from the strict necessity of access for the conveyed property. (*Daywalt, supra,* 217 Cal.App.2d at p. 673.)

In addition, "[a way of necessity], having been created by the necessity for its use, cannot be extinguished so long as the necessity exists." (*Blum v. Weston* (1894) 102 Cal. 362, 369[36 P. 778].) An easement by necessity may persist even though the original grantor and grantee no longer own the properties in question: An "easement of necessity may be asserted by *remote grantees* in the chain of title long after the easement was created by the original common grantor, despite the failure of a prior grantee to exercise the right; and the 5-year statute of limitations on quiet title actions [Code Civ. Proc., §] 318) does not apply." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 459, p. 637, citing *Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 700-701[197 Cal.Rptr. 137](*Lichty*).)

However, " 'a right of way of necessity ceases when the owner of the way acquires a new means of access to his estate, as where he acquires other property of his own over which he may pass, or where a public way is laid out which affords access to his premises; and the fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases to be absolutely necessary.' " (*Daywalt, supra,* 217 Cal.App.2d at pp. 676-677; accord, *Moores, supra,* 38 Cal.App.4th at p. 1051.)But the burden of proof that an easement by way of necessity has ceased is on the party opposing the easement "to show by acceptable evidence that a new right of way was in fact made available to the plaintiff." (*Daywalt, supra,* 217 Cal.App.2d at p. 677.)

(4a) We now turn to whether the two elements of an easement by way of necessity-(1) a strict necessity for the right-of-way, and (2) common ownership of the servient and dominant tenements at the time of the conveyance giving rise to the necessity-were satisfied here.

III. *The Element of Common Ownership*

As noted, one of the elements of an easement by way of necessity is that the dominant and servient tenements were under the same ownership at the time of the conveyance that gave rise to the necessity. (*Moores, supra,* 38 Cal.App.4th at p. 1049.)***805**

In this case, the trial court found that the common ownership condition was not satisfied, because the original owner of the properties in question was the federal government. Relying on *Bully Hill, supra,* 4 Cal.App. at page 183, the trial court ruled that "[o]riginal ownership by the United States does not constitute the necessary unity of ownership to support an easement by ... necessity."

In *Bully Hill*, the defendants claimed an easement by necessity for a three-mile wagon road that crossed the plaintiff's land. Although that road was the only manner by which the defendants could reach, by team or wagon, their hotel from any public road (*Bully Hill, supra,* 4 Cal.App. at p. 182), the Court of Appeal stated that "this is far from saying that another road to the mines and buildings cannot be constructed over said defendant[s]' lands." (*Id.* at p. 183.)Because the defendants did not show "the vital fact that there [was] no other way to reach the lands or property of defendants" (*ibid.*), the appellate court in *Bully Hill* refused to sustain the defendants' claim of an easement by necessity. It concluded: "[T]he facts essential to the existence of a way of necessity were not established by the evidence or found by the court. 'The right of way from necessity must be in fact what the term naturally imports and cannot exist except in cases of strict necessity. It will not exist when a man can get to his property over his own land. That the way over his own land is too steep or too narrow or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way.' [Citation.]" (*Ibid.*)

However, the court in *Bully Hill* also noted that "[t]here is nothing in this record to show that the relation of grantor and grantee ever existed between the plaintiff and any of the defendants. The mere fact that all of the land was originally part of the public domain and hence owned by a common grantor, cannot confer the peculiar right out of which a way of necessity arises. If, however, it be fully conceded that all other basic facts essential to a way from necessity existed, the vital fact that there is no other way to reach the lands or property of defendants is lacking." (*Bully Hill, supra,* 4 Cal.App. at p. 183.)

In this case, the trial court and the Garcias rely on the *Bully Hill* court's statement that "[t]he mere fact that all of the land was originally part of the public domain and hence owned by a common grantor, cannot confer the peculiar right out of which a way of necessity arises" (*Bully Hill, supra,* 4 Cal.App. at p. 183) to bar an easement by way of necessity here. ***806**

But *Bully Hill* did not cite any authority for that proposition. Nor did it rely on that statement to reject defendants' claim of an easement by necessity. Instead, it focused on defendants' failure to establish strict necessity, namely, that there was no other way to reach defendants' hotel.

Moreover, *Bully Hill* is in conflict with the current trend in the law and recent California case law.

In *Moores, supra,* 38 Cal.App.4th 1046, the California Court of Appeal for the First Appellate

District reached the opposite conclusion from that suggested in *Bully Hill* (although it did not discuss that case specifically). Mr. and Mrs. Moores (the Mooreses) claimed an easement by necessity to cross property owned by William Walsh, which easement was necessary to reach Highway 1 from their property. (*Id.* at p. 1048.)Evidence was presented that the federal government had once owned both properties.(*Ibid.*) The parcel now owned by the Mooreses had been previously conveyed by the federal government to the State of California as a "school lands" grant in 1873, which had left it landlocked on all sides by federal land. (*Ibid.*) The state had subsequently transferred the land to the Regents of the University of California, who had sold it to the Mooreses. (*Ibid.*) The Walsh property consisted of parcels which the federal government had transferred to private owners. (*Ibid.*) After a court trial, judgment was entered for Walsh.(*Ibid.*)

In analyzing the Mooreses' claim that an easement by necessity existed, the appellate court ruled that an easement by way of necessity may arise from lands owned by the federal government. But it concluded that "because the State of California and later [t]he Regents had the power of eminent domain there was no strict necessity for an easement over the Walsh parcel." (*Moores, supra,* 38 Cal.App.4th at p. 1050.)In coming to the conclusion that the power of eminent domain allowed the state to create its own access, it addressed Walsh's contention that "common ownership must be by other than the federal government in order to satisfy the [other] prong of the easement by necessity test" (*id.* at p. 1049, fn. 1), which would have avoided the need to reach the issue of necessity. The court ruled: "More recent cases ... make it clear that this is not the case. [Citation.] An easement by necessity may exist across lands owned by the federal government. [Citation.]" (*Ibid.*)

In reaching this conclusion, the *Moores* court cited two federal cases that found that an easement by necessity could arise where the federal government conveyed a property landlocked by other federal land: *State of Utah v. Andrus* (D. Utah 1979) 486 F.Supp. 995, 1002, and *Kinscherff v. United States* (10th Cir. 1978) 586 F.2d 159, 161.***807**

Moreover, numerous other cases share that view. (See Bruce & Ely, The Law of Easements and Licenses in Land (2001) Creation of Easements by Implication, ch. 4, § 4:7, pp. 4-19 to 4-20, fn. 25 (hereinafter Bruce & Ely), collecting cases.)

Commentators have likewise concluded that the federal government should be treated the same as a private common owner: "Such an approach is consistent with both theories underlying the easement-of-necessity concept. It furthers the public policy of promoting productive use of land and also is in harmony with the presumption that the parties intended to grant or to reserve an easement to benefit the landlocked parcel." (See Bruce & Ely, *supra,* § 4:7, pp. 4-19 to 4-20; 4 Powell on Real Property (2001) Easements and Licenses, § 34.07 [4], pp. 34-59 to 34-60 [cases permitting easements by necessity over federal land represent the "wiser holding" because the "public policy favoring land utilization applies to cases where ownership was in the state as well as where the original unity was in a private person"]; Tiffany, The Law of Real Property (3d ed. 1939) § 793, p. 290 [it is not clear "why a conveyance by the government should be subject to a different rule ... from a conveyance by a private individual" when, inter alia, "the same considerations of public policy in favor of utilization of the land apply in both cases"].)

We agree. Since an easement by way of necessity is based on the presumption that a conveyance seeks to transfer " 'whatever is necessary for the beneficial use of that property' " (*Daywalt, supra,* 217 Cal.App.2d at p. 673), there is absolutely no reason to impute a different intention to the federal government when conveying western lands (failing an expression of intent to the contrary). After all, particularly in the 19th century-when the West was being settled-the federal government had no reason to render the land it conveyed unfit for occupancy or cultivation. Quite the opposite. "During most of the 19th century, our public land policy was basically one of disposal [of lands owned by the United States] into non-Federal ownership to encourage settlement and development of the country. Those lands most favorably situated for mineral development, agriculture, and townsites were settled first." (U.S. Public Land Law Review Com., One Third of the Nation's Land, A Report to the President and to the Congress (1970) p. 28; see also Yale, Legal Titles to Mining Claims and Water Rights, in California, Under the Mining Law of Congress, of July, 1866 (1867) pp. iv-v, 10-13.) Indeed, California case law recognizes that the

doctrine of easements by necessity "*is* founded upon the salutary policy against permitting land to remain in perpetual idleness." (*Roemer, supra,* 203 Cal.App.3d at p. 207, original italics; *Lichty, supra,* 149 Cal.App.3d at p. 703;*Reese, supra,* 216 Cal.App.2d at p. 331;*Daywalt, supra,* 217 Cal.App.2d at p. 672.)Accordingly, looking at both the rationale underlying the doctrine of easement ***808** by necessity and the general purposes of federal conveyances in the 19th century, no reason exists why the conveyance by the federal government in this case should not be given the same presumption afforded other parties, namely, that a conveyance includes whatever is *necessary* for the beneficial use of the land. (See *Daywalt, supra,* 217 Cal.App.2d at pp. 672-673.)

Indeed, the trial court in this case found that "the CHINO QUARTZ mine was in active production after the grant from the UNITED STATES OF AMERICA and prior to 1944." It would make no sense that the federal government would convey title to an active mine to a private party without intending to give the new owner access to the property.

Thus, we agree with the commentators and the Court of Appeal in *Moores* that common ownership by the federal government satisfies the requirement of common ownership under the doctrine of easements by necessity. Neither the public policy nor rationale underlying easements by necessity is served by the creation of a categorical exception for the federal government. [FN5]

> FN5 The opposing concern is that an easement by necessity over former federal land "would permit every remote grantee of a portion of the public domain to have an easement by way of necessity over surrounding lands. This argument overlooks the special terminability aspect of easements by necessity upon a change of circumstances. The changed circumstances effectively eliminate the necessity." (4 Powell on Real Property, *supra,* Easements and Licenses, § 34.07[4], p. 34-60, fns. omitted.)

IV. *Application of the Common Ownership Requirement*

This does not quite end our consideration of the matter, however. We must now determine whether the federal government owned all the surrounding land at the time that the Chino Quartz Mine was conveyed such that it gave rise to a strict necessity for a right-of-way. As mentioned, the trial court found that "[n]o evidence was presented as to whether the United States of America[] was the common owner of all of the land between the CHINO QUARTZ MINE parcel and the land where JURS ROAD is now located at the time said mine was granted to F. NOVELLA."

The parties agree, however, that this finding is not supported by substantial evidence and that the federal government was the common owner of all the land in 1878. Indeed, the trial court's finding is seemingly inconsistent with its other finding that "*[a]part from the original public ownership by the UNITED STATES,* no evidence was presented to show that there was any common ownership of the parcels of real property owned by the plaintiffs and the parcels of real property owned by defendants WALSH, STONE[,] and GARCIA." (Italics added.) And the Garcias concede in their brief that "[t]he CHINO QUARTZ MINE was originally granted to F. NOVELLA by ***809** the UNITED STATES government by patent in 1878. At that time, all of the surrounding land, including the land owned at trial by all of the parties[,] was owned by the UNITED STATES government."

And there was substantial evidence that the federal government owned all the land between the Chino Quartz Mine and Jurs Road in 1878. Frank Harrison, a title investigator who had researched the chain of title of the Kellogg, Walsh, Stone, and Garcia properties, testified that in 1878 "the property now owned by Garcia, now owned by Stone, now owned by Walsh, was still all owned by the United States Government." Harrison further agreed that at the time, any roads that existed in the area, "for instance, from Jurs Road ... currently going through the Garcia property, through the Stone property, through the Walsh property, would have been on United States Government land." Harrison also testified that prior to the 1957 patent, the Wild Rose Mine "was held in the name of the United States Government," and this property surrounded the Chino Quartz Mine.

Accordingly, substantial evidence supports the

parties' concession that the land between the Chino Quartz Mine and Jurs Road was owned by the federal government at the time of the 1878 patent. The court's contrary finding is simply not supported by substantial evidence.

Hence, we conclude that the court erred in its finding that the United States was not the common owner of all the relevant parcels in 1878 and in its ruling that the Kelloggs could not make out a claim of an easement by necessity based on the federal government's original common ownership of the Kelloggs' and the Garcias' land.

V. *Strict Necessity*

Nonetheless, to establish an easement by necessity, the Kelloggs also had to show that a strict necessity for access existed at the time of the conveyance, i.e., that the property was landlocked. (*Daywalt, supra,* 217 Cal.App.2d at p. 672;*Lichty, supra,* 149 Cal.App.3d at p. 699;*Roemer, supra,* 203 Cal.App.3d at p. 206;*Moores, supra,* 38 Cal.App.4th at p. 1049.)The court made no finding on that point.

However, we have already identified evidence in the record showing that the Chino Quartz Mine was landlocked by federal land after it was conveyed in 1878, and the Garcias do not contend otherwise, conceding that all of the surrounding land was owned by the federal government at the time of the 1878 patent. There was a strict necessity for a right-of-way.

At oral argument, however, the Garcias argued that the absence of any evidence that the north road existed or joined Jurs Road in 1878 precludes an easement by necessity. We reject this argument. ***810**

(5a) " '[A] way of necessity does not rest on a pre-existing use but on the need for a way across the granted or reserved premises.' " (*Reese, supra,* 216 Cal.App.2d at p. 331.) " '[A]t least in the absence of unusual circumstances, the *failure or delay of a grantee to assert or exercise a right of way by necessity* over his grantor's adjoining premises, where he cannot reach a highway from his property except over lands privately owned, *does not preclude him, or a remote grantee, from subsequently asserting such right.* The question has arisen most frequently where the original grantee failed to assert his right of way by necessity, and thereafter a remote grantee sought to exercise it.' " (*Lichty, supra,* 149 Cal.App.3d at p. 700, italics added by Lichty, quoting Annot. (1941) 133 A.L.R. 1393.)Because an easement by way of necessity is imputed on the basis of the presumption that a party conveys whatever is necessary for the property's beneficial use (*Daywalt, supra,* 217 Cal.App.2d at pp. 672-673) and is founded on the policy against permitting land "to remain in perpetual idleness" (*Lichty*, at p. 703), "*the right to a way of necessity may lie dormant through several transfers* of title and yet pass with each transfer as appurtenant to the dominant estate *and be exercised at any time by the holder of the title.* [Citation.]' " (*Id.* at p. 701, italics added by Lichty.)

Still, although a strict necessity at the time of conveyance can create an easement by way of necessity, it does not preserve it for all time. As noted earlier, an easement by necessity will exist only so long as the necessity exists. (*Lichty, supra,* 149 Cal.App.3d at p. 699;*Daywalt, supra,* 217 Cal.App.2d at pp. 676-677;*Moores, supra,* 38 Cal.App.4th at p. 1051.)

(4b) The evidence in the record here indicates that the Kelloggs had no access to a public road solely over their own land or over another's land through an alternative easement. They remained landlocked at the time of trial.

Admittedly, a map in the record appears to show that the Kelloggs' Wild Rose Mine property on its southern boundary came near Fay Street, located in the Lynn Park Acres subdivision. At trial, Dennis Wiebe, a land surveyor, initially testified that his examination of a subdivision map showed that the Kelloggs' property touched Fay Street and that a driveway could be constructed to the street. But Wiebe then testified that a county assessor's map showed a parcel *between* the Kelloggs' land and Fay Street. And he testified that Fay Street was located in Lynn Park Acres, a private subdivision, and that the Kelloggs would have to obtain an easement for a right of way across the subdivision's streets from the owners of the property along those streets, perhaps as many as 50 of them. Further, Wiebe testified that when he did a ***811** boundary survey for one of the property owners between the Kelloggs' property and Fay Street, he determined that "the existing road did

not go into the Kellogg property."

In sum, it was not established that the necessity for an easement no longer existed because of the availability of another route affording access from Fay Street to the property. To the contrary, the trial court held that there was insufficient evidence that the Kelloggs had an easement to Fay Street across the property of the Moores-a ruling not challenged on appeal.

(5b) The party proposing that strict necessity no longer exists bears the burden of proof on that issue (*Daywalt, supra,* 217 Cal.App.2d at p. 677)-a burden which none of the defendants carried. We also note that none of the defendants argued in their posttrial briefs that the necessity had ceased to exist, and the Garcias do not so contend on appeal.

(4c) Accordingly, the only reasonable conclusion that can be drawn from the evidence is that a strict necessity existed for a right-of-way: The Chino Quartz Mine was landlocked by federal land when conveyed by patent in 1878 and continued to be landlocked through trial.

VI. *Conclusion*

Since the Kelloggs' property was landlocked at the time it was conveyed to their predecessor-in-interest, and the dominant and servient tenements were under the same ownership at the time of the conveyance (that of the federal government), an easement by way of necessity arose. And since there was no evidence that the necessity ceased to exist, the Kelloggs are entitled to an easement by way of necessity through the existing roadway that crosses the Garcias' property so that they can access their landlocked property. Of course, if the Kelloggs' necessity ever ceases, the Garcias can seek relief from the easement.

*Disposition*

The judgment is reversed and the case remanded to the trial court with directions to enter judgment that the Kelloggs have an easement by necessity ***812** across the Garcias' property. The Kelloggs shall recover their costs on appeal. (Cal. Rules of Court, rule 26(a).) [FN6]

FN6 In light of our decision that the Kelloggs have an easement by necessity over the Garcias' property for access to Jurs Road, we decline to address their alternative theories in support of the same easement. If that necessity were ever to cease, it would only be because the Kelloggs have obtained an alternative route to their property.

Sims, Acting P. J., and Raye, J., concurred. ***813**

Cal.App.3.Dist.
Kellogg v. Garcia
102 Cal.App.4th 796, 125 Cal.Rptr.2d 817, 02 Cal. Daily Op. Serv. 10,146, 2002 Daily Journal D.A.R. 11,551

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Kinscherff v. U. S.
C.A.N.M.,1978.

United States Court of Appeals,Tenth Circuit.
John KINSCHERFF and Sunnyland Development Co., Inc., a New Mexico Corporation, Appellants,
v.
UNITED STATES of America, the State of New Mexico, the Pueblo of Santa Ana, Mark IV Enterprises, a New Mexico Corporation, E. M. Riebold and H. E. Leonard, Appellees.
**No. 77-1083.**

Argued Aug. 8, 1978.
Decided Nov. 1, 1978.

Property owners brought quiet title action seeking declaratory relief and damages against the United States and others, and claiming right to use road. The United States District Court for the District of New Mexico, H. Vearle Payne, J., dismissed cause, and property owners appealed. The Court of Appeals held that: (1) plaintiff's interest in public road would not be any more than any other member of public and as such did not constitute an "interest" under statute authorizing suits against United States in quiet title action to real property in which government claims an interest and which requires in part that plaintiff set forth nature of "interest" which plaintiff claims in real property, and (2) complaint stated cause of action as to existence of implied easement of necessity, its extent, or whether road was such an easement.

Set aside and remanded.

West Headnotes

**[1] United States 393 ⚿125(22)**

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(22) k. Property, Actions Relating to in General. Most Cited Cases
Interest of plaintiff in public road, if it existed, was vested in public generally, and thus, was not an "interest" in real property contemplated by statute permitting suits against United States in quiet title actions to real property, which statute required in part that the plaintiff set forth the nature of the "interest" which plaintiff claims in the real property. 28 U.S.C.A. § 2409a.

**[2] Quieting Title 318 ⚿10.2**

318 Quieting Title
318I Right of Action and Defenses
318k9 Title of Plaintiff
318k10.2 k. Sufficiency in General. Most Cited Cases
(Formerly 318k10(2))
Under New Mexico law, quiet title action may be brought by anyone claiming some interest in title to real property.

**[3] Quieting Title 318 ⚿10.2**

318 Quieting Title
318I Right of Action and Defenses
318k9 Title of Plaintiff
318k10.2 k. Sufficiency in General. Most Cited Cases
(Formerly 318k10(2))
Members of public as such do not have a "title" in public roads, for purposes of maintaining quiet title actions. 1953 N.M.Comp. §§ 55-1-1 et seq., 55-1-5.

**[4] Quieting Title 318 ⚿2**

318 Quieting Title
318I Right of Action and Defenses
318k2 k. Property Subject of Action. Most Cited Cases
Easements are real property interests subject to quiet title actions. 28 U.S.C.A. § 2409a.

**[5] Public Lands 317 ⚿114(3)**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(J) Patents
317k114 Construction and Operation in

General

317k114(3) k. Property Included. Most Cited Cases

While nothing ordinarily passes by implication in a patent, implied easement may arise within scope of patent.

**[6] Easements 141 ⚿61(8)**

141 Easements

141II Extent of Right, Use, and Obstruction

141k61 Actions for Establishment and Protection of Easements

141k61(8) k. Pleading. Most Cited Cases

In action to quiet title to road built by United States, complaint stated claim as to existence of implied easement of necessity, its extent, and whether subject road was such an easement. 28 U.S.C.A. § 2409a.

**[7] Limitation of Actions 241 ⚿180(7)**

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k180 Demurrer, Exception, or Motion Raising Defense

241k180(7) k. Motion. Most Cited Cases

In action to quiet title wherein plaintiffs claimed title by virtue of implied easement by necessity, as successors in interest to grantee of United States by patent, pleadings raised mixed question of law and fact, precluding dismissal on limitations grounds, as to whether patentee or successor in interest knew or should have known of United States' claim of no easement or limited easement over subject property. 28 U.S.C.A. § 2409a.

***159** Hartley B. Wess, Miller & Melton, Ltd., Albuquerque, N. M. (Robert E. Melton, Miller & Melton, Ltd., Albuquerque, N. M., with him on the brief), for appellants.

Carl Strass, Atty., Dept. of Justice, Washington, D. C. (James W. Moorman, Acting Asst. Atty. Gen., Edmund B. Clark, James ***160** R. Arnold, and Larry A. Boggs, Attys., Dept. of Justice, Washington, D. C., with him on the brief), for appellees, United States and the Pueblo of Santa Ana.

Richard L. Russell, Chief Counsel, State Highway Dept., Santa Fe, N. M. (Toney Anaya, Atty. Gen. of New Mexico, and Henry Rothschild, Deputy Chief Counsel, State Highway Dept., Santa Fe, N. M., with him on the brief), for appellee, State of New Mexico.

Before SETH, Chief Judge, and BARRETT and LOGAN, Circuit Judges.

PER CURIAM.

This is a quiet title action under 28 U.S.C. s 2409a, seeking declaratory relief and damages against the United States and others. The complaint alleges that the United States had built a road on its land to reach a dam site, and that it continues to control the use of this road. The road is asserted to be the only access plaintiffs have to their property. Plaintiffs are seeking to develop their land, but the United States would not let them use the road, which is adjacent to the property, to bring in equipment, machinery, or material.

Plaintiffs seek to establish a right to use the road for all purposes as members of the public, and also as a way of necessity. The land of plaintiffs was patented to their predecessors in interest.

The trial court dismissed as to the defendant, State of New Mexico, as to the Pueblo of Santa Ana, and as to several individuals who were residents of New Mexico. Subsequently the court also dismissed the cause as to the United States for failure to state a cause of action under 28 U.S.C. s 2409a, and this appeal was taken.

[1] On this appeal the plaintiffs argue that this is properly an action to quiet title. The statute, 28 U.S.C. s 2409a, in permitting suits against the United States in quiet title actions to real property in which the Government claims an interest, requires in part that the plaintiff " . . . set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was required, and the right, title, or interest claimed by the United States."28 U.S.C. s 2409a(c). Thus plaintiffs assert that they have a real property interest in the Jemez Dam Road as members of the public entitled to use public roads pursuant to N.M.S.A. s 55-1-1 Et seq. (1953 Comp.), and as an owner of land abutting a public highway, and under 43 U.S.C. s 932. This "interest" in plaintiffs, we must hold, is not an interest in real property contemplated by 28 U.S.C. s 2409a. If it exists, it is vested in the public generally. The legislative history of section 2409a refers to the historical development of Quia timet suits in the courts of equity in England, and to

quiet title suits as developed in this country. U.S.Code Cong. & Admin.News, 1972, Vol. 3, p. 4547. It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case law.

[2] The plaintiffs, on this point, do not assert that their interest is an easement or any similar right; instead, as mentioned above, the right is claimed by them as members of the public. The substantive law in New Mexico for quiet title actions refutes the notion that the public has a real property interest in public roads. A quiet title action may be brought by anyone claiming an interest in the real property.Marquez v. Maxwell Land Grant Co., 12 N.M. 445, 78 P. 40. The interest, however, must be some interest in the title to the property.Rock Island Oil & Refining Co. v. Simmons, 73 N.M. 142, 386 P.2d 239. An attempt to remove a cloud from title presupposes that the plaintiff has some title to defend.Weathers v. Salman, 86 N.M. 203, 521 P.2d 1152.

[3] Members of the public as such do not have a "title" in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road. Plaintiffs*161 argue also that the general provisions for highways, N.M.S.A. s 55-1-1 Et seq. (1953 Comp.), confer on the public a real property interest in public roads. Plaintiffs misconstrue the statute because it does no more than define public highways, determine maintenance responsibility, and provide an administrative process for abandoning public roads. Indeed, section 55-1-5 provides that rights of way vest in the State of New Mexico after a state highway has been open to the public for one year.

Thus the "interest" plaintiffs seek to assert as part of the public is not of such a nature to enable them to bring a suit to quiet title.

[4] Plaintiffs also claim an interest by virtue of an implied easement of necessity, as successor in interest to a grantee of the United States by patent in 1936. Easements are real property interests subject to quiet title actions. The legislative history of 28 U.S.C. s 2409a indicates that Congress intended easements to be included in the real property rights adjudicated in a quiet title action. The House Report states: "The quieting of title where the plaintiff claims an estate less than a fee simple an easement or the title to minerals is likewise included in the terms of the proposed statute."H.R.Rep.No. 92-1559, 92d Cong., 2d Sess. reprinted in (1972) U.S.Code Cong. & Admin.News 4552.

[5] An easement of necessity for some purposes could possibly have arisen when the United States granted the patent to plaintiffs' predecessor in interest. The complaint so asserts. While nothing ordinarily passes by implication in a patent, Walton v. United States, 415 F.2d 121 (10th Cir.), an implied easement may arise within the scope of the patent.Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir.). In Superior Oil, which involved an alleged implied right of access over a road on Hopi land to the plaintiff's leasehold, the court stated: "The scope and extent of the right of access depends . . . upon what must, under the circumstances, be attributed to the grantor either by implication of intent or by operation of law founded in a public policy favoring land utilization," (citing 2 Thompson, Real Property, s 362).353 F.2d at 36. In United States v. Dunn, 478 F.2d 443 (9th Cir.), the court held that defendants were entitled to a hearing to determine whether their patent included an implied easement to construct an access road across federal land.

[6] With the dismissal on motion the issues as to the existence of an implied easement of necessity, its extent, or whether this road is such an easement, were not considered. These are each mixed issues of fact and law. The allegations in the complaint adequately raised the claim of easement of necessity in the lands of the United States, and an easement of such nature is an interest which can be properly raised in a quiet title action under 28 U.S.C. s 2409a. The facts thus must be developed. We, of course, express no opinion as to whether such an easement here exists, nor its extent.

[7] Similarly, the limitation issue is a mixed question of fact and law as to whether the patentee or a successor in interest knew or should have known of the Government's claim of no easement or of a limited easement. Again we express no opinion as to such limitation period, and the facts pertinent to the commencement of the limitation period must be

developed.

Thus by reason of the factual issues raised, but not before the trial court, as to the easement and the period of limitation, the case must be remanded.

We find no error as to the dismissal of the several defendants nor in the way it was done. The plaintiffs had adequate opportunity at the hearing to set aside the orders to present their position.

The order of dismissal is set aside, and the case is remanded for further proceedings.

C.A.N.M.,1978.
Kinscherff v. U.S.
586 F.2d 159

END OF DOCUMENT

State of Utah v. Andrus
D.C.Utah, 1979.

United States District Court, D. Utah, Central Division.
The STATE OF UTAH, by and through its Division of State Lands, Plaintiff,
v.
Cecil D. ANDRUS, Individually and as Secretary of the United States Department of the Interior; Frank Gregg, Individually and as Director of the Bureau of Land Management within the Department of the Interior; William Whalen, Individually and as Director of the National Park Service within the Department of the Interior; Robert S. Bergland, Individually and as Secretary of the United States Department of Agriculture; and John McGuire, Chief of the Forest Service within the Department of Agriculture, Defendants.
UNITED STATES of America, Plaintiff,
v.
COTTER CORPORATION, a subsidiary of Commonwealth Edison, Defendant.
STATE of UTAH, by and through its Division of State Lands, Defendant-in-Intervention.
**Nos. C 79-0037, C 79-0307.**

Oct. 1, 1979.

United States filed suit seeking a temporary restraining order to prevent lessee of state school trust lands, encircled by federal land, from engaging in any construction, road building, leveling land, or destroying primitive, scenic and wildlife characteristics on the federal land. State of Utah, which intervened as a party defendant, filed an answer and counterclaim alleging that, by denying its lessee access to the school trust lands, the United States violated a compact with the state and interfered with its right to fully utilize the school trust land. The District Court, Aldon J. Anderson, Chief Judge, held, inter alia, that: (1) Utah has the right of access to state school trust lands, which right is subject to federal regulation when its exercise requires the crossing of federal property; however, such regulation cannot prohibit access or be so restrictive as to make economic development competitively unprofitable; furthermore, the Bureau of Land Management may regulate federal public lands so as to prevent impairment of wilderness characteristics, but such authority is subject to uses which were existing on October 21, 1976, the date Federal Land Policy Management Act was enacted, and (2) lessee's right to gain access was not an existing use on the date of enactment of the Federal Land Policy Management Act and, therefore, the lessee's activity could be regulated so as to prevent wilderness impairment, but such regulation could not be so restrictive as to constitute a taking.

Orders in accordance with opinion.

West Headnotes

**[1] Public Lands 317 ⚷42**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(C) Donations and Bounty Lands
317k42 k. Grants by Congress in General. Most Cited Cases

**Public Lands 317 ⚷51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
Generally, land grants by the federal government are construed strictly, and nothing is held to pass to the grantee except that which is specifically delineated in the instrument of conveyance; however, legislation dealing with school trust land has always been liberally construed.

**[2] Public Lands 317 ⚷51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant

to State in General. Most Cited Cases
One of Congress' primary purposes in enacting the state school land grant legislation was to place the states on an "equal footing" with the original 13 colonies and to enable the state to produce a fund, accumulated by sale and use of the trust lands, with which the state could support the common schools.

**[3] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
Given the rule of liberal construction of legislation dealing with school trust land and given the congressional intent of enabling the state to use school lands as a means of generating revenue, Congress must have intended that the state of Utah, or its lessees, have access to school lands encircled by federal land. Act July 16, 1894, 28 Stat. 107.

***[4] Deeds 120 ⚿118***

120 Deeds
120III Construction and Operation
120III(B) Property Conveyed
120k118 k. Evidence. Most Cited Cases
Under the common law, it was assumed that a grantor intended to include in the conveyance whatever was necessary for the use and enjoyment of the land.

**[5] Easements 141 ⚿16**

141 Easements
141I Creation, Existence, and Termination
141k15 *Implication*
141k16 k. Severance of Ownership of Dominant and Servient Tenements. Most Cited Cases

**Easements 141 ⚿18(2)**

141 Easements
141I Creation, Existence, and Termination
141k15 Implication
141k18 Ways of Necessity
141k18(2) k. Grant of Tract Partly or Entirely Surrounded by Grantor's Land. Most Cited Cases
When a grantor conveys only a portion of his land, and the land received by the grantee is surrounded by what the grantor has retained, it is generally held that the grantee has an easement of access, either by implication or necessity, across the grantor's land.

**[6] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
State of Utah and its lessee had a right to cross federal land, encircling state school trust land, to reach the school land.

**[7] Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) *Proceedings in Land Office*
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Only by looking at the overall use of the public lands can one accurately assess whether or not the Bureau of Land Management *is carrying out the broad* purposes of the Federal Land Policy and Management Act; if one's view is expanded to the complex entirety of land management decisions, then the statute is not necessarily internally inconsistent. Federal Land Policy and Management Act of 1976, § 102(a)(8, 12), 43 U.S.C.A. § 1701(a)(8, 12).

**[8] Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Bureau of Land Management is not required to immediately balance the mineral values against the wilderness values of a particular piece of land prior to *designating the land a wilderness study area; the* BLM may, consistent with the Federal Land Policy

and Management Act, look first at potential wilderness characteristics and then proceed to study the area for all its potential uses prior to formulating its final recommendations to the executive. Federal Land Policy and Management Act of 1976, § 603(a, c), 43 U.S.C.A. § 1782(a, c); Wilderness Act, § 2 et seq., 16 U.S.C.A. § 1131 et seq.

**[9] Statutes 361 ⚷219(1)**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
Generally, interpretation of a statute by those charged with its execution is entitled to great deference.

**[10] Environmental Law 149E ⚷44**

149E Environmental Law
149EII Land Use and Conservation
149Ek44 k. Forest and Wilderness Management. Most Cited Cases
(Formerly 199k25.5(9) Health and Environment)

**Public Lands 317 ⚷96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Under the terms of the Federal Land Policy and Management Act, the Bureau of Land Management has authority to manage public lands so as to prevent impairment of wilderness characteristics, unless those lands are subject to an existing use; in the latter case, BLM may regulate so as to prevent unnecessary or undue degradation of the environment. Federal Land Policy and Management Act of 1976, § 603(c), 43 U.S.C.A. § 1782(c).

**[11] Public Lands 317 ⚷96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Under provision of the Federal Land Policy and Management Act requiring the Bureau of Land Management, during the period of wilderness review, to manage the public land "in a manner so as not to impair the suitability of such areas for preservation as wilderness * * *," the mandate that existing uses continue in the "same manner and degree" as being conducted on October 21, 1976, the date of the Act's enactment, refers to activity that was actually taking place on that date; when the statute refers to existing uses being carried out in the same manner and degree, it is referring to actual uses, not merely a statutory right to use. Federal Land Policy and Management Act of 1976, § 603(c), 43 U.S.C.A. § 1782(c).

**[12] Mines and Minerals 260 ⚷92.5(1)**

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.5 Federal Law and Regulations
260k92.5(1) k. In General. Most Cited Cases
(Formerly 260k92.5)
Provision of the Federal Land Policy and Management Act does amend the Mining Law of 1872 and subjects rights thereunder to the Bureau of Land Management's authority to regulate so as to prevent wilderness impairment. Federal Land Policy and Management Act of 1976, §§ 302(b), 603, 43 U.S.C.A. §§ 1732(b), 1782; 30 U.S.C.A. § 22.

**[13] Public Lands 317 ⚷96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Provision of the Federal Land Policy and Management Act does not mandate that the Bureau of Land Management allow all potential uses to take place on a particular portion of land regardless of wilderness characteristics. Federal Land Policy and Management Act of 1976, § 201, 43 U.S.C.A. §

1711.

**[14] Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Bureau of Land Management's authority is limited to preventing permanent impairment of potential wilderness values; although it is not explicitly provided for in the Federal Land Policy and Management Act, it is consistent with Congress' attempt to balance competing interests and with the Wilderness Act which provides the legislative backdrop for the relevant section of FLPMA to find that if a given activity will have only a temporary effect on wilderness characteristics and will not foreclose potential wilderness designation, then that activity should be allowed to proceed. Federal Land Policy and Management Act of 1976, § 603, 43 U.S.C.A. § 1782; Wilderness Act, § 2 et seq., 16 U.S.C.A. § 1131 et seq.

**[15] Environmental Law 149E ⚿44**

149E Environmental Law
149EII Land Use and Conservation
149Ek44 k. Forest and Wilderness Management. Most Cited Cases
(Formerly 199k25.5(4) Health and Environment)
Definition of wilderness provided for in the Wilderness Act and incorporated by reference into the Federal Land Policy and Management Act contemplates that some human activity can take place in wilderness areas as long as the area generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable. Federal Land Policy and Management Act of 1976, § 603(a), 43 U.S.C.A. § 1782(a); Wilderness Act, § 2(c), 16 U.S.C.A. § 1131(c).

**[16] Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Bureau of Land Management is authorized under the Federal Land Policy and Management Act to manage public lands "by regulation or otherwise"; thus, the agency's authority is not dependent on the issuance of formal regulations. Federal Land Policy and Management Act of 1976, §§ 302(b), 603(c), 43 U.S.C.A. §§ 1732(b), 1782(c).

**[17] Administrative Law and Procedure 15A ⚿229**

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
There is an exception to the doctrine of exhaustion when it appears that efforts to find relief within the agency would be futile.

**[18] Public Lands 317 ⚿55**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k55 k. Leases by State. Most Cited Cases
Lessee of state school trust lands, against whom the United States filed suit seeking a temporary restraining order to prevent the lessee from engaging in any road building or destroying wildlife characteristics on federal land encircling the school land, would not be required, before seeking relief from the court to first "exhaust its administrative remedies" by applying for a right-of-way, having such right-of-way denied, and appealing to the Interior Department's system of land board review, since there was little chance that the agency would do anything but deny the lessee's application, and the court would not require the lessee to engage in a useless exercise.

**[19] Public Lands 317 ⚿55**

317 Public Lands
317II Survey and Disposal of Lands of United

States
317II(E) School and University Lands
317k55 k. Leases by State. Most Cited Cases
Doctrine of primary jurisdiction was inapplicable to suit brought by the United States against lessee of state school trust lands, seeking a temporary restraining order to prevent the lessee from engaging in "any construction, road building, leveling land, or destroying primitive, scenic and wildlife characteristics" on federal land encircling the school lands.

**[20] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
State had to be allowed access to state school trust lands, encircled by federal lands, so that those state lands could be developed in a manner that would provide funds for the common schools.

**[21] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
Because it was the intent of Congress to provide school trust lands to the state of Utah so that the state could use them to raise revenue, the access rights of the state to said lands, which were encircled by federally owned land, could not be so restricted as to destroy the economic value of the school trust lands; that is, the state had to be allowed access which was not so narrowly restrictive as to render the lands incapable of their full economic development. Act July 16, 1894, 28 Stat. 107.

**[22] Public Lands 317 ⚿7**

317 Public Lands
317I Government Ownership
317k7 k. Governmental Authority and Control. Most Cited Cases

**Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Under the Constitution, Congress has the authority and responsibility to manage federal lands, and through statute, Congress has delegated this authority to agencies such as the Bureau of Land Management. U.S.C.A.Const. art. 4, § 3, cl. 2.

**[23] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
Nothing in the school land grant program indicates that, when Congress developed the school land grant scheme, it intended to abrogate its right to control activity on federal land. U.S.C.A.Const. art. 4, § 3, cl. 2.

**[24] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases
As regards state school trust land encircled by federally owned land, it is consistent with common-law property principles to find that the United States, as the holder of the servient tenement, has the right to limit the location and use of the state's easement of access to that which is necessary for the state's reasonable enjoyment of its right.

**[25] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United

States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases

**Public Lands 317 ⚿55**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k55 k. Leases by State. Most Cited Cases
Although the state of Utah or its lessee must be allowed access to state school trust lands encircled by federal land, the United States may regulate the manner of access under statutes such as the Federal Land Policy and Management Act. Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.

**[26] Statutes 361 ⚿223.4**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 k. General and Special Statutes. Most Cited Cases
Under statutory rules of construction, when "special acts" conflict with acts that deal with the same subject matter in a more general way, the special acts are to prevail, regardless of whether the special acts were passed prior to or after the general act; but this rule does not apply if there is some indication that Congress intended to modify the special act.

**[27] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases

**Public Lands 317 ⚿55**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k55 k. Leases by State. Most Cited Cases
Bureau of Land Management can regulate the method and route of access to state school trust lands encircled by federal land, and this regulation may be done with a view toward preventing impairment of wilderness characteristics, assuming no existing use; however, the regulation may not prevent the state or its lessee from gaining access to its land, nor may it be so prohibitively restrictive as to render the land incapable of full economic development.

**[28] Eminent Domain 148 ⚿2.1**

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
While a government can regulate without engaging in a taking, regulation that reaches the point of seriously impinging on "investment-backed expectations" can constitute a taking.

**[29] Public Lands 317 ⚿51**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 k. Effect of Reservation and Grant to State in General. Most Cited Cases

**Public Lands 317 ⚿96**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(I) Proceedings in Land Office
317k96 k. Authority and Duties of Officers in General. Most Cited Cases
Utah has the right of access to state school trust lands, which right is subject to federal regulation when its exercise requires the crossing of federal property; however, such regulation cannot prohibit access or be so restrictive as to make economic

development competitively unprofitable; furthermore, the Bureau of Land Management may regulate federal public lands so as to prevent impairment of wilderness characteristics, but such authority is subject to uses which were existing on October 21, 1976, the date Federal Land Policy and Management Act was enacted. Act July 16, 1894, 28 Stat. 107; Const.Utah art. 10, §§ 3, 7; Federal Land Policy and Management Act of 1976, § 603(a), 43 U.S.C.A. § 1711(a); Wilderness Act, § 2 et seq., 16 U.S.C.A. § 1131 et seq.

**[30] Public Lands 317 ⚿55**

317 Public Lands
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k55 k. Leases by State. Most Cited Cases

In respect to state school trust lands encircled by federal land, state lessee's right to gain access was not an existing use on October 21, 1976, the date of enactment of the Federal Land Policy and Management Act and, therefore, the lessee's activity could be regulated so as to prevent wilderness impairment, but such regulation could not be so restrictive as to constitute a taking. Act July 16, 1894, 28 Stat. 107; Const.Utah art. 10, §§ 3, 7; Federal Land Policy and Management Act of 1976, § 603(a), 43 U.S.C.A. § 1711(a); Wilderness Act, § 2 et seq., 16 U.S.C.A. § 1131 et seq.

*999 Robert B. Hansen, Atty. Gen., Richard L. Dewsnup, Dallin W. Jensen, Asst. Attys. Gen., Salt Lake City, Utah, for plaintiff.
Ronald L. Rencher, U. S. Atty., and James R. Holbrook, Asst. U. S. Atty., Salt Lake City, Utah, for defendant United States of America.
Dale A. Kimball, Martineau, Rooker, Larsen & Kimball, Salt Lake City, Utah, and John D. Havens, Lakewood, Colo., for defendant Cotter Corp.
Kea Bardeen, and James G. Watt, Denver, Colo., for amicus curiae Mountain States Legal Foundation, Utah Mining Association, Independent Petroleum Association of the Mountain States, and Independent Petroleum Association of America.
Mary Jane Due, Washington, D. C., for amicus curiae American Mining Congress.

MEMORANDUM OPINION, DECREE AND INJUNCTION

(In Lieu of Findings of Fact, Conclusions of Law, and Order, under Rule 52, F.R.C.P.)

ALDON J. ANDERSON, Chief Judge.
This is a case of first impression involving important questions concerning the administration and use of public lands. Plaintiff, the United States, filed suit on May 25, 1979, seeking a temporary restraining order to prevent Cotter Corporation (hereinafter Cotter) from engaging in "any construction, road building, leveling land, or destroying primitive, scenic and wildlife characteristics" on certain federal land. The court granted the order.[FN1]

FN1. On June 1, 1979, Cotter filed a motion for dissolution of the restraining order claiming that the proposed road was necessary to gain access to mineral leases on a section of state school land and would not cause permanent damage. Argument was heard and the motion was denied. On June 4, 1979, the court extended the temporary restraining order until June 15 when argument could be heard on the motion for preliminary injunction.

The State of Utah moved to intervene as a party defendant. It was unopposed and the motion was granted by the court. Thereafter, Utah filed an answer to the complaint and a counterclaim, alleging that by denying Utah's lessee (Cotter) access to certain state school trust land (section 36) the United States violated a compact with the state and interfered with its right to fully utilize the school trust land. This was followed with a motion for summary judgment. On June 6, 1979, the state filed a motion to consolidate this case with Utah v. Andrus, C 79-0037, (D.Utah, filed January 16, 1979). On finding that consolidation would serve the interests of judicial economy and would not prejudice the parties, the motion was granted.[FN2]

FN2. On June 15 oral argument was heard on all motions. At that time the parties agreed that if the court would hear arguments on a request for permanent injunction that neither the United States nor Cotter would take any further action with regard to the land in question. This included

agreement by the United States to withhold any decision on whether or not the area should be designated a wilderness study area.

On July 12, 1979, argument was heard on the request for permanent injunction and the matter was fully submitted, with final briefs filed thereafter.[FN3]The court has carefully considered the matters presented and is ready to rule.

FN3. Amicus Curiae briefs were submitted by the Mountain States Legal Foundation and the American Mining Congress.

FACTS

This case involves access to mining claims located on both federal and state land.[FN4]The state land is surrounded by land in ***1000** federal ownership and land access to section 36 is possible only by crossing federal property. The state land was granted to Utah by the United States under the Utah Enabling Act (Act of July 16, 1894, 28 Stat. 107). The major portion of the land in territorial Utah, at the time of statehood, was in federal ownership. In order to provide a tax base for the new state, the federal government granted to Utah certain sections of land in each township specifically, sections 2, 16, 32 and 36. But this grant was not unconditional nor was it a unilateral gift. In order to receive the grant, Utah, like other states, was required to use the proceeds of the granted lands for a permanent state school trust fund. Utah met all the conditions of the federal grant [FN5] and, upon statehood, received the sections of land.[FN6]

FN4. In Cotter's initial letter to the Bureau of Land Management informing the agency of its intent to commence road building, Cotter indicated that the purpose of the road was to gain access to the state school section. (Complaint, Exhibit A.) Cotter continued to assert this purpose in its motion to dissolve the temporary restraining order. Later in the proceedings, however, Cotter argued not only for its right of access to state school lands, but also to its federal mining claims. Therefore, the court has treated the case as if it involved both issues since both issues were subsequently argued by the parties.

FN5.Utah Const., Art. X, ss 3, 7.

FN6. For a more detailed history of the school land grant as it applied to Utah, see Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978), cert. granted, 442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 296 (1979).

As a result of the state school land grants, the pattern of property ownership in much of Utah represents a checkerboard, with sections of school trust land interspersed within federal land. Since nearly two-thirds of Utah's land is in federal ownership,[FN7] and since this land frequently surrounds state school sections, the question of access rights and activity on state school and federal land is of utmost importance to both Utah and the United States. In most situations, neither sovereign can take any action with regard to its land holding without impacting the other's land.

FN7. See One Third of the Nation's Land (Public Land Law Review Commission) at 23 (1970).

On October 21, 1976, the United States Congress passed the Federal Land Policy and Management Act (FLPMA) intended to provide, in part, a new statutory base for the Bureau of Land Management's (BLM) administration of the lands within its jurisdiction. Only a few are pertinent here. Under section 201(a) (43 U.S.C. s 1711(a) (Supp.1979)), the BLM [FN8] is directed to conduct an inventory of all BLM managed lands and their resource and other values. Under s 603(a) (43 U.S.C. s 1782(a) (Supp.1979)), BLM is directed to examine all roadless areas of 5000 acres or more which have been identified during the inventory process as having wilderness characteristics. Based on this review BLM is to recommend to the President whether or not each such area should be preserved as wilderness according to the provisions of the Wilderness Act (16 U.S.C. s 1131 et seq. (1974)). During this period of review BLM is to manage the lands so as to prevent impairment of wilderness characteristics and unnecessary and undue degradation of the environment. (Section 603(c), 43 U.S.C. s 1782(c) (Supp.1979)). It was against this historical and statutory backdrop that Cotter located its mining

claims and began building a road to gain access to those claims.

> FN8. The Act gives the Secretary of the Department of Interior authority to carry out its provisions. In fact this authority has been delegated to the Bureau of Land Management. For the sake of simplicity, the terms "Secretary" and "Bureau of Land Management" are used interchangeably.

Cotter Corporation is a uranium mining and exploration company wholly owned by Commonwealth Edison, a public utility serving Northern Illinois. (Affidavit of Erik Bruner, filed June 11, 1979.) Between January and June, 1976, Cotter acquired additional federal claims and the state mineral lease on section 36.(Id. ) The federal claims were located pursuant to the Mining Law of 1872 (30 U.S.C. s 22 et seq. ).

During that last six months of 1977, Cotter conducted drilling operations on federal land to the north and to the south of the lands at issue here. These operations indicated a "trend" of uranium ore between the two drilling points. Subsequent drilling operations confirmed the trend. In order to conduct these operations, Cotter constructed access roads (Bruner affidavit), but did not notify BLM of the construction activity. In June, 1978, Cotter began to construct a road across the lands in question here in order to further its exploratory drilling.

***1001** In the meantime, BLM proceeded with the inventory and wilderness area examination required by FLPMA. During the review, BLM identified a portion of roadless unit UT-05-236 as being appropriate for designation as a Wilderness Study Area (WSA).[FN9] The proposed study unit includes the lands in question here. In April, 1979, BLM published the proposed area in the Federal Register and has received public comment on the proposal (Affidavit of Donald C. Pendleton, filed May 25, 1979). As yet BLM has not finally decided to designate the area a formal WSA. The court is informed that in all likelihood the area will be so designated.[FN10]

> FN9. The BLM procedure for carrying out the wilderness review portions of FLPMA is as follows: First, the agency identifies roadless areas of 5000 acres or more which have wilderness characteristics. These areas are then designated Wilderness Study Areas (WSAs), and BLM studies each area to determine the suitability of the area for inclusion in the Wilderness System. At this point in its planning, BLM looks at all the potential uses of an area, including the potential for mineral development. After completion of this phase BLM reports to the President its recommendation as to each area's suitability (or lack thereof) for inclusion in the Wilderness System. The President then makes his recommendations to Congress, which makes the final determination.

> FN10. Memorandum Supplementing the Initial Memorandum In Support of Plaintiff's Motion for Preliminary Injunction and Opposing Utah's Motion for Summary Judgment, filed June 8, 1979, at 3.

When BLM became aware of Cotter's road building activity in June, 1978, it contacted Cotter personnel and advised them of BLM's interest in the area and requested that the road building activity be brought to a halt. Cotter agreed to this request and ceased all construction activity for approximately one year. (Bruner affidavit.) On May 24, 1979, Cotter notified BLM of its intention to begin construction of a road to gain access to section 36 (Complaint, Exhibit A). BLM then instituted this proceeding.

*OPINION*

At stake here are three very important and conflicting interests. The state of Utah has a clear interest in protecting its rights under the grant of school trust lands and in being able to use those lands so as to maximize the funds available for the public schools. Cotter, of course, has an interest in developing its claims in the most economical way possible. Finally, the United States has an interest in preserving for future generations the opportunity to experience the solitude and peace that only an undisturbed natural setting can provide. As noted herein, these public interests conflict. This is reflected in the more narrow questions of statutory interpretation and reconciliation posed for decision. In order to resolve the issues and effect a balance of interests, it is

important to examine each interest and its statutory base.

I. State School Trust Land

As previously explained, the state school land grants were not unilateral gifts made by the United States Congress. Rather, they were in the nature of a bilateral compact entered into between two sovereigns. In return for receiving the federal lands Utah disclaimed all interest in the remainder of the public domain, agreed to forever hold federal lands immune from taxation, and agreed to hold the granted lands, or the proceeds therefrom, in trust as a common school fund. Thus, the land grants involved here were in the nature of a contract, with a bargained-for consideration exchanged between the two governments. See Utah v. Kleppe, 586 F.2d 756, 758 (10th Cir. 1978), cert. granted442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 296 (1979).

[1][2] Recognition of the special nature of the school land grants is important both in determining the Congressional intent behind the grant and in understanding judicial treatment of similar grants. Generally, land grants by the federal government are construed strictly, and nothing is held to pass to the grantee except that which is specifically delineated in the instrument of conveyance. E. g., United States v. Union Pacific Railroad Co., 353 U.S. 112, 116, 77 S.Ct. 685, 687, 1 L.Ed.2d 693 (1957). But the legislation dealing with school trust ***1002** land has always been liberally construed. Wyoming v. United States, 255 U.S. 489, 508, 41 S.Ct. 393, 399, 65 L.Ed. 742 (1921); Utah v. Kleppe, supra at 761.Further, it is clear that one of Congress' primary purposes in enacting the legislation was to place the new states on an "equal footing" with the original thirteen colonies and to enable the state to "produce a fund, accumulated by sale and use of the trust lands, with which the State could support the (common schools)".Lassen v. Arizona Highway Dept., 385 U.S. 458, 463, 87 S.Ct. 584, 587, 17 L.Ed.2d 515 (1967).

[3] Given the rule of liberal construction and the Congressional intent of enabling the state to use the school lands as a means of generating revenue, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

[4][5] Further, traditional property law concepts support Utah's claimed right of access. Under the common law it was assumed that a grantor intended to include in the conveyance whatever was necessary for the use and enjoyment of the land in question. Mackie v. United States, 194 F.Supp. 306, 308 (D.Minn.1961). When a grantor conveys only a portion of his land, and the land received by the grantee is surrounded by what the grantor has retained, it is generally held that the grantee has an easement of access, either by implication or necessity, across the grantor's land. E. g., United States v. Dunn, 478 F.2d 443, 444 & n.2 (9th Cir. 1973). Although this common law presumption might not ordinarily apply in the context of a federal land grant, the liberal rules of construction applied to school trust land allow for the consideration of this common law principle and justify its application here.[FN11]

> FN11. The case of Leo Sheep Co. v. United States, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979) is not apposite. In that case the United States Supreme Court held that the government had not reserved an access easement in a particular land grant because the government had the power to condemn the land in question. The defendants in this case have no such power.

[6] Therefore, the court holds that the state of Utah and Cotter Corporation, as Utah's lessee, do have the right to cross federal land to reach section 36, which is a portion of the school trust lands. The extent and nature of that right, however, remain to be determined. In order to reach that decision the court must examine the character and extent of BLM's authority under the Federal Land Policy and Management Act.

II. Federal Land Policy and Management Act

[7] FLPMA represents an attempt on the part of Congress to balance a variety of competing interests, including those enumerated above. To some extent, the statute appears to be internally inconsistent,

reflecting different concerns of environmentalists, miners, and ranchers. For example, in section 102 (43 U.S.C. s 1701(a)(8) (Supp.1979)) outlining the Congressional declaration of policy, the statute declares it to be the policy of the United States to manage the public lands.

in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; . . . that will provide food and habitat for fish and wildlife and domestic animals, and that will provide for outdoor recreation and human occupancy and use . . .

The same section declares national policy to be the management of public lands in a manner
(that) recognizes the Nation's need for domestic sources of minerals, food, timber and fiber from the public lands including implementation of (the Mining and Minerals Policy Act of 1970) section 21a of Title 30 as it pertains to the public lands. (Sec. (12))

***1003** On their face these two provisions appear contradictory. Indeed, it is difficult to imagine how an agency is both to encourage mining or logging and preserve land in its natural condition. It is only when the statute is viewed in a dynamic rather than a static context, and is viewed as applying to all public lands, that the conflict can be resolved. If all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied. A parcel of land cannot both be preserved in its natural character and mined. Thus, it would be impossible for BLM to carry out the purposes of the Act if each particular management decision were evaluated separately. It is only by looking at the overall use of the public lands that one can accurately assess whether or not BLM is carrying out the broad purposes of the statute. If one's view is expanded to the complex entirety of land management decisions, then the statute is not necessarily internally inconsistent. Some lands can be preserved, while others, more appropriately, can be mined. BLM is not required to fully implement section 21a of Title 30 each time it makes a decision under FLPMA. Consequently, BLM is not obliged to, and indeed cannot, reflect all the purposes of FLPMA in each management action.

Cotter contends that BLM must take all potential values into account when it designates an area as a WSA. The statute, however, envisions a dynamic process, not a static one-time-only decision. FLPMA is addressed in part to solving the problem of the lack of a comprehensive plan for the use, preservation and disposal of public lands. S.Rep. No. 94-583, 94th Cong., 1st Sess. 35-6 (1975), U.S.Code Cong. & Admin.News 1976, p. 6175. The purpose of the inventory and the wilderness review is to enable BLM to ascertain the character of the lands within its jurisdiction, and the best use to which particular portions of land can be put given such things as wilderness characteristics, mineral values, and the nation's needs for recreation, energy, etc. BLM is entitled to address this problem one step at a time. E. g., Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955).

[8] BLM is not required to immediately balance the mineral values against the wilderness values of a particular piece of land prior to designating the land a WSA. BLM may, consistent with FLPMA, look first at potential wilderness characteristics and then proceed to study the area for all its potential uses prior to formulating its final recommendations to the Executive.

A. BLM's Authority Under FLPMA

Under section 603(c) (43 U.S.C. s 1782(c) (Supp.1979)), BLM is required, during the period of wilderness review, to manage the public land

in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however to the continuation of existing mining . . . uses . . . in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands (BLM) shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

(Emphasis added in part.)

Cotter argues that this language authorizes only one management standard: preventing undue or unnecessary degradation of the environment. It is Cotter's position that the use of the word "impair" "merely gives direction to the existing

authority of (BLM) to manage with a view toward environmental protection."(Supplementary Memorandum of Defendant Cotter Corporation In *Opposition* to Injunction, filed June 25, 1979, at 20.)

The United States, on the other hand, argues that under section 603(c) there are two management standards: one that applies to uses of the land existing on October 21, 1976, and one that applies to uses coming into existence after that date. Under this interpretation, existing uses are to be regulated only to the degree required to ***1004** prevent unnecessary and undue degradation. New uses, however, may be (indeed, must be) regulated to the extent necessary to prevent impairment of wilderness characteristics.[FN12]Obviously, the latter standard is more strict.

> FN12. Initially, there was some argument in this case as to whether or not the area in question could ever meet the definition of wilderness under 16 U.S.C. s 1131 (1974). After the first hearings, however, that argument was not actively pursued by either party. Assuming that the question of the existence of wilderness characteristics is still at issue, the court holds that the government has presented more than sufficient evidence to show that the land in question meets the criteria of 16 U.S.C. s 1131 (1974). Cf. Parker v. United States, 309 F.Supp. 593 (D.Colo.1970), aff'd, 448 F.2d 793 (10th Cir. 1971), cert. den., sub nom.Kaibab Industries v. Parker, 405 U.S. 989, 92 S.Ct. 1252, 31 L.Ed.2d 455 (1972).

[9] The Solicitor of the Department of Interior has issued an opinion dated September 5, 1978, (hereinafter referred to as "Solicitor's Opinion") which interprets the effect of section 603(c). Under this interpretation, section 603(c) does indeed mandate two standards, the first of which governs regulation of uses not in existence on October 21, 1976, and the second of which governs uses existing on that date. (Solicitor's Opinion, pp. 11, 16.) Generally, the interpretation of a statute by those charged with its execution is entitled to great deference. E. g., Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Red Lion Broadcasting v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969). The court can find no reason not to give such deference in this case.

Further, the Solicitor's interpretation finds support in the Act's legislative history. In the Report (H.Rep. No. 94-1163, 94th Cong.2d Sess. 17 (1976), U.S.Code Cong. & Admin.News 1976, p. 6175) accompanying the House version of what was to become FLPMA, the language of section 603(c) was described as follows:

While tracts are under review, they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws. The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of *minimum* improvements, such as wildlife habitat and livestock control improvements, where needed for the protection or maintenance of the lands and their resources . . . (*Emphasis* added.)

It appears to the court that the above passage indicates that the authority to manage lands so as to prevent impairment of wilderness characteristics was meant to be a new addition to the Secretary's continuing authority to regulate all uses so as to prevent undue degradation. Other parts of the legislative history confirm this view.

The Senate version of FLPMA contained no specific wilderness review section. Rather, it included several sections indicating that the inventory and review process would not, in themselves, either change or prevent change in land use management. The Senate Report accompanying this version indicates that the Committee drafting the bill was concerned that existing uses not be terminated and that future uses, including use as wilderness, not be foreclosed by new activity. S.Rep. No. 94-583, supra at 44,U.S.Code Cong. & Admin.News 1976, p. 6175. It appears that the Senate and the House were concerned about devising a way to protect both existing uses and wilderness values present on tracts not subject to existing uses. As interpreted by the Solicitor, section 603(c) reflects that concern. The Secretary's authority to preserve wilderness is subject to existing uses which may not be arbitrarily terminated, nor regulated solely with a view to preserving wilderness characteristics. But the Secretary may continue to regulate such uses in order to prevent unnecessary or

undue degradation. On the other hand, activity on lands with potential wilderness value which are not subject to existing uses may be regulated more stringently so as to preserve wilderness characteristics. The Solicitor's interpretation is consistent with the Act's legislative history and reflects the full measure*1005 of Congressional intent in the adoption of 603(c). Cotter's interpretation reflects only one of Congress' concerns, i. e., protection of existing uses.

Finally, the Solicitor's interpretation is supported by the language and structure of the statute itself. The word "impair" would prevent many activities that would not be prevented by the language of "unnecessary or undue degradation." [FN13]For example, commercial timber harvesting, if conducted carefully, would not result in unnecessary or undue degradation of the environment. See, One Third of the Nation's Land (Public Land Law Review Commission) 102 (1970). But the same activity might well impair wilderness characteristics as those are defined in 16 U.S.C. s 1131 (1971). Compare Parker v. United States, 309 F.Supp. 593 (D.Colo.1970), aff'd, 448 F.2d 793 (10th Cir. 1971), cert. den. sub nom., Kaibab Industries v. Parker, 405 U.S. 989, 92 S.Ct. 1252, 31 L.Ed.2d 455 (1972), with Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976). Further, if Congress had not intended to mandate two standards, it would merely have indicated that the Secretary was to continue to manage all lands so as to prevent unnecessary degradation. If one takes the position that this is what Congress intended, then the language of impairment must be mere surplusage. Statutory rules of construction are against such a finding.[FN14]Wilderness Society v. Morton, 156 U.S.App.D.C. 121, 135, 479 F.2d 842, 856 (D.C.Cir.1973), cert. den., 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1978).

FN13. As stated in the amicus brief of the American Mining Congress:

> A reasonable interpretation of the word "unnecessary" is that which is not necessary for mining. "Undue" is that which is excessive, improper, immoderate or unwarranted.
>
> Brief of Amicus American Mining Congress in Opposition to the United States' Request for Permanent Injunction, filed July 6, 1979, at 9.

FN14. There is further indication within FLPMA itself that the Congress intended two management standards. Section 302(b) provides:

> Except as provided in 1744, 1781(f) and 1782 (section 603) of this title and in the last sentence of this paragraph, no provision . . . shall in any way amend the Mining Law of 1872 . . . .
>
> The last sentence of 302(b) is as follows:
>
> In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.
>
> If the standard of undue degradation were not separate and distinct from the impairment standard contained in section 603(c), there would have been no need to include both the last sentence and reference to section 603(c) in section 302(b). By making distinct reference to both standards in 302(b), Congress indicated its intent to formulate two different approaches to management of the public lands.

Moreover, legislative history confirms that the language of impairment was not surplusage. Initial drafts of the bill in the House did not contain this language; it was added at the suggestion of Congressman Dellenback who stated that the purpose of the language was to keep the Secretary from "changing anything." Its purpose was to maintain the existing character and use of public lands whether that use was wilderness or developed recreation. (Solicitor's Opinion, p. 16).

[10] Therefore, the court holds that under the terms of FLPMA the BLM has the authority to manage public lands so as to prevent impairment of wilderness characteristics, unless those lands are

subject to an existing use. In the latter case BLM may regulate so as to prevent unnecessary or undue degradation of the environment.

B. Cotter's Rights Under FLPMA

Given that there are two standards by which BLM can manage the public lands, it remains to be determined what standards apply to Cotter's activity. Cotter argues that its activity falls within the existing use provision of 603(c). The main thrust of Cotter's argument is as follows:

1) under the Mining Law of 1872, Cotter has a right of access to its unpatented claims;

2) Cotter, as Utah's lessee, also has a right of access to state school land;

3) these rights, even though not exercised prior to October, 1976, constitute existing uses under FLPMA.

[11]***1006** Section 603(c) mandates that existing uses may continue in the "same manner and degree" as being conducted on October 21, 1976. Unless the statute is referring to activity that was actually taking place on that date, there is no way to give meaningful context to the "manner and degree" language. In order to determine whether or not a given operation is being conducted in the same manner and degree as it was formerly being conducted, there must be some former activity against which the extent of the present operation can be measured. Presumably, when the statute refers to existing uses being carried out in the same manner and degree it is referring to actual uses, not merely a statutory right to use.

[12] Cotter next points to section 302(b) as an indication that its rights of access cannot be denied under FLPMA. Cotter's emphasis in quoting 302(b) is, however, selective. Section 302(b) provides in pertinent part:

Except as provided in 1744, 1781(f) and 1782 (section 603) of this title and in the last sentence of this paragraph no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims under that Act, including, but not limited to, rights of ingress and egress. (Emphasis added.)

Cotter emphasizes only the latter portion of this section and from this argues that no provision of FLPMA can be taken to amend the Mining Law of 1872. On its face, however, this section makes clear that section 603 does amend the Mining Law of 1872. Rights under that law, including rights of ingress and egress, can be impaired by virtue of section 603. Moreover, the Mining Law itself makes clear that rights of access to mining claims are not absolute. Such rights are subject to regulation under 30 U.S.C. s 22 (1971).

It might also be argued that section 201 (43 U.S.C. s 1711 (Supp.1979)) acts as a limitation on BLM's right to restrict Cotter's right of access to its federal claims. Section 201 provides in pertinent part:

The preparation and maintenance of such inventory or the identification of such areas (of critical environmental concern) shall not, of itself, change or prevent change of the management or use of public lands.

The argument is that since, prior to BLM's inventory, this land was open to all mining activity, section 201 prevents BLM from changing the use to which the land was being put if such change is based solely on the results of the inventory.

In the Report accompanying the Senate version of FLPMA (S.Rep. No. 94-58, supra at 44), section 201 is explained as follows:

The purpose of this statement is to insure that, under no circumstances will the pattern of uses on the national resource land be frozen, or will uses be automatically terminated during the preparation of the inventory and identification of areas possessing wilderness characteristics. Equity demands that the Secretary not be barred from considering and permitting new uses during the lengthy inventory and identification processes. On the other hand, the "of itself" language is not meant to be license to continue to allow or disallow uses as if no inventory and identification process were being conducted. The Committee fully expects that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses

which might be discovered as appropriate in the inventory or identification process . . . will be foreclosed by any use or combination of uses conducted after enactment of S.507, but prior to the completion of those processes. (Emphasis added.)

It is clear that the Congress [FN15] intended to provide a balanced solution to the problem *1007 of land management during the inventory process. While Congress did not intend the use of public lands to be frozen pending the outcome of the inventory process, neither did it want future uses to be foreclosed by the impact of present activity. Further, the Congress recognized that it might not be possible to both allow present uses and prevent foreclosure of certain other future uses.

> FN15. While the legislative history quoted here is from the Senate Report, the House version of the bill contained no similar language. The language was adopted in the conference committee, but without any further indication as to the Congressional intent behind the language. Thus, it is possible to assume that the Senate Report accurately reflects the intent of the Congress, there being no contrary indication.

This is consistent with the decision in Parker v. United States, supra. In that case, involving the Wilderness Act, the court held that the Department of Agriculture could not take any action that would foreclose Congressional consideration of an area's potential for wilderness designation.[FN16]In this case, if BLM could not prevent activity that would permanently impair wilderness characteristics, then those characteristics could be destroyed before either BLM or the Congress had the chance to evaluate an area's potential uses. This Congress did not intend.

> FN16. Amicus American Mining Congress has cited a portion of legislative history indicating that Congress inserted section 201 into FLPMA with the intent of overruling the Parker case. See, Brief of Amicus American Mining Congress in Opposition to the United States' Request for Permanent Injunction, supra. It should be noted, however, that the statement quoted by the amicus is from the Senate Committee Report on Senate Bill 424, a bill that was debated some time prior to the debate and passage of FLPMA. Perhaps more important, the final statement of the Senate intent behind including section 201 (or section 102 as it was in the initial version) contains language almost identical to that quoted by the amicus, but does not include any reference to the Parker case. The fact that this language was omitted from subsequent statements of legislative intent argues that Congress, in fact, did not intend to overrule Parker. Certainly, without a more definitive statement, this court will not assume that Congress set out to undo that decision.

[13] Therefore, the court holds that 1) BLM may regulate activity on federal land so as to prevent impairment of potential wilderness characteristics; 2) the authority to so regulate is subject to uses actually existing on October 21, 1976; 3) section 603 does amend the Mining Law of 1872 and subjects rights thereunder to BLM's authority to regulate so as to prevent wilderness impairment; 4) section 201 does not mandate that BLM allow all potential uses to take place on a particular portion of land regardless of wilderness characteristics.

[14] BLM's authority is, however, limited to preventing permanent impairment of potential wilderness values. Although it is not explicitly provided for in FLPMA, it is consistent with Congress' attempt to balance competing interests and with the Wilderness Act which provides the legislative backdrop for section 603 [FN17] to find that if a given activity will have only a temporary effect on wilderness characteristics and will not foreclose potential wilderness designation then that activity should be allowed to proceed.

> FN17. Opinion of the Solicitor of the United States Department of Interior, September 5, 1978, at 4.

[15] The definition of wilderness provided for in the Wilderness Act (16 U.S.C. s 1131(c)) and incorporated by reference into FLPMA in section 603(a) contemplates that some human activity can take place in wilderness areas as long as the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work

substantially unnoticeable . . . ."[FN18]

FN18.16 U.S.C. s 1131 (1974).

Further, the draft statement of BLM's Interim Management Policy and Guidelines for Wilderness Study Areas (January 12, 1979, at 9) recognizes that temporary activities, the negative impacts of which could be substantially reversed through appropriate reclamation procedures, would not impair wilderness characteristics under the terms of 603(c).

There has been a great deal of argument in this case over whether or not the effects of Cotter's proposed road and drilling operations can be successfully reclaimed. Unfortunately*1008 the factual matters inherent in such an argument have not been sufficiently addressed. At the July 12 hearing on the motion for permanent injunction, Cotter proffered, for the first time, its reclamation plan. BLM has not had the opportunity to review the plan nor to make a comparison of the costs and feasibility of reclamation of a land access route over the cost and effect of other forms of access.

[16][17][18][19] In view of the court's findings and conclusions of law, the BLM must be given the opportunity to review and respond to Cotter's reclamation plan. BLM has no formal regulations for review of proposed activity within potential WSA. But BLM is authorized under FLPMA to manage the public lands "by regulation or otherwise . . . ." See sections 302(b) and 603(c). Thus, the agency's authority is not dependent on the issuance of formal regulations.[FN19] Further, in a lawsuit involving issues of the magnitude and importance as those involved here, it is imperative that all parties have the opportunity to respond to critical factual issues. Moreover, the question of the adequacy of a reclamation plan is precisely the kind of question to which the expertise of an administrative agency is most relevant. Cf. Izaak Walton League of America v. St. Clair, 497 F.2d 849, 852 (8th Cir.), cert. den., 419 U.S. 1009, 95 S.Ct. 329, 42 L.Ed.2d 284 (1974). The court is ill-equipped at this stage of the litigation to make a factual determination on the complex question of the comparative *1009 costs and feasibility of reclamation efforts over other forms of access. Thus, the court orders that BLM must be given the opportunity to expeditiously review Cotter's reclamation plan with a view to determining whether or not the impact of the proposed road will be temporary or permanent and with a view toward comparing the cost and feasibility of reclamation with the cost and feasibility of alternative forms of access.

FN19. BLM has argued strenuously that Cotter should be required to "exhaust its administrative remedies" by applying for a right-of-way, having such right-of-way denied, appealing through the Interior system of land board review, and then applying to the court for relief. BLM has also argued that the doctrine of primary jurisdiction ought to apply and that this court should forego action until Interior has had the chance to formally act in the matter. The court does not agree with either argument.

In the first place, there is considerable question as to whether or not a) Cotter is required to apply for a right of way or b) if it is so required, that there is any procedure by which it could have done so. Although BLM now argues that such a procedure exists and that knowledge of the procedure was available to the public, BLM employees previously told Cotter that no such application was required. Further, BLM and Cotter have been negotiating this road for over a year and Cotter was never told to complete a right-of-way application during that time. If no procedure for exhausting administrative remedies exists, then Cotter cannot be penalized for not pursuing such remedies.

Further, there is an exception to the doctrine of exhaustion when it appears that efforts to find relief within the agency would be futile.Bendure v. United States, 554 F.2d 427 (Ct.Cl.1977). Given Interior's position in this case, there is little chance that the agency would do anything but deny Cotter's application. The court will not require Cotter to engage in a useless exercise.

As to the doctrine of primary jurisdiction, the court finds that it does not apply in

this case. As defined by the U. S. Supreme Court

> "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-4, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956) (emphasis added). In this case, there is no regulatory scheme beyond the broad provision of FLPMA. Cf. Izaak Walton League of America v. St. Clair, 497 F.2d 849 (8th Cir. 1974). That is, BLM has no published adopted procedure through which it would handle Cotter's claim. The doctrine would seem to assume an administrative mechanism through which primary jurisdiction could be exercised. In this case there is no such mechanism. Further, in initiating this suit, BLM did not ask that Cotter be enjoined pending BLM's processing of any application that Cotter might make. It asked the court to permanently enjoin Cotter or to enjoin Cotter pending a Solicitor's opinion on the state school land issue. Apparently BLM is not as concerned about the court's taking jurisdiction of this case without any prior Interior action, if the court rules in its favor and permanently enjoins Cotter from any further activity. Under these circumstances, the court finds that the doctrine of primary jurisdiction does not apply in this case. The opportunity given BLM to review the reclamation plan is based solely on the court's perception that BLM should be given the opportunity to respond to the factual issues raised by the reclamation plan and that the court is not equipped to decide this issue raised by the plan at this time. It is not based on Cotter's alleged failure to exhaust administrative remedies nor on the doctrine of primary jurisdiction.

If BLM should decide that the effects of the road will, indeed, be permanent, then the parties (and probably this court) may be required to confront this and other disputed issues. In the interest, however, of giving this judgment finality for the purposes of appeal and for purposes of the parties' own planning, the court chooses not to keep jurisdiction over the lawsuit. The court is aware that should BLM delay reviewing the reclamation plan or make a decision contrary to Cotter's interest, that the parties may need to institute a new lawsuit in order to obtain a final resolution of their dispute. In that event, the court will give the new lawsuit the highest priority and will handle the matter as expeditiously as possible. However, in light of the possibility that further litigation will be necessary, and in light of the fact that throughout the litigation BLM has assumed that the effects of the road would be permanent and thus has put the questions of regulation of access to federal and state land at issue, the court will address the questions remaining in the lawsuit.

III. FLPMA and the State School Lands

[20][21] The state must be allowed access to the state school trust lands so that those lands can be developed in a manner that will provide funds for the common schools. Further, because it was the intent of Congress to provide these lands to the state so that the state could use them to raise revenue, Lassen v. Arizona Highway Dept., supra, the access rights of the state cannot be so restricted as to destroy the lands' economic value. That is, the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their full economic development.

[22][23][24][25] The state's right of access is not, however, absolute. Under the Constitution Congress has the authority and responsibility to manage federal land. U.S.Const. Art. IV, s 3, cl.2. Through statute Congress has delegated this authority to agencies such as the Bureau of Land Management. Cameron v. United States, 252 U.S. 450, 459-60, 40 S.Ct. 410, 412, 64 L.Ed. 659 (1920). There is nothing in the school land grant program that would indicate that when Congress developed the school land grant

scheme it intended to abrogate its right to control activity on federal land. Further, it is consistent with common law property principles to find that the United States, as the holder of the servient tenement, has the right to limit the location and use of Utah's easement of access to that which is necessary for the state's reasonable enjoyment of its right. See, e. g., United States v. Hughes, 278 F.Supp. 733 (E.D.Tenn.1967). Thus, the court holds that, although the state of Utah or its lessee must be allowed access to section 36, the United States may regulate the manner of access under statutes such as FLPMA.

The United States has argued here that not only can the United States regulate Utah's route across federal land, it can also prevent access if it finds that such access would impair wilderness characteristics. The state counters by arguing that if such access can be prevented under FLPMA, then the statute violates the Fifth Amendment by accomplishing taking of property without just compensation.

[26] The court has already rejected the argument made by the government based on an analysis of the Congressional intent behind the school land grants. The court further finds that the school land grants were accomplished under what is termed "special" legislation. Under statutory rules of construction, when "special acts" conflict with acts which deal with the same subject matter in a more general way, the special acts are to prevail, regardless of whether the special acts were passed prior to or ***1010** after the general act. See Utah v. Kleppe, supra at 768-69.Of course, this rule does not apply if there is some indication that Congress intended to modify the special act. There is, however, no such indication in the legislative history of FLPMA. Indeed, the terms of FLPMA itself would indicate that Congress did not intend to amend rights under the school land grant program. See section 701(g)(6) (codified at 43 U.S.C.A. s 1701 note (Supp.1979)).

[27] Thus, the court finds that 1) BLM can regulate the method and route of access to state school trust lands; 2) this regulation may be done with a view toward preventing impairment of wilderness characteristics (assuming no existing use); [FN20] 3) the regulation may not, however, prevent the state or its lessee from gaining access to its land, nor may it be so prohibitively restrictive as to render the land incapable of full economic development.

FN20. The Court had also assumed, and now holds, that Utah's right of access to the state school land is not, in this case, an existing use since the right was not exercised prior to October 21, 1976.

IV. FLPMA and Access Rights Over Federal Land

Section 701(h) (codified at 43 U.S.C.A. s 1701 note (Supp.1979)) of FLPMA provides:

All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

The Solicitor has interpreted this section to mean that valid existing rights cannot be taken pursuant to section 603. (Solicitor's Opinion, p. 32).[FN21] The court agrees with this interpretation. The court has also found, however, that Cotter's right of access to both its federal and state claims can be regulated.

FN21. The Solicitor also states that such rights may not be condemned. Without further explanation, the court cannot determine why such rights could not be condemned, assuming just compensation was paid. Certainly, there does not seem to be anything on the face of section 701(h) that would prevent condemnation of and payment for existing rights. Thus, the court does not adopt this portion of the Solicitor's opinion.

The parties have stipulated that "Cotter's proposed road appears to be the only feasible and least environmentally disruptive land access for Cotter to its targeted drilling sites and for entry into state section 36 . . ." (Joint Pretrial Stipulation, filed July 9, 1979; emphasis added in part). Thus, in this case, regulation to prevent wilderness impairment could result in total prohibition of land access. BLM has contended that helicopter access is available, feasible and acceptable to the agency. Cotter contends that such access would be prohibitively expensive and would not result in any substantial saving of the environment. This issue was not, however, the subject of live testimony with full cross-examination. The court is not, therefore, provided with sufficient information on which to base a ruling. To further

complicate the case, it is not clear that the entire proposed road is necessary for Cotter to gain access to section 36.[FN22]This is important because different criteria may be applied to judge the propriety of regulation of state, as opposed to federal, access rights. It may be that requiring helicopter access to section 36 would be sufficiently expensive so as to render minerals on that section incapable of ***1011** economic development. Therefore, requiring such access and denying land access would violate the intent of the school trust grant. It may be, however, that requiring such access to federal claims would not be so expensive as to constitute a taking under 701(h). If the entire road is not necessary to gain access to section 36, then it could be that substantial parts of it could be prohibited, while other parts could not. Unfortunately, on the record as it now stands, this matter is far from clear.

> FN22. Cotter has asserted that because of the section's terrain it cannot cut across the section. Rather, it must enter from two points: one on the north, the other on the south. See Affidavit of Erik Bruner, filed June 11, 1979. This is, however, a mere conclusory allegation. Without further information it is impossible to know whether it would be more expensive to cut through section 36 from north to south, prohibitively expensive, or physically impossible to do so. Even if it would be physically impossible, there still remains the question of whether access to one portion of the section is sufficient to prevent an abrogation of Utah's access rights.
>
> > It is also true that the parties stipulated that the proposed road was the only feasible route to the federal claims and section 36. It is not clear from this stipulation, however, that the United States agreed that the entire road was necessary to gain access to section 36 alone. Further, the government now vigorously contends that it was unaware of the extensions to section 36 until this lawsuit began.

[28] Finally, the record contains very little factual information relevant to the taking issue. The court recognizes that a government can regulate without engaging in a taking. The court also recognizes, however, that when regulation reaches the point of seriously impinging on "investment-backed expectations," it can constitute a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); Goldblatt v. Hempstead, 364 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). Given its current information, the court feels that there is a substantial question of a taking in this case if access to federal claims are indefinitely prohibited or if alternative access is unreasonably expensive. The facts in this case are not, however, sufficiently clear at this time for the formulation of a ruling on this matter.

[29][30] In sum, the court holds that Utah does have a right of access to state school trust lands. That right is subject to federal regulation when its exercise requires the crossing of federal property. Such regulation cannot, however, prohibit access or be so restrictive as to make economic development competitively unprofitable. Further, the court holds that BLM may regulate federal public land so as to prevent impairment of wilderness characteristics. Such authority is, however, subject to uses which were existing on October 21, 1976. These uses must have been actually existing on that date. Cotter's right to gain access was not an existing use on October 21, 1976. Therefore, Cotter's activity may be regulated so as to prevent wilderness impairment. But such regulation cannot be so restrictive as to constitute a taking. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED that the State of Utah, and Cotter Corporation as its lessee, have a right of access to state school section 36, which section is more precisely described in Exhibit A of the complaint filed herein. That right is subject to reasonable regulation by the United States Department of the Interior to prevent impairment of wilderness characteristics, but without damaging the competitive economic development of it. The United States may not, in carrying out such regulation, prohibit access. But the United States may, within the limits of the state school land grants and the Due Process Clause of the Fifth Amendment, review and regulate the proposed nature and location of access roads.

IT IS FURTHER ORDERED, ADJUDGED,

DECREED AND DECLARED that Cotter Corporation, as the owner of certain unpatented mining claims on federal land, more precisely described in the complaint filed herein, has a right of access to its mining claims. That right is subject to regulation by the United States Department of the Interior to prevent impairment of wilderness characteristics. In carrying out such regulation the United States may not permanently deprive Cotter Corporation of access to its claims. But the United States may, within the limits of the Due Process Clause of the Fifth Amendment, prescribe the mode of access and the location of access roads, if any.

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED that the United States Department of the Interior must be given the opportunity to review Cotter Corporation's proposed reclamation plan and the necessity of constructing the entire proposed road to gain access to section 36. Therefore, Cotter Corporation is hereby enjoined from engaging in any construction, road building, leveling land or destroying primitive, scenic and wildlife characteristics on certain federal land as described in the complaint filed ***1012** herein until such time as the Department of the Interior has reviewed the reclamation plan and the proposed extensions of the road into section 36 and rendered a decision thereon. At such time as the Department's decision is rendered, the parties may pursue such further remedies before this court as they deem necessary.

D.C.Utah, 1979.
State of Utah v. Andrus
486 F.Supp. 995, 10 Envtl. L. Rep. 20,570

END OF DOCUMENT

**EXHIBIT A**

**Map Identifying Roads Used To Access The Backman Property**

**[*See*, Attached.]**

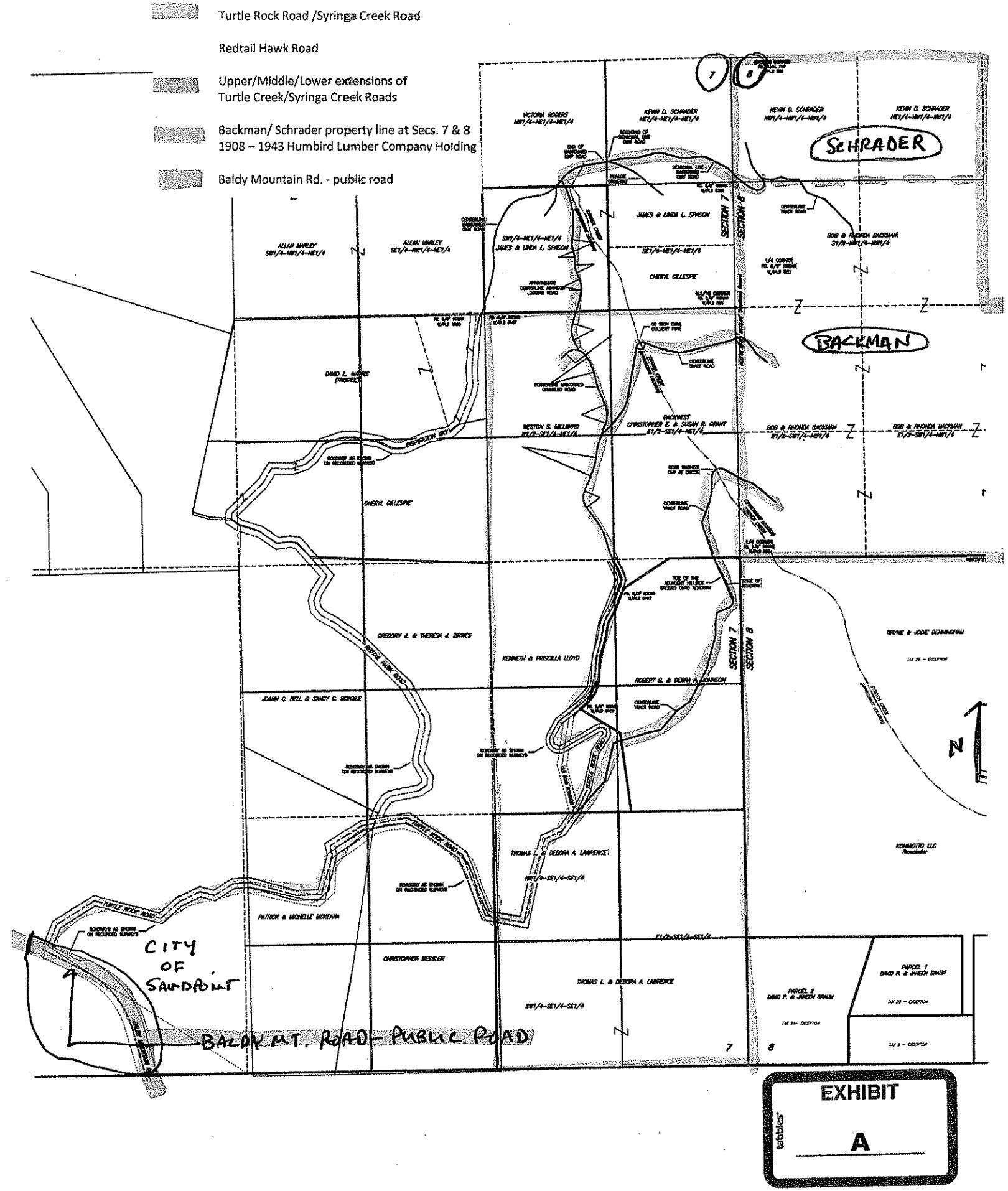
Turtle Rock Road /Syringa Creek Road
Redtail Hawk Road
Upper/Middle/Lower extensions of
Turtle Creek/Syringa Creek Roads
Backman/ Schrader property line at Secs. 7 & 8
1908 – 1943 Humbird Lumber Company Holding
Baldy Mountain Rd. - public road
SCHRADER
BACKMAN
SECTION 7
SECTION 8
CITY OF SANDPOINT
BALDY MT. ROAD – PUBLIC ROAD
EXHIBIT
A
tabbies

**EXHIBIT B**

**Chain Of Title To The Backman Property**

***i.e.*, S 1/2 of the NW 1/4 and the S 1/2 of the NW ¼ of the NW 1/4 of Section 8, Township 57 North, Range 2 West, Boise Meridian**

[The defined terms/references used in this Exhibit A have the same meanings as assigned to them in Appellants' Brief.]

Humbird owned the Backman Property until 1945, when it conveyed the property to Wert. Plaintiffs' Exhibit 4. In 1952, Wert conveyed the Backman Property to Brown. Plaintiffs' Exhibit 5. In 1969, Brown conveyed the Backman Property to Long Lake Lumber Company ("Long Lake"). Plaintiffs' Exhibits 6-7. In 1980, Pack River Company, a subsidiary of Long Lake, conveyed the Backman Property to Pack River Management Company. Plaintiffs' Exhibit 8. In 1984, Pack River Management Company conveyed the Backman Property to Shamrock Investment Company ("Shamrock"). Plaintiffs' Exhibit 9. Shamrock conveyed the Backman Property to itself in 1990 to reflect a conversion in the company from a limited to a general partnership. Plaintiffs' Exhibit 10.

Powers purchased the Backman Property in 1994. R. Vol. II, p. 261; Plaintiffs' Exhibit 11. Powers conveyed the Backman Property to his mother, McGhee, a few weeks later. Plaintiffs' Exhibit 12. McGhee conveyed the Backman Property back to Powers in May 1995. Plaintiffs' Exhibit 13. Powers sold the Schrader Property to Schrader's predecessor-in-interest in 1995. R. Vol. II, p. 261-62. Powers conveyed the Backman Property to Backmans in 2005. Plaintiffs' Exhibit 15.