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ACCESS TO THE PUBLIC LANDS IN MONTANA

By

Vito A. Ciliberti

B.S., North Carolina State University, 1957

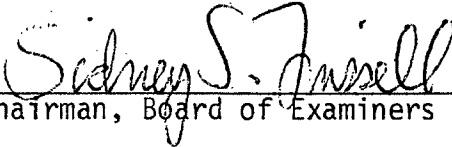
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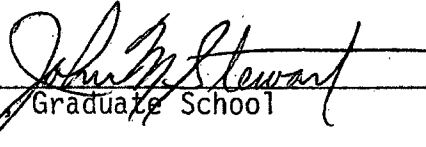
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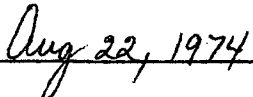
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Expanding population, increasing interest in outdoor recreation, technological changes resulting in more intensive and extensive outdoor recreation opportunities, in conjunction with increased leisure time and affluence have resulted in greater demand for the recreational use of public lands.

In many areas the demand for increased use has been met with the closure of access routes to the public lands by private parties.

Federal public lands are generally available for all legal recreational activities. About 90% of Montana-owned lands are not.

The study encompassed legal research regarding access, the analysis of U.S. Forest Service and Bureau of Land Management access policy and two illustrative examples of access restrictions in Montana to (1) elucidate the right of the public to use public lands, (2) analyze the application of the law regarding access to public lands, (3) examine the role of the Forest Service and the Bureau of Land Management relative to providing and maintaining access to public lands.

Existing legislation, in addition to court application of the law, provides adequate precedent regarding the right of the public to use federal lands for legitimate purposes. Expanded and active use of existing law is needed to protect the public's right to use federal lands.

Montana laws regarding state lands must be modified to accommodate public recreational use.

The U.S. Forest Service and the Bureau of Land Management have adequate administrative authority to resolve almost all public access problems. This authority is seldom used and access to the public lands is being lost faster than it can be replaced.

ACKNOWLEDGEMENTS

Appreciation is extended to my graduate committee and those others who provided counsel and encouragement during the course of this study. Particular thanks are extended to Dr. S.S. Frissell, R.M. Weddell, M. Michel, and W.P. Cunningham. In addition, the assistance provided by the U.S. Forest Service, Bureau of Land Management, and the Montana Department of Natural Resources and Conservation also deserve mention.

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CHAPTER I
INTRODUCTION

In recent years changing socio-economic conditions have been manifest in many ways in the United States. Perhaps the most obvious effect has been the increasing intensity of land use as a result of expanding population, technological development, and a greater amount of leisure time. While much of the increase in land use has been appropriately directed toward public lands, many of the areas adjacent to private land holdings are not available to the public.

Until recent times, access to the public lands was not considered a problem of major consequence, although there have been occasional conflicts since late frontier times. The population of this earlier period, characterized by relatively low numbers, moderate affluence, the last real vestiges of regionalism and moderate mobility, did not place an undue pressure upon the use of public lands. In this era people did not travel great distances to escape from the huge metropolitan areas of the present. Those persons desiring to cross private lands to reach the public domain were generally allowed to do so because such usage was light and relatively infrequent.

In the late 1950's and 1960's dramatic population growth, expanding industrialization, greatly increased affluence, expanding technological development and a highly mobile population intensified pressure upon land use. Increasingly, those asking for permission to cross private land were likely to be strangers. In many cases the land obstructing access to the public domain was also owned by outsiders. The land holding and use patterns were rapidly changing. Loss of access is acute where the

public lands are entirely enclosed by private lands or where access roads that cross private land to reach public land have been closed by the private owner.

The refusal of access has been realized in the denial of the use of private lands for access routes, the closure of prescriptive right-type roads (roads with a history of public use) and the acquisition of private property expressly to frustrate access to adjacent public lands. Some landholders merely did not want to be bothered with the general public while others sought to restrict usage of public lands thereby reserving the resource for themselves.

The primary objective of this research effort is to define the nature and extent of the problems of access to public lands across private lands. The rights of the public in relation to federal and state statutes and the application of law to access are explored as a means of defining remedies to correct inequities in public access to public lands. The roles of the various land holding agencies (Bureau of Land Management, Forest Service) and governmental bodies (county commissioners) are examined to relate their activities to problems of access to public lands. Recommendations based on this study are presented as a means of resolving both the public and private interest relative to public access to public lands.

The research materials used for this study include the law encyclopedias (American Jurisprudence, Corpus Juris Secundum, Montana Digest), Federal and Montana Statutes relating to the subject and the federal and state court cases bearing directly upon the issue as of August 30, 1972. The remainder of the source materials was obtained by personal interview and written correspondence.

CHAPTER II

CONCEPTS OF EASEMENTS

Access to the public domain where it is adjacent to private lands must be considered in terms of the laws controlling the use of land. These laws and the concept of private property ownership and use in the United States form the basis for understanding the limitations of access. The rights of private property ownership are essentially the very basis of the American free enterprise system. Governmental control of private lands can be made to appear antithetical to this right. Hence the rectification of access deficiencies has to be made within the law and in such a manner as to protect both the public and private interests in land usage. In this context, the resolution of access to public lands does not lend itself to simple solutions. The problems of access are further complicated by the nature of the land holding patterns wherein the public lands are frequently isolated from public highways by private lands or are held in an alternate checkerboard ownership pattern. Consequently, it becomes necessary to develop an overview of laws relating to access with an emphasis upon the laws of Montana.

Basically an unauthorized presence upon land owned by another is viewed as a trespass. In the context of access to public lands, any unauthorized entry upon the lands of another enroute to adjoining public lands can be construed as being a trespass and is unlawful (3, Sec. 11). In the case of Herrin v. Sutherland 74 Mont 58 (1925) the court found the defendant guilty of trespass by breaking a fence on the land of the plaintiff while enroute to public land. In this case the court ruled

that the defendant had a right to use the public land and necessarily the right to reach that land but questioned the defendant's methods. The defendant was also found guilty of trespassing by trampling and destroying the grass on the plaintiff's land. Since the law infers some damage from every unauthorized entry, nominal damages are recoverable in the amount that will constitute just compensation for the injury done (3, Sec. 49). This issue is exemplified by the case of Wallace v. Weaver 47 Mont 37 (1913) where the court ruled that the plaintiff in a trespass suit has a right of action for damages caused by the trespasser.

Generally the rules applied depend upon the extent of damage and whether the injury is permanent or temporary in character (5, Sec. 5). In essence, regardless of the reason for the unauthorized entry upon the land of another, a person can be faced with a law suit for a trespass. Depending upon circumstances, a suit can be either civil (between individuals) or criminal (between the state and the offending party). In this manner the law protects the right of private property ownership. A person desiring to enter upon public land and having no practicable route except over the lands of another, must in some manner establish that he has a right to use private lands to reach the public lands. In the absence of well defined access routes the aggrieved party seeking a route to public lands must avail himself of existing statutory law regarding ingress and egress to public lands and the implementation of the statutes by the courts.

Access to public lands is covered in law by easements. Easements are broadly defined as a privilege one party has in land of another (2 Sec. 1). In this sense an easement is considered a burden upon one

party and is construed as such by the courts. It is immediately apparent that if an easement is held to be a burden, the assignment of an easement in favor of one party is not taken lightly in law or by the courts. An appurtenant easement is an interest in land, an incorporeal right, that is vested in the dominant estate (the estate that benefits from the easement) and passes with the title to the land (2, Sec. 7). Easements can also be held in gross. An easement in gross is a mere personal interest, or right, to use the land of another, and does not pass with the title to the land. In either case, in the legal interpretation, an easement is distinct from occupation and use of the land and does not confer title to the land. The easement permits the use of the land of another in a manner that is not inconsistent with the general use applied by the owner. None the less, an easement is property in the form of an incorporeal right with an interest in land (4, Sec. 1). Easements may be classified as private or public depending upon utility by an individual or by the public (4, Sec. 3E).

Easements can be created by one of three ways (2, Sec. 13):

(1) Easement by express written grant: An easement by express written grant is permission to use the property of another as directed by a written contract. An easement established by written grant is permanent in nature as long as the recipient abides by the terms of the contract, does not abandon the easement, does not release the grantor from the terms of the grant or if the easement is not dissolved by merger of ownership of the land upon which the easement was established and the ownership of the easement itself. A properly executed easement of this type, if duly recorded in law, is generally not contested in

court unless exceptions to the easement have arisen as described above. In terms of establishing public access to public lands this form of easement, while important, does not represent the primary area of difficulty insofar as trespass and access problems are concerned.

(2) Easement by Implication: An easement by implication may develop in cases where no formal written provision has been executed, such as where the character or location of a unit of land is such that a way over the property to adjoining property is expected to exist. Generally this form of easement becomes identified as "easement by necessity" where in order for the land to be useable the owner in fact has to have a way to reach his land. This form of easement is by its character one of the most contested forms of easement. In Violet v. Martin 62 Mont 335 (1922) the court found that a "way of necessity" arises when one person grants to another, land to which there is no access except by passing over the lands of the grantor. This principle becomes of primary concern in developing a case to insure the public access to its lands. Stated otherwise, an easement by necessity is such that if one conveys a part of his land in such a form as to deprive himself of access to the remainder he has by necessity (implication) reserved a route over the portion of land conveyed (2, Sec. 34). The "way of necessity" is of common-law (unwritten law) origin and is supported by the rule of sound public policy that lands should not be rendered unfit for use. With respect to the public and public lands, the fact that all of the land was originally part of the public domain and owned by a common grantor (the state or federal government) does not contradict the essence of "way of necessity" (2, Sec. 35).

A way of necessity will not be implied if the claimant has another means of access to the land (2, Sec. 38). In some instances, courts have held that a way of necessity exists only where strictly necessary. However, the prevailing rule is that such an easement requires only a reasonable necessity to be valid (2, Sec. 33). Easement by necessity or implication can have a very important application in protecting the public right of ingress and egress to public lands. It is through this facet of easement that the public can appeal for access to enclosed public lands. Redress via way of necessity almost always involves some form of litigation in which substantial costs are involved. In Herrin v. Sieben 46 Mont 226 (1912), the defendant, Sieben, was charged in civil suit with illegally trespassing upon the lands of the plaintiff in proceeding to enclosed federal lands. The court found that there was an implied reservation in favor of the federal government for access to these lands and no less a reservation for a private citizen to go upon the land in question. The original grant by the federal government insofar as succession of title to the land is concerned does not differ from a grant by one private person to another. Hence, the implication of a way of necessity.

Another example of the utility of a way of necessity regarding access to enclosed lands is provided by the case of Komposh v. Powers 75 Mont 493 (1926). This suit involved private land holdings in which the plaintiff sought to obtain a right of access to his property across the property of the defendant. The defendant contested the issue at the Montana District and Supreme Court levels and subsequently appealed to the U.S. Supreme Court for the decision against him. The U.S. Supreme

Court found for the plaintiff, citing that a way of necessity "did not mean an absolute and indispensable necessity by reasonable requisite and proper for the accomplishment of the end view under the particular circumstances of the case." In this particular incident the plaintiff had been using an existing road across the property of the defendant. The defendant had decided to terminate the use of the road by the plaintiff.

In Herrin v. Sutherland 74 Mont 587 (1925) the defendant, Sutherland, was involved in a trespass suit concerning a number of charges. Of interest in the suit was the observation that the defendant had the right to hunt upon the public domain enclosed by the plaintiff's property. The right to use the public domain was to be exercised by requesting the plaintiff to designate a route across the plaintiff's land. If the plaintiff failed or refused to describe a route, the defendant could then make his own selection.

In all of these instances the concept of way of necessity exists as a redress. All instances cited required litigation to resolve the issue. In the case of Herrin v. Sutherland, another circumstance presents itself. This aspect concerns the defendant's posture in selecting a route in the face of a refusal by the landholder. If one selects a route without the protection of law, he is immediately endangered by Montana Statute 94-605. This statute provides that a landholder may use whatever force is required to prevent a trespass upon real property, State v. Howell 21 Mont 165 (1898). Therefore, way of necessity from all apparent considerations must be established by litigation and as such becomes an arduous means to establish the right of usage of the public

domain. Further, in the absence of a Supreme Court decision each separate case has to be tried on its own merits. Way of necessity as a means of redress for deficiencies in access is of limited value when viewed in context of Montana Statute 94-605.

(3) Easement by prescription: Easement by prescription may be established when the land of another is used overtly and continuously with the owner's knowledge but without his consent for a specified period of time. In Scott v. Weinheimer 140 Mont 554 (1962), the court cited the following regarding the existence of easement by prescription: "the party so claiming (easement) must show open, notorious (use without consent), exclusive, adverse, (a use that does not benefit the owner), continuous and uninterrupted use of the easement claimed for the full statutory period." In Lackey v. City of Bozeman 42 Mont 387 (1910) and Stetson v. Youngquist 76 Mont 600 (1926) the courts found that plaintiffs had satisfied the requirement of the law regarding the establishment of an easement by prescriptive right use. In the former case, the easement was gained for public use while the latter case involved two individuals. The statutory period has varied through the years being five years prior to 1895, ten years from 1895 to 1953 and, since 1953, has been five years once more.

The Montana Code, Section 67-1203, (prescription) recognizes that adverse use by the public for the statutory period will establish a highway by prescription [State v. Auchard 22 Mont 14 (1898) and Lackey v. City of Bozeman 42 Mont 387 (1910) - Montana Supreme Court cases upholding prescriptive right acquisition by the public]. This view contrasts with some interpretations of prescriptive right which hold that

the general public is incapable of receiving a prescriptive easement (2, Sec. 40; 4, Sec. 4b). Under Section 32-103 (highways) the Montana Code uses the case of Peabody v. Trasper 103 Mont 401 (1936), to further cite the establishment of highways by prescriptive right: "Public highways are such as have been established by public authorities or were recognized by them and used generally by the public (emphasis added) or which have become such by prescription or adverse use at the time of enactment of the statute." The Montana Digest (easements), relates that the public can obtain a roadway by prescription [citing Brannon v. Lewis and Clark County 143 Mont 200 (1963)].

Acquisition of easement by prescription generally requires adherence to strict requirements. The qualifications of open, notorious and continuous use have to be expanded to include a description of the route used. The route must not be circuitous and must be limited to one definite line or route of travel (2, Sec. 63). The case of Kostbade v. Metier 150 Mont 139 (1967) exemplifies the aspect of a fixed route in conjunction with the other aspects of establishing prescriptive right. "The defendants (County Commissioners) must show that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period together with an assumption of control adverse to the owner." This case concerned a road connecting an established public highway with federal lands. The road in question crossed a section of land owned by the plaintiffs. Subject road was closed at both sides of the private section of land by the defendants through the expediency of locking the gates on the roadway. The County was able to prove that the road had been in public use for many years, that public monies had been

used to maintain the road and that the gates which the defendant had locked were constructed and used up to the time of the litigation to control livestock and not people. In this case the County Commissioners, acting in the interest of the public, initiated the litigation to regain the use of this road for the public. Other limitations regarding prescriptive right specify that the route used and specified must be the shortest route to the nearest highway or must lead to the nearest public highway (2, Sec. 64). Additionally, it is the duty of the owner of the easement to keep it in repair (2, Sec. 85).

The nature of easement by prescription is based on the presumption that the right of use had existed and was lost. For example, a road that had been in use by the public is closed to public use. Subsequently it is necessary to initiate litigation as a means of returning the road to public use once again. As in the cases cited, in easement by way of necessity, redress has to be sought in the courts on a case by case basis under present law. This situation, because of the five year prescriptive period, places many prescriptive-right type roads used by the public in jeopardy. Both the Forest Service (32) and the Bureau of Land Management (28) cite the loss of use of prescriptive-right roads as one of their most serious access problems.

The utility and appropriateness of the two forms of easements (by written grant and by prescription) most amenable to resolving the public right of ingress and egress to public lands are limited under present circumstances. The ineffectiveness of these forms of redress is increasingly apparent as the number of road closures (i.e. O'Brien Creek, Sherman Gulch, Grant Creek, Butler Creek, Deep Creek and Bear Gulch

roads) in the Missoula area indicates. As the use pressure upon land increases, more landowners will seek to deny the public use of the prescriptive type roads. Easement by necessity also has little real application as most federal lands can be reached from some route however inconvenient or distant the access may be. The question of reasonable access is the issue under these circumstances. The relativity of the term "reasonable" immediately suggests that such a determination would have to be resolved by litigation.

The difficulty, time, and expense involved in obtaining easements through prescription and necessity has resulted in the loss of public access by default. An alternate means has to be employed to prevent further deterioration of this situation and to recover access that has already been lost.

The public use of state-owned lands in Montana presents a different problem from that of federal lands. Whereas the public has the right to use federal lands, this right is essentially nonexistent as regards the public lease lands owned by the state. With the exception of the approximately 490,000 acres of state forest land which is largely open to public use, the remainder of the state trust lands, about 5,000,000 acres, are not available for public use. The Montana Enabling Act specifies that these school lands which were given to the state by the federal government are to be used to finance the public schools. To this end these lands are leased, primarily for agricultural purposes, as one means of supporting the public school system. About 90% of these lands have existing access routes (54). The problem with these lands is not in the accessibility of the land itself. A means has to be devised to

realize income from public use so as to fulfill the requirement of law. Additionally the potential conflict of interest between agriculturalist and recreationist has to be resolved. The Montana Department of State Lands is working on the problem. Most persons immediately concerned with the utility of the state lands, both agriculturalists and state employees, realize that the issue is becoming increasingly pertinent and changes must be made to accomodate the public. However, much remains to be done in this area of the development and execution of a suitable program for the appropriate public use of the state lease lands.

CHAPTER III

FEDERAL LAW AND ACCESS TO PUBLIC LANDS

The federal government addressed itself to the aspect of accessibility to federal lands during the 1880's, long before the appearance of contemporary access problems. This was the period of disposal of federal lands through the Homestead Act of 1867. At this time it became apparent that access to public lands, primarily for entry under the Homestead Act was being denied via the stratègm of locating fences upon private lands in such a manner so as to fence off public lands. Thus, to facilitate entry upon the federal land, primarily for homesteading, but also for other purposes, the Congress of the United States passed the Act of February 25, 1885, 23 U.S. 321, Chapter 149 entitled "An Act to Prevent Unlawful Occupancy of the Public Lands." Under the provisions of the Act all enclosures of any public lands of the United States were unlawful. The maintenance, construction and control of such enclosures was forbidden. Further, the assertion of a right to exclusive use of any part of the public domain was also illegal. The Act also says that "no person by force, threats, or intimidation shall prevent or obstruct any person from peaceably entering on any tract of public land under the land laws of the United States" (emphasis added).

The fences, or obstructions, referred to did not have to be located on federal land because any unauthorized construction on federal property would constitute simple trespass. The obstructions were primarily fences that appeared on private lands in such a manner as to preclude access to public lands enclosed by the private land-holding

pattern.

Subsequent to its passage in 1885 and up to the time of the 1920's this Act was used extensively for its intended primary purpose. The concepts presented by this Act in consequence of the philosophy of land use in the United States and especially at the time of its passage was certainly revolutionary in nature. The Act was in effect regulating the use of private property as it related to the use of the public domain. The intent of the Act was to resolve a problem that is not very different from access problems of the present.

Except for its application in justifying the police power of government in situations immediately necessary to public welfare and need as in the case of Pomerang v. City of N.Y. 151 N.Y. 2d 789 (1955), where the Act was used to support governmental police power, the Act of February 25, 1885 has fallen into disuse insofar as access to public lands is concerned. In large part the cessation of use has resulted from the practical termination of the homesteading of federal lands. Additionally it appears that the federal agencies administering the lands (to which this Act applies) feel that the Act was useful only in the strictest interpretation of intent and that its usefulness ended when the era of disposal of the public domain ended. Further, it appears that the Taylor Grazing Act, which permits fencing of the public domain for agricultural purposes with certain qualifications (i.e., the public must not be denied entry) has, to an extent, superseded the Act of February 25, 1885. In refuting the applicability of this Act under present-day circumstances a Forest Service official has indicated that the Act was not intended to prevent the denial of access to federal lands: "It is clear

that the Act was not intended to interfere with use and enjoyment of private property unless such use was a mere subterfuge for enclosing or preventing access to the public domain." (38)

Another interpretation of the Act of February 25, 1885, was made by a Montana County Attorney late in 1972. In this analysis the attorney's observation was essentially that the Act referred to prohibits exactly what many landowners are doing. For private gain of one sort or another, they are deliberately denying access and thereby in effect restricting the use of the public domain. A further comment by this attorney relative to the Forest Service Official's response to the Act of February 25, 1885 was that the attitude exhibited was merely an excuse for the Forest Service to evade the issue of public access to public lands.(20)

An examination of several cases that employed the Act of February 25, 1885 to resolve access issues, will clarify the merits of the two differing opinions cited above.

One of the first applications of the Act was in the case of United States v. Brighton Ranch Company 25F 465 Nebraska (1885). The federal government sought to have 57 miles of fence removed that inclosed 52,000 acres of public land. The fence was constructed on both private and federal lands. In finding for the federal government and thereby sustaining the Act of February 25, 1885, the following opinions (partial) were handed down by the court: "The defendants had no right to build a fence upon the lands of the United States and it was the right of the United States to protect all public lands from misuse." The defendants were required to remove the existing fence and were prohibited from building fences in the future. This case merely touches on the edges of the

issue of access as it is viewed today. In the Case of United States v. Douglas-Willan Sartoris Company 3 Wyo 228 (1889) the land-ownership pattern was the familiar checkerboard system with the even-number sections in the possession of the federal government. The defendant, Sartoris Company, had enclosed a part of its land with a series of fences wholly on company property. The effect of the fencing was to enclose many of the even-numbered sections of federal land. The United States brought suit under the provisions of the Act of February 25, 1885 seeking removal of the fences in question. The court found for the defendant claiming that the Act was an illegitimate exercise of police power and an unwarranted invasion of the use of private property. The court also considered the aspect of "way of necessity" and disposed of this issue by stating that the federal government could not demand that the Sartoris Company destroy its fencing to afford the plaintiff the privilege of unlimited ingress and egress. The case was not appealed. The dissenting judge related that: "(1) enclosure of public lands to which the defendant had no claim; (2) assertion of exclusive use; (3) obstruction to or the prevention of settlement by force come within the jurisdiction of the Act in question." The issues raised by this dissent are the very essence of the access problem and illustrate how a court's interpretation of law can effectively negate the intent of legislation. The political interests of the judges ruling in favor of defendants are not known. However inasmuch as this decision was made by the Wyoming Supreme Court it may well be that the judges were susceptible to external influences to a greater degree than a federal court would have been. Later use of the Act in question tends to support this concept.

A similar case was that of the United States v. Buford 8 Utah 173 (1892). The United States as plaintiff sought redress or an indictment charging the defendants with fencing-in public lands contrary to the Act of February 25, 1885. The court found that the defendant had in fact "purposely, intentionally and exclusively enclosed government land so as to exclude others from going upon and passing over the enclosed land" (emphasis added) and ruled in favor of the federal government to have the fences removed. The court opinion related that: "if the government retains the title to a tract of land, having sold the land surrounding it on every side, a right of way to a public road is reserved by implication" (emphasis added). This right of way continues in both cases, both in favor of and against a subsequent grantee; for it is a right created by operation of law, and from necessity, to enable owners to enjoy their lands."

The case of Camfield v. United States 167 U.S. 518 Colorado (1897) involved a checker-board land-holding pattern and fencing system as described above. The defendant's (Camfield) actions came within the letter of the statute (Act of February 25, 1885). The defense maintained the Act was unconstitutional. The court found for the plaintiff citing in part as follows:

It is only by prohibiting all enclosures of public lands by whatever means, (emphasis added) that the Act becomes of any avail. The federal government needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated (removed) by the ordinary process of courts of justice. If it is found to be necessary for the protection of the public to forbid all enclosures of public lands the government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage to the individual proprietor

does not authorize an act which is in its nature a purpresture (taking) of government lands. This court is of the opinion that, in passing the Act in question, Congress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property (emphasis added)."

This opinion, which admittedly exhibits judicial bias for the Act, reflects a much stronger implementation of the Act of February 25, 1885 than the cases previously cited. As such, this case has potential precedential value in reapplying the provisions of the Act to present-day access problems. The aspect of the nature of fencing was and is still a controversial issue. Basically if all fencing that surround federal land was judged to be illegal there would be no fencing at all in many areas. The access issue will have to be resolved by sustaining the fencing but allowing passage through the fences to the federal lands so enclosed. Thus the strict application of law as directed in Cardwell v. United States 13 F 593 (1905) may be unworkable if followed to the letter of the opinion. This opinion in part, stated: "if the Act be construed as applying only to fences actually erected upon public lands, it was manifested unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it (the Act) as prohibiting all enclosures of public lands by whatever means, that the Act becomes of any avail." This language is very similar to that used in Camfield v. United States (above).

A somewhat unusual situation concerning the application of the Act of February 25, 1885 is recorded in the case of Homer v. United States 185 F 741 Wyoming (1911). In this instance the defendant (Homer) constructed a fence around a large tract of land which included smaller tracts of public land. The subsequent fencing-out of the smaller tracts

of land was not considered lawful by the court. This case also considered the aspect of interest and the court held that as in the case of Camfield v. United States that one's intent in building a fence was immaterial if it in fact enclosed public lands (emphasis added). The court directed the defendants to "construct such openings in the enclosure as will allow free ingress and egress (emphasis added) to the public lands in question." This case presents a solution that would be workable in today's world if a means of implementation could be devised.

The case of Golconda Cattle Company v. United States 201 F 281 Nevada (1912) is in some respects analogous to the difficulties the Forest Service is currently experiencing with the Flying D Ranch near Bozeman, Montana. The defendant cattle company controlled land which constituted a band of property completely enclosing some 37,000 acres of federal land. The cattle company constructed a fence along the perimeter of their property which for all practical purposes represented an inclosure of federal lands. The 44-mile long fence was provided with nine openings of approximately 100 feet in length some of which were located in very rough territory where the ground was almost inaccessible. The initial verdict was for the United States. The preliminary findings were based largely on the opinions in the Camfield case and reaffirmed that one's intent in building a fence is immaterial if in fact the fence encloses public land. Under the doctrine laid down by the Camfield case, "the United States has a clear right to legislate for the protection of public lands and to exercise what is called a police power to make protection effective, even though there might be some inconvenience or slight damage to individual proprietors." The case was appealed with the initial decision being

affirmed. A rehearing was obtained and the decision was reversed on the basis that the openings in the fence described above were indicative of reasonable access by the public to the public domain. Even though the federal government was ruled against in this case, the concept that the public has a right of access to public lands did not materially suffer from the decision.

In 1913 the federal government filed a suit against a ranch company to compel the opening of a road that connected a public highway with federal lands beyond the ranch. The road had been constructed as a private way but had subsequently been used by the public for about 8 years. The suit, United States v. Rindge 208 F 611, California (1913) was decided in favor of the defendant (Rindge) on the basis that an existing alternate road into the general area provided sufficient access to the public lands. Therefore the fences in question did not constitute an obstruction to entry to the lands in question. This road again became the subject of litigation in the case of Rindge Company v. County of Los Angeles 262 U.S. 700, California (1923). The County of Los Angeles was successful in its effort to condemn the road for public use. The important aspect of this ruling was the part of the court's opinion that stated: "public use of a road is not limited to its use as a mere necessity or ordinary convenience, but included its use as a scenic highway for the public enjoyment, recreation and health." This case with its description of use extending beyond the aspects of bare necessity can serve as a precedent for state-initiated eminent domain proceedings in Montana. Another interesting court case is that of MacKay v. Uinta Development Company 219 F 116, Wyoming (1914). The court ruled in favor

of the defendant (MacKay) in regards to the charge that he had trespassed upon the Uinta Company's lands which were open and unfenced and therefore indistinguishable from the intervening public land owned in checkerboard fashion by the federal government. The practical application of this ruling may well be that the Montana Statute 26-303 which requires land-owner permission to hunt big game on private property may be invalid if a person cannot distinguish the private land from adjoining public land.

In retrospect, the Act of February 25, 1885 appears to have fulfilled the intent of its framers to a considerable degree. However the utility of the Act in the past is only of value in establishing its potential applicability to present-day circumstances. In the final analysis the applicability of this Act will have to be tested through a well conceived litigation as suggested by Conklin (20). An exploratory litigation, aside from its immediate implications, can possibly focus public interest on the problem of ingress and egress to public lands. A heightened interest in access to the public lands may cause the Forest Service and Bureau of Land Management to re-evaluate their responsibilities as stewards of the public domain. A change in the attitude of the land-administering agencies could in itself resolve much of the access deficiencies in view of the eminent domain proceedings these agencies can initiate. Litigation based on the Act of February 25, 1885 may also spur legislative activity at the state level to resolve access difficulties. This too would be quite appropriate as the land-holding patterns which control access routes and roads come within the jurisdiction of state law. Such litigation may also spur activity in Congress as was suggested by Senator McGovern in his letter to the Director of the Bureau of Land

Management (29).

Any activity that creates public awareness of the seriousness of the problem can only serve to provide public pressure that will ultimately force a resolution of the inadequacies of public access to public lands.

CHAPTER IV

EXAMPLES OF ACCESS DEFICIENT SITUATIONS

The previous chapters have presented a background of law and court cases related to the general aspects of trespass, easements and access to the public lands. An understanding of statutory law and its application is essential in the review of the case histories provided in this section. The law should be viewed as a living organism adapting to changing conditions to protect both the individual and society in general. A balance has to be realized in the rights of both, particularly where their interests may be at cross-purposes. The case histories define current situations in which the existing law has not or cannot be used to properly protect both the public and private interest where access to the public lands is concerned.

Therefore statutory law, its general application, and the use of case histories illuminate the shortcomings of redress under law for access deficient situations under existing conditions. These three chapters (I, II, III) provide the basis for recommending changes in the application of existing law and the modification of existing statutes.

Teton Ranger District - Lewis and Clark National Forest

Generally, the Forest Service has not been aggressive in acquiring access for the recreational use of public lands. In part this position is a result of the small appropriations by Congress for this purpose (52). For example, the Choteau office received two thousand dollars in the fiscal year 1971 to be expended for right-of-way acquisition. With

today's cost of real estate, the two thousand dollar allocation is rather insignificant. On the other hand, the acquisition of access associated with a timber sale is well funded either directly or as part of the proceeds from a timber sale. This condition is indicative of the need for public pressure upon both Congress and the federal land administering agencies to properly fund right-of-way acquisition programs. In relation to access acquisition, the District Ranger at Choteau expressed the opinion that without public support the Forest Service would not actively support the right of public ingress and egress to public lands.

In the township designated T30N-R14W in Pondera County Montana there is a parcel of privately-owned land lying to the south of United States Highway 2 within the confines of the Lewis and Clark National Forest and directly across Highway 2 from Glacier National Park. There exists in this parcel of private land a federally owned, thirty-three feet wide, right-of-way extending from U.S. Highway 2 across the South Fork of Two Medicine Creek to the National Forest land. This right-of-way is apparently unknown to the public, is unmarked and is fenced off from the public road. Further, the point of entry into this access is marked with a "No Trespassing" sign.

This situation is representative of the effect of insufficient funding resulting in the loss of access to public lands because of the absence of identification of a right-of-way. Analogous to this circumstance are instances of the fencing of federal lands by the owners of adjacent lands to prevent the entry of the public. These examples of deliberate attempts to defraud the public by virtue of public ignorance could be resolved by the establishment of a program to properly locate

and identify all public rights-of-way and lands in a manner readily intelligible to the public. This would largely be a matter of the adequate funding of such a program. Aside from the aspect of funding, it appears that there are some land managers who are not interested in extending public access availability because of the "people problems" that may result. This latter consideration is specious because the Forest Service, for example, appears to have sufficient administrative regulations at hand to resolve or control any problem resulting from excessive or improper public use (52). The two aspects presented above, that of proper location and identification of public right-of-way and public lands, and the problems created by increased dispersal of public use can be largely accommodated through increased congressional funding to properly implement the mandate of the Multiple Use Act which lists recreational activities as one of the basic renewable resources (Public Law 85-517).

The attempted closure of the road that crosses the north fork of Dupuyer Creek (Township T27-R8W, R9W, R10W) to connect with the Lewis and Clark National Forest provides another instance of public-private landowner conflict. In this instance the public is well aware of this route and has used this road as access into the Rocky Mountain front west of Choteau, Montana for many years. The road closure was temporarily effected by the landowner bulldozing a deep ditch across the road at a point which could not be by-passed with even four-wheel drive vehicles. Upon public complaint (petition) the Commissioners of Teton County authorized public funds to make the road passable again and enjoined the landowner from further obstructing the road. To date, the landowner has refrained from directly obstructing this road but has resorted to posting the area

with "No Trespassing" signs and is claiming the road to be non-public. It appears that the landowner, who is able to properly finance a court test of this road closure, will seek a legal remedy. However, on behalf of the public, the County Commissioners will employ the services of the Teton County Attorney to keep this road open to the public. The road in question is one that has been kept in service by continuing public use and has apparently not been established by deed or dedication. The Teton County Commissioners are attempting to keep in public use all roads that are currently in existence and are being used by the public (51). The south fork road across Dupuyer Creek has been obstructed by both a gate and "No Trespassing" signs. In this instance the roadway passes directly through a ranch yard while on the otherhand in the case of north fork closure, the section of the road in question does not even pass close to any type of residence. One County Commissioner stated that every time there is a successful road closure, it is followed by a number of others in the immediate area (51). The road crossing the north fork of Dupuyer Creek is considered to be rather critical access to the national forest land by both the Choteau District Ranger and the Teton County Commissioners. In this immediate area there are several legal right-of-way routes available to the public about twenty-four miles apart in a north-south direction all along the front range. The access route via Dupuyer Creek divides one of these twenty-four mile areas into about half thereby considerably easing entry into this rugged country and contributing to the dispersal of use.

The Deep Creek drainage south of Dupuyer Creek in Township T23N-R8W is closed to public travel by ditches bulldozed in 1950 by the owners of

the Salmond Ranch, across allegedly public roads. This ranch encompasses three townships in a north-south direction and presents a barrier of approximately fifteen miles to the national forest land on its western boundaries. The ranch company leases the federal and state lands on its western boundaries. These lands are inaccessible to the public because of the closure of prescriptive right roads. This example of road closure was apparently never challenged and is, in part, an example for others to emulate who desire to close areas to public use.

O'Brien Creek Road Closure

The O'Brien Creek drainage is located immediately west of Missoula, Montana entirely in Missoula County. The drainage is substantially in the area designated as T13N-R20W to R22W and is approximately ten miles long and four miles in width, extreme dimensions, comprising about 16,000 acres. Of this acreage approximately one-half is public national forest land.

The O'Brien Creek road extends in an east-west direction about six miles into the drainage crossing a small segment of public land in the southwest corner of section 25 T13N-R21W and terminating about three quarters of a mile to the west at the common section line between sections 26 (private) and 35 (National Forest) T13N-R21W. From this point a trail continues west for about another mile through the northwest corner of section 34 T13N-21W (public land) and across section 27 T13N-R21W which is also public land. (Refer to the map of the area in Appendix B)

The O'Brien Creek valley has been inhabited since the 1860's and received its name from David O'Brien who lived there until 1888 (6). At

about the turn of the century, a lumber mill operation was operating in the valley and a small settlement complete with school existed there at the time. An industrial railroad extending approximately to the north-south section line between sections 25 and 26 T13N-R21W operated in the valley for a number of years (6). The school was initially located at about the midpoint of section 29 T13N-R21N subsequently being relocated to a site about one-fourth mile to the east. The lumber mill was also initially sited in the vicinity of the center of section 29 T13N-R20W subsequently being relocated to the east half section 30 T13N-R21N adjacent to the creek (49).

For a variety of reasons the once thriving community declined so that by the late 1950's the valley was uninhabited. However, for several years (1948-1953) Hans Jensen and his family lived in a house located just west of the north-south section line between sections 29 and 30 T13N-R20W adjacent to the road until the house burned in March 1953 (24). In 1970, Mrs. Elsie Whitman installed a house trailer upon the site of the Jensen house which incidentally was the location of a house occupied by an early settler named Graves--the father of Mrs. Whitman. For a period of approximately fifteen years (1953-1968) the upper portion of the O'Brien Creek valley was uninhabited (25). Neil Jensen, a son of H. E. Jensen, began living near Hagerty Gulch in 1968.

Historical evidence indicates that through time, the O'Brien Creek road was used as a public way by virtue of the community which existed in the valley in the early 1900's (6). Verbal accounting also indicates that throughout most of the years of this century the road has been used by the public in general without express permission of the landowners

holding fee title to lands adjoining the road. Such fences and gates that were maintained were used to control stock and the gates were left unlocked (36,49).

The problem of road closure appears to have begun in 1946 when Hans E. Jensen attempted to place a lock on a gate on the road at the east side of section 30 T13N-R20W and was apparently enjoined from doing so by the County Commissioners (23). At a later date, Hans Jensen was prevented from placing a lock on a gate located in the southwest quarter of section 28 T12N-R20W by the County Commissioners via an order apparently served by the sheriff (25).

During September of 1953, H. E. Jensen entered into an agreement with J. C. Klapwyck wherein Klapwyck acquired title to the property at the east side of section 30 T13N-R20W, where at one time Jensen had attempted to maintain a locked gate. A condition of the transaction was that "both parties promise to keep boundary gates closed so as to prevent livestock from wandering when fences are built to establish boundaries" (36). Apparently at a later date, Jensen again attempted to close the O'Brien Creek Road east of this gate, wherein J. C. Klapwyck and W. C. Maclay requested assistance from both the County Engineer and the County Attorney to prevent such closure (26,27). It is interesting to note that in the letter of April 18, 1960, the statement was made that Missoula County had maintained this road for 60 years and that the road was a public highway for five and one-half or six miles--its entire length (26).

From 1952 until 1968 the gate at the east side of section 30 was apparently not locked (25). Beginning in 1968, this gate was periodically locked though it is claimed that the public frequently destroyed these

locks to travel to the end of the road (25). Then during the forest fire season of 1970, the United States Forest Service placed a lock on the gate at the east end of section 30 (25). After the fire danger had passed the Forest Service lock was removed and replaced with another by J. C. Klapwyck who has succeeded in keeping the gate locked since that time. To sustain his right to lock this gate, J. C. Klapwyck and others appeared before the Missoula County Commissioners requesting the right to close the O'Brien Creek road west of section 28. The County Commissioners complied with this request without, however, following the letter of the law as specified in Section 32-105 Revised Codes of Montana 1947 which requires due notice and a public hearing, although this aspect of law may not have been necessary as the road was never officially designated as public.

With this formalized closing of the road, N. H. Jensen approached the Missoula County Commissioners requesting that the O'Brien Creek road be opened to the public for its entire length or closed for the same distance, this claim being predicated on the opinion that the road's status should be the same for its entire length. In a letter to the County Commissioners, D. G. Stevenson of the Forest Service has supported the same position as follows:

The point of this is that the public does not have access to public lands on up the bottom of O'Brien Creek, nor can the public get off the road for 2 miles below Mrs. Wittney's (Whitman's) place without violating "No Trespassing" signs. Since the public cannot go anywhere, or even get to its own lands, why should the public pay to maintain or plow the roads?
(33)

The road is being maintained at present up to the east side of section 30 (21, 22, 43).

This is the basis of the problem--a road that has through time been used by the public for many years and has been obstructed on different occasions by two parties. In one instance the County Commissioners supported the Klapwyck position that the gate be kept open when Klapwyck so requested; subsequently it appears that when Klapwyck requested the closing of this road the County Commissioners complied with his request. The problem also involves the determination of whether the road is public or private for its entire length. The decision in this case would determine the appropriateness of using public funds for maintaining the road.

Other facets relating to the problem are as follows:

1. The Forest Service owns an easement west of section 30 connecting the west side of section 30 with a parcel of public land in the southwest corner of section 25. Why would this sixty-foot wide and approximately one-half mile long easement have been purchased if the Forest Service did not have access to the remainder of the O'Brien Creek road?

2. Unofficially, Mr. H. Stoutenberg of the Missoula County Commissioners states that in his opinion the O'Brien Creek road is public for its entire length. If this is the case, why did he as chairman of the County Commissioners agree to the closing of the road (43)?

3. A petition requesting the opening of the O'Brien Creek road was circulated by H. E. Jensen among the enrolled taxpayers of Missoula County and received 544 signatures. This petition was rejected by the County Commissioners on the basis that it represented only the Jensens' position relative to the road closure (43).

4. When the Missoula County Commissioners were asked about the

public interest in this road (i.e., access to the public lands beyond the road for fishing, hiking, picnicking, and hunting) they replied that if a landowner in the area requested the opening of the road they would consider the request. The landowner in this case would be the Forest Service who at this time places a low priority on the O'Brien Creek area as a recreation site. Therefore, although the Forest Service claims that under its multiple use concept recreation is equivalent in importance to lumber production, this does not actually seem to be the case. D. G. Stevenson related that if a timber sale should develop in the area and access cannot be negotiated, the Forest Service will consider condemnation to procure the necessary access (56). (The O'Brien Creek and drainage is scenic and is well suited to hiking, picnicking, fishing, and hunting on the public lands.)

The County Commissioners, in considering the opening of this road by virtue of landowner request, are thereby denying the concept of public interest in the area that they are supposedly representing. To support their position in this aspect, they have maintained that this road closing is substantially a private matter concerning only Jensen and Klapwyck.

5. In December 29, 1971, the County Commissioners issued a resolution describing the O'Brien Creek road as a county road through sections 30, 25, and 26 by virtue of use and maintenance. Then on February 24, 1972, a revised resolution was issued claiming that O'Brien Creek road was recognized only as a road and that only portions had been serviced by the county. The revised resolution makes the claim that the O'Brien Creek road is a county road up to section 30. Thus, for some reason, a major change in concept has been effected (13,14,26,27).

6. The economic aspect of road closure is worthy of consideration. In lieu of continually rising costs, County Commissioners are often times overly willing to close a road to reduce county road maintenance expenses. This concern for cost, out of context of the overall situation, is praiseworthy. However, it seems reasonable to assume that in cases such as the O'Brien Creek road, the county would be able to sustain the public right of way and merely retain the road as an access route or trail with a minimum of expense as an alternative means of protecting the public interest in this area.

In addition, the County Commissioners because of the legal costs involved appear to be reluctant to employ the services of the County Attorney to force the opening of this road unless some compelling public interest is proven.

CHAPTER V
THE ACCESS PROBLEM IN PERSPECTIVE

The primary intent of this study was to define the nature and extent of the problem of access to public lands across private lands. The concept of access in this study includes both roaded and roadless situations whereby the use of public lands is denied to the public because of the isolated nature of the public land area. With the nature and extent of access deficiencies in hand an understanding of both the law and court interpretation of the law should lead eventually to the development of means to ameliorate the loss or denial of access to public lands. Inasmuch as any rectification of the problem will have to come largely through legislation and court activity, albeit both initiated and supported by public pressure, it is necessary to review the historical evidence relating to the subject. To this end the intent and execution of the Act of February 25, 1885 (1) and a variety of federal and state court cases have been presented as background material (Chapter III). Supporting evidence in the form of case studies were used to relate situations that by their nature would be unlikely to appear in the transcripts of court cases (Chapter IV). All of this material is utilized in conjunction with information obtained through interviews, correspondence, and published and unpublished materials, to develop an understanding of the access problem and to develop recommendations to resolve the problem of public access to public lands.

Overview

The access problem is only one manifestation of the increasing

pressure upon the land. A relatively fixed land base subjected to increased use via expanding population, more leisure time and technological advances has resulted in an impact upon the land of unprecedented proportions. Coincident with these effects is the increase in the denial of access to the public land which has further concentrated use in the accessible areas. Therefore from sociological and ecological aspects, aside from the fact that the public has a right to use public lands, in many instances the denial of access is contrary to the public good. Within this frame of reference is the interaction of the various user publics, the land administering agencies, the legislative bodies and the courts regarding the disposition of the natural resource called "public domain".

In the historical overview the United States Congress first addressed itself to the problem of access to public lands with the passage of the Act of February 25, 1885 when the population of the United States was approximately fifty million persons. Although the Act of February 25, 1885 appears to have been intended primarily to facilitate and encourage entry upon public lands for homesteading (38), it was also applied to situations analogous to current-day problems Golconda Cattle Co. v. United States 201 F281 (1912). These cases provide an indication of the potential utility of the Act of February 28, 1885 in alleviating access deficiencies. However, not all of the courts supported the concept of public interest regarding access to public lands. In one instance a Wyoming circuit court held the Act of February 25, 1885 to be unconstitutional United States v. Douglaw-Willon Sartoris Co. 3 Wyo 288 (1889). A similar case tried by the United States Supreme Court at a later date found the Act of February 25, 1885 to be constitutional and with this

decision the application and utility of this law became more certain Camfield v. United States 167 U.S. 518 (1897). For example, one part of the 1905 decision against Cardwell in Cardwell v. United States relating to the Act of February 25, 1885 states that "it is only by treating it as prohibiting all inclosures of public lands by whatever means that the Act (February 25, 1885) becomes of any avail" Cardwell v. United States 13 F 593 (1905). In this instance the fences objected to were erected upon non-public land. A classical example of a private holding totally enclosing public lands is provided by the case involving the Golconda Cattle Company. A situation which is analogous to that of the Flying D Ranch near Bozeman, Montana (28, 29, 32) and the Caliente Mountain area in southern California (15). An example of road closure affecting entry upon federal land is provided by the case of United States v. Rindge 208 F611 (1913), a situation involving roads that were obstructed by the defendant. In this instance the court found for the defendant (Rindge) and denied the United States' position regarding the application of the Act of February 25, 1885. This case appears to be an example of the transition from the federal protection of public lands via prosecution under law to that of litigation on the state level through both condemnation and civil procedure. In 1923 the roads in question were condemned by a county action and upheld by court decree to permit the public access to certain public lands Rindge v. County of Los Angeles 262 U. S. 700 (1923). Another type of access deficiency is represented by the MacKay v. Unita Development Company 219 F 116 (1914). This case involved the familiar checker-board ownership pattern that is common in much of western Montana wherein federal land occurs as alternate sections. MacKay was

charged with trespass for driving his sheep upon the Development Company's land. The court found for the defendant (MacKay) indicating that as the lands in question were "open and unfenced and there was nothing on the face of the earth by which they could be readily distinguished from each other without a knowledge of surveying", MacKay was not guilty of trespass. The Camfield case was cited in this instance as sustaining the doctrine that "wholesome legislation" may be constitutionally enacted, though it lessens in a moderate degree what are frequently regarded as the absolute rights of private property. The court held in part as follows:

The Development Company admits that MacKay had the right in common with the public to pass over public lands. But the right admitted is a theoretical one, without utility, because it is denied except on terms it prescribes.

The application of the Act of February 25, 1885 is well defined in the cases cited. Strict interpretation may indicate that it was intended solely to facilitate settlement of federal lands (38). However it appears that in light of today's needs and the present-day broad interpretation of law by the courts, this Act may still have utility especially where it is concerned with the intentional enclosing of federal lands to prevent access thereto (20, 28, 41). The aspect of entry upon federal land may be the issue here regardless of the purpose for going onto the public land, assuming of course that it is legal [Stoddard v. United States 214 F 566 (1914), (41)].

With the passage of the settlement period, land disposal by the United States came to an end and the law fell into disuse. However, under broad usage, the Camfield case interpretation continued to support governmental police action for the public good (Pomerang v. City of New York, supra p. 15). Thus the access problem shifted largely to the local civil

procedure level wherein public bodies and private individuals were involved at their own expense to resolve access problems. There are numerous cases involving access. Therefore only a few cases, especially those bearing directly upon or having merit regarding the problem of access to public lands, were cited. A case of particular interest is that of Herrin v. Sieben 46 Mont 226 (1912). In this situation, the private land holder sought to enjoin the defendant from crossing the private land to reach public land. The court found for the defendant citing in part as follows: "There is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections, but also in favor of private citizens who may wish to go upon them" (emphasis added). Here then is a clear statement indicating that the private citizen has the right to go upon enclosed federal land. The court commented that "viewed otherwise would grant the plaintiff a monopoly of the use of public lands" (Herrin v. Sieben, supra). This reasoning obviously has immediate implications for any area that cannot be reached except by passage over a privately-owned access route. A similar finding supporting an individual's right to hunt (i.e., entry) upon inclosed public land is in Herrin v. Sutherland 74 Mont 587 (1925) again describing in essence the nature of a "way of necessity". The broad implication of these two cases is that the public has the right to enter upon the public domain across a private holding if no reasonable alternate route exists.

Civil procedure litigation is expensive in both time and money. In situations where an individual is concerned over the closing of a road that had been used generally though not formally dedicated to public use,

it is unlikely that he would commit himself to a legal confrontation with those obstructing the road. These roads of the "prescriptive right" principle are those that are most frequently being lost via default. Frequently in these situations, an alert and publicly-oriented County Commission will act to prevent the closure of these prescriptive-right-type roads (51). But, as in the case of the O'Brien Creek road closure, County Commissioners have frequently failed to respond to public request (43, 44).

Resolution of Access Problems

The available legal redress for access problems, legislation, court litigation and public petition to local commissions, may in the technical sense offer recourse under law (50). This is far from the case. The U.S. Forest Service indicates that it is losing access of the "prescriptive right"-type of road faster than new access can be provided (32, 46). In other instances, access is lost by default whether this occurs because of public apathy, fear of personal retribution, or inadequate funds to finance a court litigation. It does not appear that sufficient remedy exists to protect the right of access to public lands (17, 18, 24, 41).

Prescriptive Right Access

Therefore it appears that resolution of the prescriptive right road access situation will have to come through legislative efforts to keep all existing roads that are or have been used by the public open to public use (29, 41, 51). Further, it is apparent that such legislation must not be subject to administrative discretion to minimize or eliminate personal interpretation of law (13, 14, 17, 23, 24, 25, 26, 27, 41, 49).

At present, the closure of these prescriptive-right-type roads appears to be the most pressing access issue. All legislation intended to resolve this aspect of the problem would have to be specifically directed to keep all existing roads of this caliber open to public use. This view, aside from the access issue, would thereby minimize the necessity for the construction of alternate routes (32) and obviously reduces the use impact upon the resource itself. To ease passage of such legislation it is conceivable that with today's increased use of the resource it may be necessary to utilize public funds in some cases to assist landholders in reducing the impact of public thoroughfare across these roads. This assistance would most likely be in the form of gating and fencing along road rights-of-way.

The necessity for adequate and specific legislation not subject to administrative interpretation and specifically developed to keep all existing prescriptive right roads in use is supported by facts describing the O'Brien Creek road closure. The information uncovered during the course of this study reveals many of the problems that specific legislation could resolve. Basically the issue appears to revolve around two parties--Jensen and Klapwyck--whose personal relationship was probably the main cause of the road closure although public misuse of the area adjacent to the road is claimed to be the primary cause. The historical data indicates a double turnabout in position regarding the closing of this road with Klapwyck successfully appealing to the County Commissioners in 1960 to keep the road open and then subsequently in 1970 to have the road closed. Jensen, from all appearances, lost his cause in both instances (23, 24, 25, 26, 27). A public petition circulated in 1971 by

Jensen received the signatures of 544 registered Missoula County voters requesting that the road be kept open. The County Commissioners disregarded this petition. Inquiry regarding this petition provided the comment from the commissioners that if a landholder at the upper end of the O'Brien Creek valley complained about the closure the commission might act to open the road (43). This position on the part of the County Commissioners denies the responsibility of the commission regarding their accountability to the public. Further, by forcing the "opening" of this road solely for the use of the landowner, the County Commissioners will still not have made the road usable by the general public. The landowner at the upper end of the drainage is the United States (Forest Service) who at this time has little interest in opening this road (16, 33, 38).

In summation, the O'Brien Creek road closure is a good example of a "prescriptive right" type road that has been closed by the County Commissioners in spite of the fact that their chairman voiced an opinion that the road was a public way used by the public for as long as he could remember.

The point made here is that in a situation of this sort the only recourse is for someone to initiate litigation to force the opening of this road. As the Forest Service is not inclined to press the issue the cost would have to be borne by either Missoula County which does not want to spend the money to finance such an effort, or by a private group or individual. Hence by default access into an area that has been used for hiking, fishing, picnicking and hunting is essentially lost to the public because of the steep terrain surrounding the drainage which severely limits access except by the road in question. The case of Kostbade v.

Metier 150 Mont 139 provides an analogy to the O'Brien Creek situation (Chapter IV). In this case a suit brought by a landholder to stop the public use of a prescriptive right road was successfully contested by the County Commissioners. These cases substantiate the need for adequate legislation to protect the public interest in access to public lands.

Enclosed Public Lands

The other major facet of access to public lands concerns those enclosed areas that do not have any apparent existing route such as a road or trail leading from a public highway to the public land beyond a private holding. In this instance there are four general types of positions to be considered:

1. private lands enclosing federal lands not subject to lease,
2. lands as described in (1) that enclose leased public lands,
3. unmarked federal lands which border upon public rights of way and,
4. public lands as described in (3) that are fenced and posted with "No Trespassing" signs.

In reviewing this aspect of access to public lands the role of the land administering agencies such as the U.S. Forest Service and Bureau of Land Management was of paramount interest. These public agencies are frequently in a position to resolve much of the access problem concerning the lands they manage. They have legislative authority which has granted them extensive administrative discretion (by specifying access to enclosed public lands as a qualification for leasing for example). It appears that these agencies can both rectify and allieviate much of the existing access problem without the need for additional legislation

(20, 38, 46, 52).

The case of the Montana state grazing lands presents a situation substantially different from that of the federal lands. State public lands are to be used to provide income for the public school system and in this context the interpretation of such usage usually precludes public use of these state lands. Even though the Revised Codes of Montana have been amended to embrace the multiple use concept, the provision of income from state lands is still paramount. In simpler language, the public does not have the right to use these grazing lands. Leasees of grazing lands in effect own the land as long as the contract controlling the leasing is not abrogated (42, 45). Administrative access to state lands is also tenuous. On occasion, representatives of the Montana Division of Forestry have been denied access to state lands enclosed by private land. In these instances the Division of Forestry has merely refused to press the issue, and aside from negotiation, will not try to force entry by condemnation (40, 54). There are strong overtones of political pressure in this approach (39, 45, 54). The situation regarding state lands leaves much to be desired but as this part of the access problem is largely beyond the scope of this paper, it is only being touched upon here. With sufficient public pressure to make more of the state lands available to public use, the objective of greater availability of public lands can be achieved. This possibility is well within reality in consideration of both the one-man-one-vote court decision and the passage of the new state constitution which may in large measure, wrest political power from stock raisers (41). Further, as the State of Montana reportedly has access to ninety percent of its land, the problem of public access to state lands is

academic pending the availability of the land to the public in general (45). Under the multiple use concept of the Revised Codes of Montana, the Department of State Lands is investigating means of opening up state lands to public use. Part of this study involves analyses of what other western states are doing with their state lands (42). Hopefully this evaluation will be used to guide future state land use in Montana.

The largest proportion of the access problem involves the U.S. Forest Service and the Bureau of Land Management because of the large areas these agencies administer and the relatively low degree of access to federal lands under their administration. Both agencies report that they have about forty to forty-five percent of the legal access they would like to have (46, 53). Much of the access these agencies now use is of the prescriptive right type and while many landholders seldom deny the Forest Service and Bureau of Land Management administrative access, the situation changes radically when the aspect of general public access arises (52). In any event the maintenance of existing access should be given priority over the development of new access routes in order to minimize the need for new road construction into unroaded areas.

If, as Nelson (30) and Van Gilst (38) contend, the Forest Service does presently have sufficient authority to resolve access problems concerning its lands then much of the controversy developing over access to public lands is without foundation. However the position taken by Nelson (30) and Van Gilst (38) that the Forest Service has sufficient redress is not supported by Enke's (46) contention that the Forest Service has suitable access to less than 50 percent of its lands. Lack of motivation to resolve access problems may also be a factor.

Other sources also indicate that access to the Forest Service lands is a problem in some areas. Baldock in his Senior thesis at the University of Montana (1971) has indicated this to be the case in a survey concerning the Rattlesnake Mountains (17). The Jensen-Klapwyck controversy (24) is also indicative of the nature of the problem as is the letter from Senator McGovern to the Bureau of Land Management in 1971 (29). Other contacts made by personal interview and written correspondence recognize the problem of access to public lands (31, 34, 37, 52, 55).

If the assumption is made that the Forest Service has ample authority to resolve access deficiencies it then appears that the agency is derelict in its duty to protect the right of public access to public lands. Political influences may limit the Forest Service's efforts to rectify access deficiencies (52, 55). The situation presented in the Caliente Mountain area controversy involving the Bureau of Land Management (i.e., political pressure preventing this agency from resolving an access problem) may be analogous to circumstances the Forest Service is facing (15). Certainly the concept that public access to public lands is an improper qualification for the leasing of federal lands is an indication of political pressure to contravene additional public land control.

Isolated Federal Lands Not Subject to Lease.--In the first instance, the Federal Government has the same rights as a private landholder, i.e., by way of necessity, a right to enter upon its land (the public also enjoys this right). The lack of assertion of this right, particularly that of the defense of the public's right to enter upon public lands is deplorable. That the Forest Service and Bureau of Land Management have

been reluctant to use condemnation when all else fails is strong evidence of either a disregard for the public right to use public land or the effects of adjoining landholder influence (15). In at least one instance (Forest Service vs. Flying D Ranch) it has been reported that where a landholder was not willing to negotiate, the threat of condemnation did produce a negotiable situation (46). Generally speaking, condemnation is employed where a timber harvest is planned and negotiations have failed (52, 55). The Bear Creek access route 20 miles west of Missoula is an example of condemnation for access to a timber harvest site. The same determination needs to be exhibited where and when general public access is needed.

Federal Lands Subject to Lease.--In the second case where federal lease lands are involved, the simple expediency of requiring public access as a qualification for leasing would immediately resolve much of the access problem. The Forest Service and Bureau of Land Management could immediately apply this qualification within their existing administrative authority. Although the lease lands represent a source of income for the federal government they are in effect a subsidy to these ranchers who are in a position to capitalize on these lands (in many instances these lands are leased at a rate that would not pay the taxes on them if they were privately owned and are obviously coveted by the leasee). An example of the abuse of the privilege of leasing public lands is provided by the Piceance Creek access problem in northwestern Colorado. In this case public access to the lease area was restricted only during the big game hunting season. The owners of the prescriptive right type roads exacted a toll for access to the public domain during this period (15).

Unmarked Federal Lands Adjoining Public Ways.--In the third case, where unidentified public lands adjoin existing legal public access routes the resolution of access is simple. All that is needed is the determination of the location of these lands and their adequate identification. Lands that are fenced under the provisions of the Taylor Grazing Act, besides being identified with signs indicating the area to be public land, could also bear a caption indicating that said land is open to public use. The federal land adjoining the Marshall Canyon road two miles east of Missoula is an example of this situation. The limiting factor in this case is manpower and money. However, as a consequence of the present need to provide more public recreational areas and to disperse use on the public lands, greater emphasis will have to be given to the location and identification of these lands.

Illegally Marked Federal Lands.--The fourth category, that of illegal fencing and posting of public lands, also has an obvious solution. It is only a matter of locating federal property lines, removing illegal signs and fences and initiating the legal prosecution of those refusing to comply with the law. This facet of the access problem will also require an increase in money and manpower by the land administering agencies (37).

In summation, it appears that there is much the federal land holding agencies can do to resolve the access problem providing they have the willingness to properly address the problem and the necessary financing is available. At this time, it appears that there is little support for this type of program (52). Motivation to materially approach the access problem will most likely have to come from outside forces as it is unlikely that either the Forest Service or the Bureau of Land Management

will take positive action without public pressure (40, 52, 55). If these agencies do not respond to public pressure to resolve access issues, legislation will have to be devised to detail, with great specificity, what the landholding agencies will do under varying conditions to provide for public access to public lands (29).

Values of Appropriate Access

The overall concept of appropriate usage of the natural resource base is to achieve a variety of goals in conjunction with meeting the socio-economic requirements of present and future generations. The federal Multiple Use Act and more recently the modified Montana Enabling Act provide statutory recognition and direction for the sustained yield concept in the utility of the publicly-owned lands. One of the major uses recognized by these Acts is the direct use of the land by the general public for recreational purposes. Obviously, recreational activity is tied directly to the degree of accessibility of the public lands by the public. The resolution of access deficiencies to the public lands will resolve several issues:

1. the right of the public to be able to use public lands that are now not available to public use--for of what value is the right to use public lands when no practical way exists for the public to reach these lands?

2. for many people there is utility in the availability of public lands in a vicarious rather than physical sense. These persons derive satisfaction from the knowledge that the public lands are there for their use and are theoretically at least protected from overuse.

3. the various factors of increased interest in outdoor recreation

increased affluence and more leisure time have created greater public demand for the recreational use of public lands. The administrators of the public lands have an obligation, as stewards of the public lands, to make these lands available for public use within statutory limitations. The statutory limitation in this case is the Multiple Use-Sustained Yield Act which specifies in part that the land shall be managed to produce its various products in perpetuity. Public use in the form of recreation is one of these products. Continued "production" of recreation opportunity entails among other things dispersion of use as a means of reducing adverse human impact resulting from the concentration of use. A properly designed access system can disperse recreational use. The objectives of suitable public access to the public lands and good land management regarding human impact and expanding the usable base are not incompatible.

Precedence--The Approach Used in California and Oregon

Access deficiencies can be resolved by both administrative action and the modification of statutes pertaining to trespass. In either case public support will be necessary to initiate and implement corrections in the abuse of the rights of public ingress and egress to public lands. In the event that precedence is necessary, the experiences of other states can be used as a guideline. In the case of Thornton v. Hay 462 P2d 671 (Oregon 1969), the state (Thornton, Attorney General) contended that the public right to go upon public lands transcends the fee holder's (owner) right to deny the public access to public lands. In this instance the fee lands isolated the public ocean beaches from the public. The Oregon Supreme Court found for the plaintiff (state). An interesting aspect of

this decision was the view presented by one of the Justices: "that precedence should not be an overriding factor in making decisions in the area of public utility of public lands." The Justice's contention was that the law regarding the use of property held for the benefit of the public must change as the public need changes.

The Montana prescriptive right statute specifies non-use of a prescriptive right road to be the basis for denying further public use if the road is successfully closed to public use for the statutory period of five years. The California Supreme Court has ruled that once land has been used as public land and when such use has been affirmed (by prescriptive right) that land could not be removed from public use. If the foregoing interpretation of law were applied to prescriptive right roads in Montana such roads could never revert to private status. Portions of the California Constitution can also be used as an example of a more enlightened approach regarding the public use of public lands (Appendix). Article 25, Section 2 of the California Constitution states in part that no one possessing the frontage or tidal lands of any bay, estuary, harbor or other navigable water in this state shall be permitted to exclude the right-of-way to such water whenever it is required for any public purpose.

The California courts are also altering their application of the law to adapt to changing conditions. This modification of position is well stated in the excerpt below:

This court has in the past been less receptive to arguments of implied dedication when open lands were involved than it has when well-defined roadways are at issue. With the increased urbanization of this state, however, beach areas are now as well defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads

us to the conclusion that the courts of this state must be as receptive to the finding of implied dedication of shoreline as they are to a finding of implied dedication of roadways (Gion v. Santa Cruz & Dietz v. King, 84 Cal Rptr 162 (1970)).

Obviously it would be a simple matter to substitute "public lands" for the word "shoreline" and make a direct application of this modified concept to the state of Montana.

One part of the California Constitution guarantees the right of the people to enter upon the public lands within the state (Article 1, Section 25). There is no such guarantee in Montana.

California Code, Government Section 39937, provides that by ordinance a city may declare a right of way over fee tidelands or frontage to navigable water.

Finally, the overriding principle is that of adapting the utility of the natural resource to the changing requirements of society and not tying management to circumstances extant during frontier times.

A comment made by Justice Cardozo appears appropriate:

The concept of law as a living organism adapting to changing conditions and societal needs must be paramount in the application of law if the law is not to petrify at the cost of its animating principle.

CHAPTER VI
SUMMATION, CONCLUSIONS AND RECOMMENDATIONS

Summarization

The records indicate that problems of public ingress and egress to public lands in the United States have been recognized since at least late frontier times. After the passage of the Act of February 25, 1885 the Federal Government itself initiated litigation to resolve access difficulties. Later, during the period of the 1920's, the responsibility of protecting both public and private access interests appears to have shifted to the local government level largely through the civil law. Through civil law, both the public at large and the various land administering agencies have sought to maintain access to the public lands via legally defined roads, prescriptive right and way of necessity. In some respects these efforts under existing law have had a measure of success. However in many instances the existing legislation or rather, the degree of implementation of such legislation, has failed to protect the public's right of ingress and egress to public lands. The Forest Service and the Bureau of Land Management report that they are losing access faster than alternate routes are being developed. Both agencies indicate that the access problem is a tough one and it is being approached as well as their resources permit.

Access continues to be lost primarily in the area of prescriptive-right roads largely by default and through political influence exerted on those in a capacity to control these roads. The lack of suitable identification of public lands adjacent to existing public access

routes and the illegal fencing of public lands is further restricting the use of these areas.

The abandonment of the Act of February 25, 1885 (as far as access to federal lands is concerned) in conjunction with the application of existing remedy under civil law are contributing factors in continually diminishing access to public lands. The activities of the land administering agencies regarding access to public lands whether through political pressure, lack of motivation, or inappropriate leasing qualifications also contributes to the loss of access.

The matter of access to Montana's state public lands is of analogous import but this problem must be approached from another position because of the income-producing intent of the State's Enabling Act. Montana state lands are managed to produce income for the public school system and as such the public does not have the right to use much of these state lands. Past and current political climate in Montana has effectively kept the control of these lands in the hands of the cattle industry. However, with the advent of the one-man, one-vote rule and the new constitution, there may be a shift in political influence controlling public state lands. The stock-raisers have the time, money and incentive to influence control of both federal and state lease lands and the effects of their efforts are apparent. Public access to Montana state lands may involve modification of the Enabling Act to properly define the right of public use of these lands.

Aside from the general supposition that the public must be able to reach public lands to exercise their right of use, good land management would indicate suitable dispersion of access to minimize adverse

impact by concentration of use. The denial of public access to public lands negates the concept of multiple use and is inimical to congressional intent.

Conclusions

Obviously under present conditions there is recourse under law to alleviate much of the access difficulties. The available remedies to access deficiencies have been reviewed at length with appropriate examples provided to illustrate the utility of currently existing means of resolution.

However, it is apparent by virtue of the extent of the access problem that such remedies as presently implemented are not sufficient to correct the problem as it exists today. Rather the loss of access is becoming increasingly acute. By and large, the existing remedies to access problems can be said to be expensive, time consuming, and in many instances ineffective.

Much of the difficulty experienced in either preserving or acquiring access stems from the inadequate recognition of rapidly changing conditions relative to use of the basic natural resource defined as public land. The landholding agencies have not taken the initiative in maintaining access rights in light of today's needs. Perhaps a lack of public interest is a causal factor. Additionally, the influence of interests especially concerned with the disposition of federal land has undoubtedly altered the course of land management. The right of the federal government to go to and from its lands is known to be no less than that of a private citizen. Courts have held that the right of the public to go upon public land is no less than that for the land

administering agencies. Yet it is apparent that this right is not being fully utilized and protected. The case of the Caliente Mountain area is an example of where federal lands completely surrounded by private lands are inaccessible to the public. The Bureau of Land Management has not been able to negotiate for access routes for the public. While a condemnation proceeding appears appropriate, the Bureau of Land Management has not employed this remedy apparently because of political pressure (15).

If, as is claimed, the Forest Service and Bureau of Land Management have sufficient recourse under existing legislation and directives to properly resolve any access problems, the admission by the agencies that they are losing access faster than alternate routes can be provided belies this claim. It appears that these agencies have not really acted in the public interest in many cases where access to federal lands by the public is concerned. Certainly the statement that the Forest Service has forty to forty-five percent of the legal access they desire is indicative of at least the inadequacy of execution if not the full capability of remedy to access problems.

The Act of February 25, 1885 appears to have considerable utility if properly applied to correct the more blatant access denials. This belief is supported by the nature of the several court cases presented wherein this legislation was utilized and by the opinion of a practicing attorney (20). The proper application of this legislation, if upheld by the United States Supreme Court, could resolve much of the access problem, particularly those cases that are similar to the one presented by the Caliente Mountain area. The implementation of this

Act would do much to reduce administrative interpretation of civil law and land administering agency regulations. Suits could be brought by persons outside the influence of these bodies. The circumstances of the O'Brien Creek road closure are indicative of the value of litigation that could be initiated by a private citizen under the provisions of the Act of February 25, 1885.

Alternatively, additional legislation may be required to properly resolve this issue. Senator McGovern alluded to this possibility in a letter to the Bureau of Land Management (29). This letter referred to correspondence from hunters and fishermen complaining of restricted access to public lands in South Dakota. Senator McGovern told the Bureau of Land Management that he "regarded the situation as serious enough to warrant the consideration of legislative remedy if the matter cannot be handled administratively". Such new legislation would have to restrict administrative interpretation of the law regarding access and require that suitable activity occur to rectify an access problem.

Public pressure, either directly upon the land administering agencies or through congressional legislation will be needed to modify the leasing contracts for federal lands. The position taken by some Department of Agriculture officials that public access routing should not be a qualification for leasing does not seem plausible, particularly in consequence of the economic benefit the leasee derives from such leasing. The toll road practice described in the Piceance Creek case study (15) wherein access to the public lease lands became solely an economic venture during the hunting season is an example of the necessity for requiring a right-of-way qualification in the leasing of

federal lands.

The material presented above has dealt with methods that could be employed to protect the public right of access to public lands. However, aside from the public-right philosophy, the appropriate use of federal lands is also at issue. The denial of access to public lands by some segments of the public is not consistent with the intent of use of public lands. Further, increasing the accessibility to the non-wilderness federal lands where the majority of access deficiency exists can (1) disperse recreational use over a greater area and thereby reduce the effect of concentrated use and (2) can result in reduced usage of the more accessible wilderness areas. This latter effect would be realized by making Forest Service lands adjacent to cities more readily available such as the upper Rattlesnake drainage near Missoula.

In essence, if the utility of the public land resource is to be realized, the public must be able to reach the land areas through some reasonable route. The locking up of public territory for private use has to be minimized and hopefully eliminated if the legislative intent of multiple use beyond that of timber harvest and grazing is to be realized.

Finally, the public interest in the issue will have to be developed and directed to properly support legislative, administrative and court activity relative to ameliorating access difficulties if a large measure of success is to be realized. A public education and information program promulgated through the news media and various conservation groups can probably achieve this objective.

Recommendations

The nature of the access problem will require a several-faceted approach in its resolution. A first step in realizing the objective should be the development of a public education program that will both inform the public of the extent of access deficiencies and will explain the rights of the public to get to the public lands. The import of such a program will be to create broad-based public support for the acquisition of reasonable access to public lands. Widespread public support will be essential for the resolution of access deficiencies as it is very likely that public pressure will have to be exerted on the land administering agencies through the appropriate legislative bodies and possibly upon the legislatures themselves particularly at the state level. At this time it appears that the best means of developing the needed support will be to enlist the assistance of the conservation groups such as the Wilderness Society and the Sierra Club. The finances and expertise these groups can employ is quite extensive. In addition, the appearance of newspaper and magazine articles in publications such as Outdoor Life, Reader's Digest and Field and Stream can assist in the development of the needed public interest in this matter.

Subsequent to the realization of adequate public support, a road closure or general land blockage issue of considerable importance should be brought to litigation under the provisions of the Act of February 25, 1885 as suggested by Conklin (20). In view of the implications of such a case, preparations will have to be made to pursue the issue as far as the United States Supreme Court. Concurrent with an exploratory litigation legislation specifically defining what is

necessary to protect the public's right of ingress and egress to public lands should be prepared at the congressional level. Thus legislation must be written to minimize, as far as possible, both bureaucratic and judicial interpretation of the intent and application of such legislation.

This legislation would provide that:

1. All existing roads or access routes that have been used by the public (where such use can be definitely established) which connect with public lands from any public road shall be forever enjoined from closure regardless of the location of the road or the frequency of use the road sustains. Flexibility in the application of such regulations would provide that public land administering agencies may, after public hearings, close a road if such closure is needed for the management and protection of the resource.

2. In all cases of isolated federal or state land areas that do not have access routes the appropriate administering agencies will negotiate suitable access at fair market prices. In the event of failure of negotiation, condemnation would be mandatory, much as is required to acquire highway rights of way for federal and state road building programs.

3. Leasing conditions for federal and state lands must be provided which, in fact, protect the public's right to use public land by requiring an access route as a qualification for leasing.

4. In situations where access routing across private lands to public property would in actuality work a hardship upon the landowner, a program of cost-sharing for gating and fencing could be developed to

minimize public use impact upon private lands adjoining the access route.

In view of the fact that the U.S. Forest Service and the Bureau of Land Management have demonstrated their unwillingness to adequately protect the public's interest in this regard, immediate legislative activity is needed to ameliorate the problem. At the state level, the Montana Legislature will have to make statutory provisions to enable the general public to use the state lease lands. Such a law would also require positive action by the Montana Department of Natural Resources to insure public ingress and egress with qualifications regarding the management and protection of the resource. In any case, once access requirements were firmly established by law, the land administering agencies will be better able to effect their stewardship regarding ingress and egress to public lands.

The steps that must be taken to resolve the access issue are sufficiently straightforward; the difficulty lies in gaining acceptance of the necessary means to effect a resolution of access denials. The implementation of the means devised to resolve access problems will have to balance both the public and private good if general acceptance is to be realized.

In consequence of what is at stake in the issue, every effort must be made to reassert and implement the right of public access to the public lands.

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55. Slusher, E. C., Branch Chief (retired), Special Areas, Dispersed Recreation, United States Forest Service, Region I, Federal Building, Missoula, Montana. August 22, 1972.
56. Stevenson, D. G., District Ranger, United States Forest Service, Lolo National Forest, Missoula Ranger District, Missoula, Montana. October 1971.

APPENDIX A

Congressional Act of February 25, 1885

1

penditure exceeding the sum so remaining after paying for the site of said building: *Provided*, That the site shall leave the building unexposed to danger from fire in adjacent buildings by an open space of not less than forty feet, including streets and alleys; and no money appropriated for this purpose shall be available until a valid title to the site for said building shall be vested in the United States, nor until the State of Iowa shall have ceded to the United States exclusive jurisdiction over the same, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of the State and the service of the civil process therein.

Approved, February 25, 1885.

CHAP. 149.—An act to prevent unlawful occupancy of the public lands.

February 25, 1885.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

Proviso.

Title.

Inclosure of public lands without title declared unlawful.

Maintenance of inclosure forbidden.

Assertion of right without title prohibited.

United States district attorneys on complaints made to institute civil suits.

Jurisdiction of courts.

Such cases to have precedence.

Summary judgments.

Settlements and transit on and over public lands not to be obstructed.

Proviso.

Violators of these provisions held guilty of misdemeanor.

Penalty, fine and imprisonment.

President authorized to take necessary measures to remove unlawful inclosures.

No suit for unlawful inclosure of less than 100 acres without authority of Secretary of Interior.

Pending suits not affected.

SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

SEC. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offence.

SEC. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

SEC. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

SEC. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

Approved, February 25th, 1885.

February 25, 1885.

CHAP. 150.—An act making appropriations for the consular and diplomatic service of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes.

Consular and diplomatic appropriations for the year ending June 30, 1886.

Envoys extraordinary and ministers plenipotentiary.

One envoy extraordinary and minister plenipotentiary for Guatemala, Costa Rica, etc.

Residence.
Turkey.

United States of Colombia.

Ministers resident.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, severally appropriated for the consular and diplomatic service of the fiscal year ending June thirtieth, eighteen hundred and eighty-six, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter expressed, namely:

For salaries of envoys extraordinary and ministers plenipotentiary to Great Britain, France, Germany, and Russia, at seventeen thousand five hundred dollars each, seventy thousand dollars.

For salaries of envoys extraordinary and ministers plenipotentiary to Japan, China, Spain, Austria, Italy, Brazil, and Mexico, at twelve thousand dollars each, in all eighty-four thousand dollars.

For salaries of envoys extraordinary and ministers plenipotentiary to Chili and Peru, at ten thousand dollars each, twenty thousand dollars.

For salary of envoy extraordinary and minister plenipotentiary to be accredited to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua, and to reside at such place in either of said states as the President may direct, ten thousand dollars.

For salary of envoy extraordinary and minister plenipotentiary to Turkey, ten thousand dollars.

For salary of envoy extraordinary and minister plenipotentiary to the United States of Colombia, seven thousand five hundred dollars.

For salaries of ministers resident in Belgium, Netherlands, Hawaiian Islands, and Sweden and Norway, at seven thousand five hundred dollars each, thirty thousand dollars.

For salaries of ministers resident and consuls-general in Venezuela

APPENDIX B

O'Brien Creek Road Closure Correspondence

School of Forestry
University of Montana
August 23, 1972

Mr. Donald G. Stevenson, District Ranger
Lolo National Forest
Missoula Ranger District
Missoula, Montana 59801

Dear Mr. Stevenson:

As you know the O'Brien Creek road was closed by the Missoula County Commissioners at the request of Klapwyck et al., at the east side of section 30 in the O'Brien Creek drainage.

Historical evidence and non-official comments by a number of individuals, Hi Stoutenberg included, indicate that the O'Brien Creek road was used freely by the public for many years until approximately mid-1970.

The closing of this road has in effect denied the public access to the public lands in the upper drainage. In consequence of the provisions of the Multiple Use Act which provides for the recreational use of Forest Service lands in addition to timber production, grazing, water resource development and wildlife, the closing of this road obstructs the full utility of this area.

With the current and expanding recreational pressure upon federal lands it becomes increasingly important to protect the public right of access to federal lands. Aside from the mandate of the Multiple Use Act, the important aspect of spreading resource use over a wide base to minimize impact upon the resource itself is a part of the problem. In this respect the use of national forest areas immediately adjacent to Missoula such as the Rattlesnake drainage, the entire Blue Mountain region and other similar areas can provide day and weekend use and thereby relieve some of the pressure on the more remote wilderness areas.

Further, the O'Brien Creek road closure, which as you know is not an isolated instance in this area, is a sociological problem in itself, the ramifications of which are well known to you. In this respect the Forest Service should take the role of representing the general public in preventing or circumventing such road closures.

I know that you have communicated with the Missoula County Commissioners regarding this road (letter of 11-4-71) stating your opinion regarding the closure of this road and do not in essence agree with the

2-

obstructing of this road. However, when we discussed this situation, you indicated that until there was a timber sale on the public land in the drainage, access for recreational purposes would be given a low priority.

In conjunction with my thesis research on the subject of access to public lands, I would like to officially request that you take immediate steps to secure the opening of this road in particular and others in similar circumstances (the Rattlesnake road especially) for public use. I am basing this request upon the following concepts:

1. The mandate of the Multiple Use Act.
2. The need to make intermediate (BOR Type 3) areas generally available to the public to reduce pressure upon the wilderness areas (though not necessarily by road).
3. The Forest Service as a land administering agency must protect the public's right to use federal land.
4. The Forest Service must respond to the changing socio-economic needs of the country and insure the proper utility of public lands.

Further, why does the Forest Service have a 60 foot wide and half-mile easement extending from the west side of section 30 communicating with federal land if this easement was not intended to communicate with an existing public road?

I will be looking forward to your response to my letter.

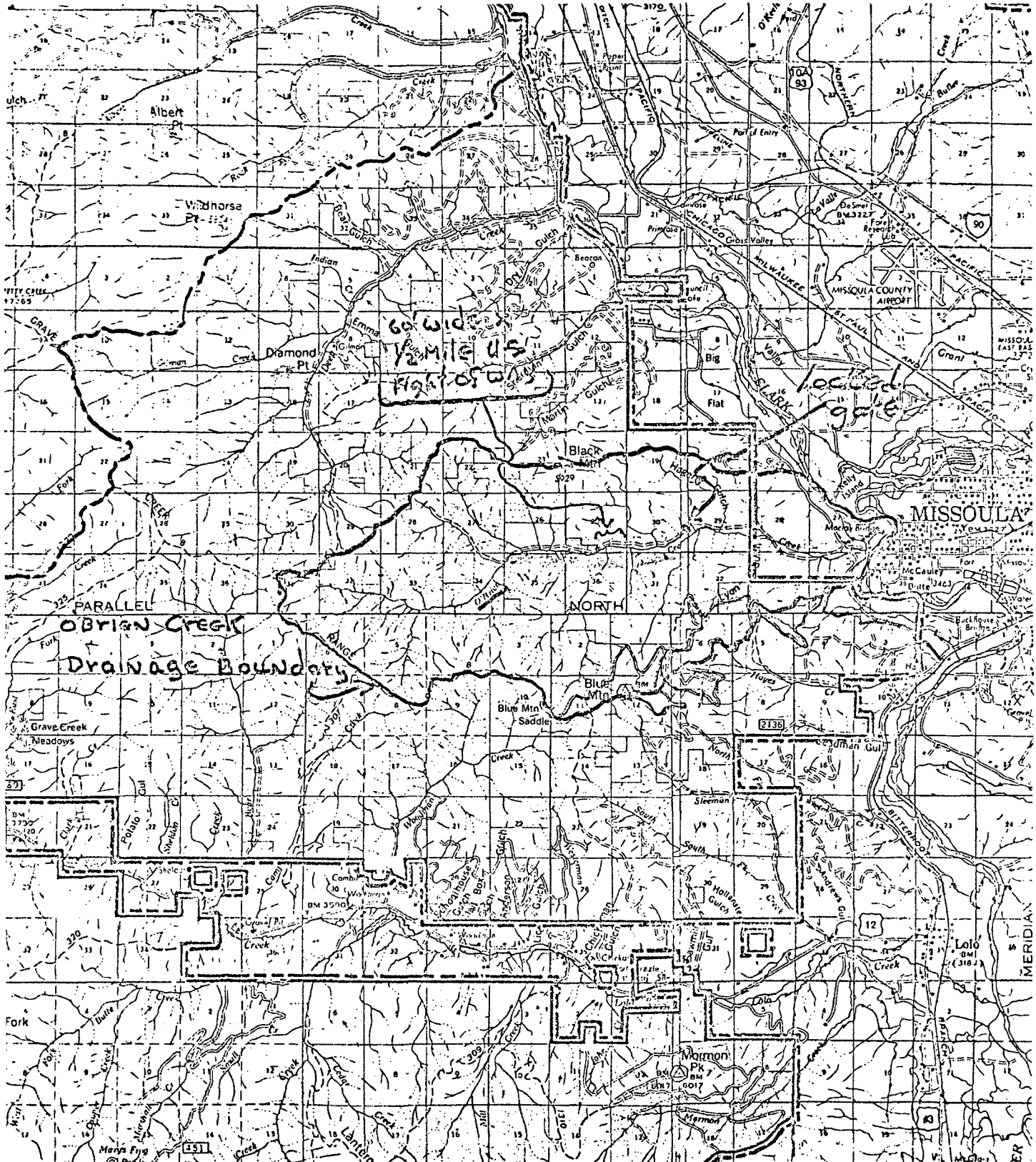
Sincerely yours,



V. A. Ciliberti

cc: D. Aldrich
S. Yurich
M. Mansfield
L. Metcalf
R. Shoup

O'BRIEN CREEK DRAINAGE



UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

Lolo National Forest
Missoula Ranger District
Missoula, Montana 59801

September 8, 1972

REPLY TO: 7720 Development Roads

SUBJECT: O'Brien Creek Road



TO: Mr. V. A. Ciliberti
School of Forestry
University of Montana
Missoula, Montana 59801

Dear Mr. Ciliberti:

Thank you for your letter and concern over access to public lands. I would be most interested in a copy of your thesis.

First let me state that it is our policy to retain whatever right of access we may presently have. We give this high priority.

Several years ago we looked into the specifics of the closure on the O'Brien Creek road. We found the history of locked gates and partial closures at various seasons of the year enough to indicate that various landowners were exercising control over the road, and thus denying prescriptive rights to occur for the general public. Examination of county and Forest Service right-of-way records revealed there is no recorded right-of-way across Section 30, T.13N., R.20W. The 60-foot wide half-mile right-of-way easement that you mentioned in the S.½ of the S.E.¼ of Section 25 was retained in a land exchange with the Anaconda Company made on February 11, 1941. The reason that the right-of-way was retained was for possible future access up O'Brien Creek. This is a common practice in all exchanges we make in accordance with the policy I mentioned at the beginning of this letter.

Obviously the public must have the right of access in order to use and enjoy their lands. We feel that the degree of access must be accomplished on a planned basis to insure proper use of the lands and their resources. We are dealing with this question of kind and degree of access in our present multiple use planning efforts. When this planning is completed, we will develop an action plan for obtaining needed accesses. O'Brien Creek is located in the Petty Mountain Planning Unit, and we hope to have this plan completed by July 1, 1973. Roger Lund of my staff is coordinating planning efforts for this unit, and would welcome any additional input that you have relating to this planning.

The time required to do a good job of multiple use planning and limited personnel skilled in right-of-way appraisals and negotiations

2.

control how fast we will be able to proceed with new acquisitions. We give acquisition priority to those accesses which will result in the greatest total benefit to the various publics and resources. We are acutely aware of the access needs, especially around Missoula, and agree with your philosophies on dispersal of use. If we can be of any further assistance, please don't hesitate to contact my office.

Sincerely,

A handwritten signature in cursive script that reads "Donald G. Stevenson". The signature is written in dark ink and is positioned above the typed name.

DONALD G. STEVENSON
District Ranger

October 27, 1946 75

TO:

Board of County Commissioners
of Missoula County, Montana.

Dear Sirs and Madam,

In reply to the undated letter received from your Office regarding the closing of the O'Brien Creek road by the placing of a padlock on the gate in the South West Quarter of Section 28, Township 13 North, Range 20 West, I wish to state that I did not know that a padlock had been placed on this gate. Also that it is not my intention to keep this gate locked and that I am writing a letter to Mr. Barrington who has the lease on my property to that effect. It is my intention to leave the road open as far as Haggerty gulch to accommodate hunters, picnickers etc. who wish to use Haggerty Gulch as a route to Black Mtn. and the country beyond. However I believe that the opinions of the County Commissioners are in error concerning this road as a search of the Records and Titles will show and I wish to state the following facts for your information.

1. I hold Title to the lands in the S.W. quarter, Sec. 28, Twp. 13 N., R. 20 W. and that part of Sec. 29, Twp. 13 N., R. 20 W. and part of the East portion of Sec. 30, Twp. 13 N. R. 20 W. (Map on File, Missoula County Courthouse) through which the O'Brien Creek road passes.
2. The only legal "Right of Way" which has ever been granted through this property was to a party by the name of Haggerty, for the purpose of travel etc. to and from his ranch in Haggerty Gulch. This right of way was through the east half of the aforementioned Sec. 29, and has since elapsed.
3. There has been and still is a gate and a "No Trespassing" sign on the O'Brien Creek rd. at the east end of Sec. 30. Said sign and gate have been on the road for over 15 years.
4. This gate was kept padlocked by the former owners of this property and was further fastened by a padlock which was the property of the U.S. Forest Service.
5. The road beyond the house and my property in Sec. 30, traverses the land belonging to Mr. John Klapwyck and is a Forest Service road. I have discussed this road with Mr. Myreck of the U.S. Forest Service and I have always allowed such persons having legitimate business or reasons, to travel through the ranch yard enclosing the area around the house.
6. The right to travel through my property, West of the center line of the aforementioned Sec. 29 and east of my Orchard fence in Sec. 30, cannot be claimed by "Right of Usage" as persons who have done so trespassed unlawfully through private property, through locked gates, and without regard for the posted "No Trespassing" signs, which acts constituted an infraction of the laws of the State of Montana.
7. The U.S. Forest Service has a right of way through this property at all times and the only other parties concerned who own land west of my property, Mr. John Klapwyck and Mr. Clyde MacLay have both been granted "right of way" through my property for the purposes of travel and driving attended stock to and from their lands.

In view of the above, I do not understand what the County Commissioners mean by, quote, "That in the opinion of the County Commissioners it is necessary that this road be opened to travel (west) to lands west of the gate in question", as there are no private or County lands west of my property other than those previously mentioned. I wish to repeat that no restrictions will be placed on public thoroughfare east of the center line of the aforementioned Sec. 29, excepting that gates must be kept closed by users according to law. I further wish to state that due to the havoc created on my property, by promiscuous shooting, theft, and breaking and entering of my house, which, under the law constitutes a felony, I, as the owner of the aforementioned property in the west half of Sec. 29 and the east portion of Sec. 30, reserve the right under the Constitution of The United States and as a Citizen thereof, to restrict and if necessary refuse the right to travel through my Property west of the aforementioned center of Sec. 29.

Hans M. Jensen

Hans E. Jensen.
P.O. box 133, Browning,
Montana.

TO: Board of County Commissioners
of Missoula County, Montana.

November 19, 1946.

Attention: John Klapwyck

I sent one copy to each County Comm. This is for your information so that you will know what's going on.

Again referring to the undated letter received from your office last month attested by the County Clerk to which your signature was placed. In connection with this letter and other information which I received I made a trip to Missoula to investigate the matter of the gate and padlock which you stated in your letter had been placed in the Southwest Quarter of Sec. 28, Twp. 13 N., Range 20 W.. I also found that an Order had been served by the Sheriff in connection with the above, though no notice of such action has been forwarded to me.

While in Missoula I took photographs of the O'Brien Creek road at the point named by the County Commissioners and called the attention of reliable witnesses to the O'Brien Creek road in this Section. For your information,

THERE IS NO GATE ACROSS THE O'BRIEN CREEK ROAD IN THE SOUTHWEST QUARTER OF SEC. 28, Twp. 13, Range 20 W. OR, FOR THAT MATTER, ANYWHERE ELSE IN SEC. 28, WHICH HAS A PADLOCK, NOR HAS THERE EVER BEEN SUCH A GATE OR PADLOCK.

I am at loss to understand the actions of the Missoula County Commissioners in this matter. For your further information, I bought the O'Brien Creek property upon my Honorable Discharge from the United States Navy with the intention of making Missoula my home. The actions of the County Commissioners in connection with the above mentioned non-existent gate and padlock and the resultant newspaper article which appeared in the "Missoulian", not to mention property damage which has since occurred on the ranch, signs torn down and destroyed, etc., have already caused me considerable embarrassment and expense and are of a nature which I consider damaging to my personal reputation and character, therefore, unless an immediate and satisfactory explanation is given me in this matter, I shall consider it necessary to take further action for my own protection.

Signed.

Hans E. Jensen

CC. To all parties concerned.
File.

Dear John,

~~XXXXXXXXXX~~ How's everything going down your way? They haven't thrown you in the clink yet for fencing your own property have they? I am sending you copies of my letters to the County Comm.s and as soon as I have time will type you a copy of the letter which I received from them. How's the Mrs. and Family. Tell them "Hello". Sincerely,
Hans E. Jensen

THESE TRANSFERS, Made and entered into this 4th day of September 1953, by and between HANS E. JENSEN and CLAUDIA S. JENSEN, presently residing in Havre, Montana, and JOHN KLAPWYK and FRIEDA KLAPWYK, presently residing in Missoula, Montana, WITNESSETH:

That for and in consideration of the sum of One Dollar (\$1.00) the receipt whereof is hereby acknowledged, and other good and valuable considerations, the parties above-named by these presents to hereby agree to transfer, each party to the other, for permanent ownership, the following described properties, in the manner herein described:

FROM, Hans E. Jensen and Claudia S. Jensen, to, John Klapwyk and Frieda Klapwyk, the following described property and all rights thereto;

A tract of land located approximately in the East Half of Section Thirty, Township Thirteen North, Range Twenty, West, M.P.M., which tract contains all of the property owned by Hans E. Jensen and Claudia S. Jensen in said Section Thirty (30), Township Thirteen North, Range Twenty, West, M.P.M., more accurately described below,

Commencing at point No.1, which lies on the Section line common to Sections Twenty-nine and Thirty, 230.88 feet South of the quarter-corner between Sections Twenty-nine and Thirty, Township Thirteen North, Range Twenty, West, M.P.M.

- Thence 583° 33' 52" W, a distance of 302.72 feet to corner #2;
- Thence N.22° 59' 58" W, a distance of 290.44 feet to corner #3;
- Thence N.14° 41' 02" W, a distance of 281 feet (281.47 correction) to corner #4;
- Thence N.15° 25' 02" E, a distance of 382.71 feet to corner #5;
- Thence N.74° 34' 58" W, a distance of 150.00 feet to corner #6;
- Thence S.25° 38' 52" W, a distance of 865.83 feet to corner #7;
- Thence S.15° 58' 58" W, a distance of 161.87 feet to corner #8;
- Thence S.50° 32' 08" W, a distance of 153.14 feet to corner #9;
- Thence N.76° 41" W, a distance of 702.85 feet to corner #10;
- Thence N. 5° 38' 10" W, a distance of 598.01 feet to corner #11;
- Thence N.76° 37' 32" W, a distance of 399.40 feet to corner #12;
- Thence S. 6° 22' 01" E, a distance of 807.96 feet to corner #13;
- Thence S.73° 06' 37" E, a distance of 1683.89 feet to Corner #14;
- Thence S.23° 47' 13" E, a distance of 242.40 feet to corner #15;
- Thence N.48° 26' 29" E, a distance of 197.54 feet to corner #16;
- Thence N.62° 21' 45" E, a distance of 298.18 feet to corner #17;
- Thence North along the Section line (of and) common to Sections Twenty-nine and Thirty to point #1, the point of commencement.

SIGNED Claudia S. Jensen
Claudia S. Jensen, Havre, Montana.

SIGNED Hans E. Jensen
Hans E. Jensen, Havre, Montana.

R.O. Hanson 9/4/53

WITNESS Mrs. Berenice Bailey

NOTARY PUBLIC FOR THE STATE OF MONTANA
RESIDING AT MISSOULA, MONTANA
MY COMMISSION EXPIRES FEB. 7, 1954

FROM, John Klapwyk and Frieda Klapwyk, to Hans E. Jensen and Claudia S. Jensen, the following described property and all rights thereto;

A tract of land located approximately in the Northeast portion of the Southwest Quarter of Section Twenty-eight, Township Thirteen North, Range Twenty, West, M.P.M. which tract is described by the engineer who surveyed it, as follows; at

the Quarter Corner between Sections Thirty-three and Twenty-eight, Township Thirteen North, Range Twenty, West, M.P.M., I ran a tie line N. 0° 03' East, a distance of 117.95 feet to point of beginning;

Thence N. 43° 47' W, a distance of 495.53 feet to corner #2;

Thence N. 2° 59' 09" W, a distance of 357.8 feet to corner #3;

Thence N. 51° 20' 53" W, a distance of 1484.34 feet to corner #4;

Thence N. 48° 53' 41" W, a distance of 654.81 feet to corner #5;

Thence N. 3° 08' 07" W, a distance of 393.09 feet to corner #6;

Thence N. 0° - - - - , a distance of 36.8 feet to corner #7, said corner being N. 89° 54' E. a distance of 691.3 feet from the $\frac{1}{2}$ corner common to Section Twenty-nine and Section Twenty-eight;

Thence ran North 89° 54' E. along said Quarter line a distance of 1961.9 feet to corner #8, which is the center of Section Twenty-eight;

Thence S. 0° 03' W, a distance of 2547.13 feet to corner #1, which is the place of beginning of beginning the boundary.

Right of ingress and egress to the two tracts of land and other lands of both parties situated in sections Twenty-eight, Twenty-nine and Thirty, by means of established roads or easements, or which may be necessary to either party or their heirs or assigns for convenient accessibility is included in this conveyance, but both parties promise to keep boundary gates closed so as to prevent livestock from wandering to or from the properties of the parties hereto, when fences are built to establish the boundaries.

SIGNED Frieda Klapwyk
Frieda Klapwyk, Missoula, Montana

SIGNED John Klapwyk
John Klapwyk, Missoula, Montana.

WITNESS _____

A Copy of this transfer of property to be filed with the County Clerk and Recorder of Missoula County, Missoula, Montana.

O'Brien Creek 'City' of Half

By JOHN A. FORSSEN

The valley of O'Brien Creek, which stabs deep into the Grave Creek Range on the western edge of the Missoula Valley, is virtually uninhabited today.

Half a century ago, it contained a bustling town supported by a sawmill. It had two railroads, a narrow gauge line connecting to Hayes Spur and a standard gauge road with a Shay geared locomotive that fed logs to the mill.

Only the faintest traces of the town remain among the waving grass of the only wide spot in the O'Brien Creek Valley. And barring the way to the scene are fences which mark private property.

The foundations of the school, leveled to the ground, can be distinguished and the broken stub of the school pump remains. Depressions in the ground along the edge of the bench show where outhouses of the town's residences stood.

A few persons remember John W. Cook of Seattle, who was a child in the unnamed town, wrote The Missoulian a letter giving some of the history of the place and sending the old picture reproduced on this page.

Charlie Graves, dude ranch proprietor, remembers. He was a boy there, too, and with some of his playmates just about destroyed the Shay engine as the result of innocent fun.

Deputy Sheriff Clark Davis remembers. He was fireman and later engineer on the "dinky" engine of the narrow gauge railroad.

The town grew up with the Harper & Baird Lumber Co. mill, operated by Bill Harper and Tom Baird. They first set up a mill in O'Brien Creek around 1905, about three miles west of the Maclay Ranch.

At first the logs were carried to the mill on chutes. Remains of the chutes are still visible in some of the side canyons. Logs were placed side by side and end to end with hewn faces tipped toward each other to form miles of chutes. Among the lowest grade woods workers were chute greasers, usually youths, who swabbed heavy grease on the chutes. Of a higher grade of workers were those who threw dirt on the chutes near the lower end to slow the logs enough so they wouldn't fear down the mill on their arrival.

Later, the mill was moved to a site farther up the creek and a new system of chutes was constructed. In about 1907 the mill was moved to its final location, which became the site of the town during the eight years the mill operated there. The mill, which cut 30,000 feet of lumber a day, employed about 30 men, and another 30 worked in the woods.

The narrow gauge railroad was

built by Harper and Baird to haul lumber to Hayes Spur, a siding on the Northern Pacific Railway at the site of the old Buckhouse Bridge, about a mile west of the present Buckhouse Bridge.

This distance of about five miles represented quite a trip for the dinky engine and five or six small cars of lumber, even though it was downhill out of the gulch, Davis recalled.

Getting back up with a train of supplies was even more of a problem. Davis said the engine burned lots of slab wood to make the trip and recalled that the steam pressure had to be just so.

The engine and rolling stock occasionally jumped the track but there was no need to call a wrecker. Davis said the crew would simply get a heavy timber and use it to pry the locomotive and cars back on the rails.

When the mill was moved to its final location, a standard gauge railroad was built 4 1/2 miles up the creek, with spurs up some of the hillsides, to haul the logs to the mill.

This railroad was powered by a locomotive driven by gears instead of the piston and rod arrangement which was familiar when steam locomotives were in use. The engine was built by the Shay company, the other common type of geared locomotive used in logging being built by Heisler.

Graves recalled that he and some other kids used to have fun pushing a small handcar up the grade from the mill and then coasting back down, using a stick thrust down against the roadbed as a brake.

On one occasion, the stick broke and the car rolled free down the grade, faster and faster. One by one, the boys jumped. Graves, aged about 8, was afraid to jump. Harry Cook, who was watching over young Graves, finally talked him into leaping just before the handcar hit a heavy car of rails. The car of rails was jolted into motion and it rolled down and hit the Shay engine, shoving it out onto a trestle.

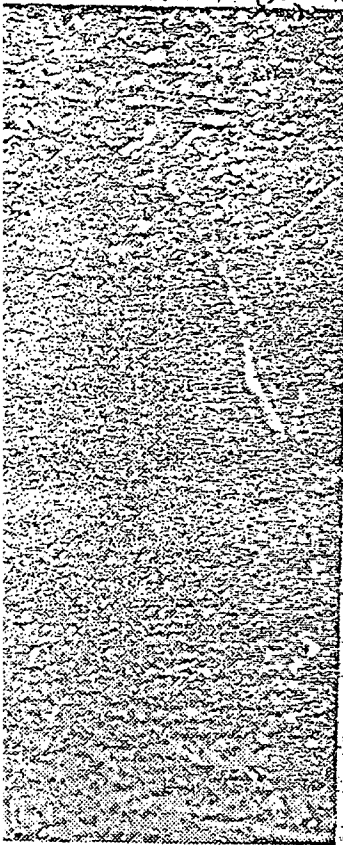
Tom Baird was watching the incident from the mill and had visions of the \$20,000 Shay engine being run off the end of the trestle.

But the engine was stopped by the timber bumper at the end of the trestle, and long afterward the marks of the wheel flanges showed in the bumper.

Did Baird whale the tar out of the boys? He did not. He had brakes put on the handcars.

O'Brien Creek had been settled long before it had its short-lived town. Ed Hayes, at the age of 19, filed a claim on land in the valley and extending south in the 1860s.

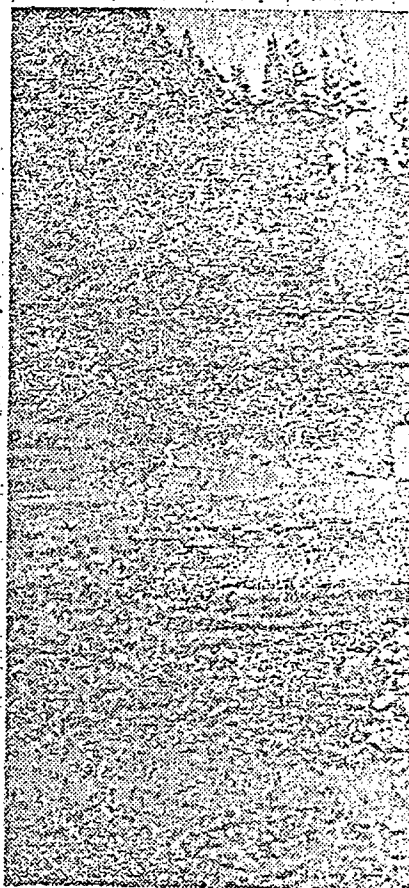
(Continued on Page 22, Col. 5)



... creek, and the roadbed is still in this section.



... rock slide and winds up into Missoula.



This collapsed building was the head office of the mill. O'Brien Creek was the scene of a major fire.



Lumber from the sawmill in O'Brien Creek was loaded for shipping on the Northern Pacific Railroad from the grade of the mill.

O'Brien Creek

(Continued from Feature Page)

but he was below the required age of 21 and couldn't hold it. Soon after the valley had one of the first sawmills in the area.

David O'Brien, for whom the area was named, was one of the early settlers and he lived there until 1838.

Later residents included some colorful characters. Louis Vaughan, who ranched in the valley, reputedly was a Jesse James rider. He never came right out and said so, but he often told children of neighboring ranches of detailed adventures of the James gang, adding more than once that the notorious outlaw "had feet under my table."

Graves remembers seeing him "fan" a gun. In this maneuver, used by the gun fighters of the old west, the heel of the left hand was used to strike rapid blows on the hammer of the pistol held in the right hand. It was regarded as a faster way to empty a double-action revolver than by pulling the trigger.

"He did it like lightning," Graves remembered.

Among the mill employes were Black Al Fowler, the sawyer, and Long Mac McDonald, who wrestled logs onto the saw carriage. The bull cook was Tom Sparks, who afterward was for many years elevator man at the Masonic Temple and became widely known.

Cook, whose letter reveals an amazing memory for detail, said the first school was a log structure at the foot of Haggerty Gulch, at the east end of the open portion of the valley. This was replaced in 1908 with an unpainted board school farther up the valley. The teacher there in 1910 was Miss Laura Cool, who has been Mrs.

I. A. Haswell of Missoula for the past 40 years.

This building was replaced in 1911 by one of planed lumber which was painted white. Cook recalled that it had a new world globe, a dictionary on a stand, four reflector style oil lamps and a new water bucket, all remarkable educational refinements for the community.

Going into the real luxury class, the school board had a well dug, eliminating the trip by older boys to get buckets of water from a spring. The stub of this pump still remains among the waving grass.

Attending the school quite regularly was Zeke, a giant Great Dane, one of two pups of a dog purchased by the Cook family from an Uncle Tom's Cabin troupe in Missoula in 1907.

Cook started school at the old Willard building in 1906 with Miss Minnie Spurgin as the teacher. Miss Fannie Robinson taught the second grade. The Cook family lived in a cottage in the orchard of the Prescott place, near the State University, and moved to O'Brien Creek in 1908. They moved back to town in 1911 after spotted fever had killed several O'Brien Creek residents.

Now, nearly half a century later, spotted fever and the unnamed town in O'Brien Creek are gone. Vaccines produced by research have ended spotted fever, and the inexorable processes of time have wiped out the once-thriving community.

Birthday gift: Bake large soft chocolate cookies and decorate each with initial out of white frosting. Soft cookies stand travel, but wrap each individually and cushion cookie layers with crushed tissue paper or cellophane straw.

MISSOULIAN - OCT - 5 - 1958

It might be very valuable for you and the County Commissioners, also to drive up this public highway for 5 1/2 to 6 miles. There are about 55,000 to 60,000, or more acres of public and private land which use the O'Brien Creek road, and have used it for years; it has been maintained by Missoula County for 60 years or longer, and persons are living to prove it.

Missoula County

copy

Missoula, Montana, April 16, 1960.

Mr. Vernon R. Peterson,
County Engineer and Road Supervisor,
Court House,
Missoula, Montana.

Re: O'Brien Creek Road.

Dear Mr. Peterson,

We own lands which are served by the O'Brien Creek Road. We raise livestock and we move our stock in and out from our lands and pastures by means of the O'Brien Creek Road. We travel this road with trucks and vehicles.

Recently, we have been told by an owner of land along this road that he was installing gates and cattle guards, and that he proposed to regulate the use of this road.

The O'Brien Creek road is a very old and long established public highway, which has been worked and improved by the County from time to time over a very great many years. The obstructions which are now installed by Mr. Jensen and which he anticipates to install to prevent use of this road are obstructions and interference with the use by the public of this old public highway. This road is of great importance to use now, as it has always been necessary and useful.

Perhaps, it might clarify the situation if we quote Section #32-103 of the Montana Codes:

"PUBLIC HIGHWAYS DEFINED: All highways, road, lanes street, alleys, courts, places and bridges laid out or erected by the public, OR NOW TRAVELLED OR USED BY THE PUBLIC, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, ARE PUBLIC HIGHWAYS. "

The O'Brien Creek road is such a public highway.

And again:

Section #32-1009, Revised Codes provides:

"It shall be the duty of any person finding any obstruction upon any highway of this state to forthwith notify the road supervisor of such obstruction."

This letter is for that purpose, to report to you ^{as} the Official in charge of public highways for Missoula County, that the O'Brien Creek highway is obstructed, and ought to be opened for public use without interference.

Sections #32-1003 and

#32-1004, and following sections provide for the giving of notice to remove obstructions and penalties etc. See Section #32-1020.

Very truly,

W. H. Jensen

January 12, 1971

RECEIVED
82

JAN 15 1971

Missoula County Commissioners
Courthouse, Missoula

MISSOULA CO. SURVEYOR

Dear Sirs:

By Brs.

By way of introducing myself and my complaint, let me say that I am not a lawyer. What I have to say quite possibly will not be in exact, legal terms but, if you will check your records, you will find it to be the truth.

I live in O'Brien Creek on land deeded to me by my father. At the time my father, Hans E. Jensen, bought this land a number of years ago, the O'Brien Creek road was locked and positively not open to public travel whatsoever. A thorough check of the abstract concerning this piece of land will prove that this road has always been privately owned. A letter from the Missoula Abstract Co., now in my father's possession and shown to the county commissioners several years ago proves this. Even more interesting is the fact that several land owners located further up the valley leased rights-of-way on this road from the owners. This, also recorded in the abstract, further proves the private ownership of this road through my property (Neil H. Jensen) and that of my father (Hans E. Jensen).

My father has a copy of this abstract as well as quite a few other legal documents testifying to our ownership of this road.

We can certainly prove our ownership of this road and have done so in the past. None the less, the County of Missoula has on a couple of occasions questioned this. (I sincerely believe that 'harassed us' would be more exact.) Each time my father has taken time from his job, dragged out his files, and again proven that we do in fact own this road. Furthermore, if you will check your records, you will find a letter from a previous County Administration admitting that the County of Missoula has never had any easement or right-of-way through our property.

Now this same abstract also states that John Klapwyk owns a portion of the road further up the valley from us. Now I want to know just what gives here? Why is it always our road that is questioned? Why never Mr. Klapwyk's? (It should be borne in mind here that the particular part of the road where John Klapwyk now maintains a locked gate was a portion of my father's property that he traded to John Klapwyk for land further down the road.) Why can John Klapwyk keep a locked gate on the road? If it is a question of 'Public Usage or Access,' then surely both these parts of the road would be subject to the same conditions. There is public land adjacent to and above Mr. Klapwyk's portion of the road.

Several things bring me to write you at this time. First, my wife, S. Lynn Jensen, went down to the County Surveyor's Office in the courthouse to ask that the county not maintain our road. This was because ^{of} a personal conviction we both share that county funds should not be spent maintaining private roads. Also, we desired

at least a bit of control over our road such as keeping out drinking parties, etc. We feel that if the road were not maintained perhaps we would be spared some of the trash and litter unlimited public use brings.

My wife on Dec. 7 was informed in your Surveyor's office that there had been, among other things, "a court case and lawsuit" against us over this road. She was also told that this same road had been a county road for "75 or 100 years." Now I don't know where the county surveyor got this information, but I can assure you it's not true. I for one would be very interested in seeing your files on this supposed lawsuit. It seems strange that we weren't included in this suit since it was supposedly against us.

Despite the fact that my wife protested your equipment on our road, you have gone ahead and run ~~xxx~~ your plows through our place anyway. Now this in itself wouldn't be too bad, but these same plows have been knocking over and tearing up my fences. I have pictures of this. To top things off, one of your men tore down a sign I had built on our gateway at the beginning of our property. This sign stated that this was a Private Road. Although tracks in the snow satisfied me as to who had done this damage, the next day our neighbor, Elsie Whitman, told us the county employe freely admitted tearing that sign down. Now I want to know: since when has your agency had the right to tear down private property without even attempting to notify the owner? I think someone from the county owes us this slight courtesy.

Today a county man was up the valley and placed one of your signs on this same gateway. I built that gateway and certainly didn't build it for a county bulletin board. This sign was to the effect that the next 1.7 miles of road was narrow and had no drive-outs. One-point-seven miles of road corresponds exactly to that portion of the road my father and I own. This brings me back to my original question, Why is the County of Missoula so anxious to take over just our portion of this road?

The same man who put up this sign did drive into our driveway and up to the house. My wife was home at the time. No sooner did he drive in than he turned around and left.

I certainly am not aware of any government' agency's right to seize property in this manner without any payment or settlement whatsoever. Your continual harassment has made it clear to us that this is exactly what is being attempted. Now if somebody with the county wants to talk about buying this portion of the road, or for that matter if they would just consult me and my father about the road, we would possibly be more receptive to your ideas.

Over the years my father and I have been more than fair in letting responsible people use this road of ours. Our road was not shut up or locked this summer. Yet my neighbor, John Klapwyk, locked his portion of this road—at the point and gate previously mentioned, 1.7 miles from our gateway—to everyone save the Forest Service and Elsie Whitman.

We have been fair, but I can no longer overlook this damage to my property. I must protest these actions very strongly and immediately which is my purpose in writing you this letter. A lawyer is looking into this matter for us and you will hear from him; it's just that in the face of this latest damage, I can no longer wait quietly for him to finish his work.

If the county had taken time to contact us, they would have discovered that we are not trying to keep the public out of O'Brien Creek. We are currently in the process of negotiating with the Western Montana Fish and Game Association to construct a road along the south boundary of our lands which would give the public a guaranteed access to the valley above us. It may be possible that the U.S. Forest Service would build this road. The present road, our road, if we released our rights to it to the county, would cut off several sizeable chunks of our land from water. This we could not tolerate. Does this sound reasonable or not?

I will ask you again to please not destroy any more of my property.

Sincerely yours,



Neil H. Jensen

RT 1

O'Brien Cr.

nhj/csj

Missoula, Montana
June 24, 1960

TO: Anthony F. Keast
County Attorney
Missoula, Montana

Dear Sir:

There exists a long established public highway in the O'Brien Creek Canyon. Neglect in maintenance of this road has resulted in its now being rough and in poor condition. But recently private persons have assumed to erect gates across this public highway at frequent intervals. These gates are often padlocked. This makes the proper public use of the highway difficult and constitutes an interference with the enjoyment by the public of a proper public right. This public highway is necessary for public use for persons owning property along and beyond the highway, and also hinders the right of the public to enjoy access to the public domain (U. S. Forest) lying beyond the end of the highway.

It is requested that the County of Missoula open this road by removing the cattle guards, gates and other obstructions now interfering with the use of the road. And you are also requested to do some necessary maintenance on this road so that it can be freely utilized by the public.

Very truly yours,

W. C. Maclay

By: W. C. Maclay & W. C. Maclay
His attorneys

John C. Klapwyk

By: Leon H. Pulell
His attorney

cc. Vern Peterson, County Engineer
cc. Honorable County Commissioners

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

86

Lolo National Forest
Missoula Ranger District
Missoula, Montana 59801

219 600

BY TO: 7729 Development Roads

November 4, 1971

SUBJECT: O'Brien Creek County Road



TO: Missoula County Commissioners
Courthouse
Missoula, Montana 59801

Gentlemen:

I understand you were recently considering the question of how far the county road extends up O'Brien Creek and how far up the County should maintain it.

Our records indicate the county road goes to the east line of Section 30, T. 13 N., R. 20 W., or approximately to Mrs. Wittney's present residence. We do not have a public right-of-way west of this point, through Section 30. However, we do have a 60-foot right-of-way from the west edge of Section 30, on up the bottom of the creek to the public lands in Section 23, T. 13 N., R. 21 W.

The point of this is that the public does not have access to public lands on up the bottom of O'Brien Creek, nor can the public get off the road for 2 miles below Mrs. Wittney's place without violating "no trespassing" signs. Since the public cannot go anywhere, or even get to its own lands, why should the public pay to maintain or plow the road?

I would protest ending the county road where it ends now, at Mrs. Wittney's place, because there are public and private lands above this point that some day will require public road access.

I would be happy to work with you and the owners involved to resolve the problem.

Sincerely,

DONALD G. STEVENSON

DONALD G. STEVENSON
District Ranger

Donald G. Stevenson/lh

Surveyor

87

D.F.C.

EMF

RESOLUTION

WHEREAS, O'Brien Creek Road from its entrance from the Big Flat Road through Sections 30, 25, and 26, and to the Forest Service property on the west has been recognized as a county road since the late 1800's, and

WHEREAS, county road equipment has serviced this road in the way of grading and snow plowing for many years, and

WHEREAS, landowners and residents have always used this road for their means of ingress and egress to their property,

NOW, THEREFORE, be it hereby resolved that the County Commissioners of Missoula County do declare and reaffirm that this is a county road by right of use and is declared to be public right-of-way from the Big Flat Road up to Section 30, T 13 N, R 20 W, and that all obstacles on said right-of-way such as posts, cross members over the road, signs such as "No Trespassing", "Private Property", etc., be removed and that the public may enjoy unrestricted freedom of the use of O'Brien Creek Road.

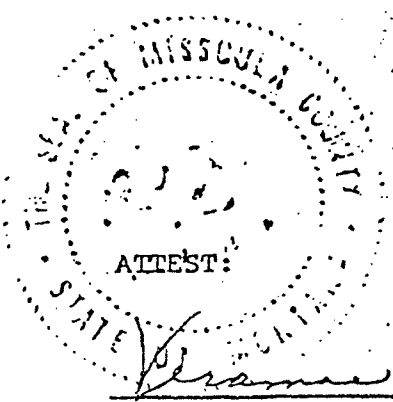
Dated this 29th day of December, 1971.

BOARD OF COUNTY COMMISSIONERS,

H. J. ...
Chairman.

Richard H. ...
Commissioner.

X X X
Commissioner.



Thomas R. ...
Clerk and Recorder.

RESOLUTION NO. 11

WHEREAS, O'Brien Creek Road from its entrance from the Big Flat Road through Sections 30, 25, and 26, and to the Forest Service Property on the West has been recognized as a road since the late 1800's, and

WHEREAS, county road equipment has serviced portions of this road in the way of grading and snow plowing for many years, and

WHEREAS, landowners and residents have always used this road for their means of ingress and egress to their property,

NOW, THEREFORE, be it hereby resolved that the County Commissioners of Missoula County do declare and reaffirm that this is a county road by right of use and is declared to be public right-of-way from the Big Flat Road up to Section 30, T 13 N, R 20 W, and that all obstacles on said right-of-way such as posts, crossmembers over the road, signs such as "No Trespassing", "Private Property", etc., be removed and that the public may enjoy unrestricted freedom of the use of O'Brien Creek Road.

Dated this 24th day of February, 1972

BOARD OF COUNTY COMMISSIONERS

Herb Loudermilk
Chairman

Richard H. Ostergren
Commissioner

Gregory K. Peterson
Commissioner

ATTEST:

Vermae L. Crouse

Clerk & Recorder

LAW OFFICES OF
MURRAY & HOLT
 407-413 WESTERN BANK BUILDING
 POST OFFICE BOX 248
 MISSOULA, MONTANA 59801

WILLIAM E. MURRAY
 HAROLD L. HOLT

INTERNATIONAL
 CABLE ADDRESS
 BENGOSHI

AREA CODE 406
 725-4950
 725-4951

JAMES H. CURTO
 OF COUNSEL

March 15, 1972

Mr. H. W. Stoutenberg, Chairman
 Board of Commissioners
 Missoula County Courthouse
 Missoula, Montana 59801

Re: O'Brien Creek property of Hans Jensen

Dear Hi:

Thank you for your letter of 2 March, 1972, with its enclosed copy of the County Surveyor's report of his investigation of the condition of the fence on Mr. Jensen's property.

As I indicated during the course of our meeting in your office on 17 February, I had personally inspected the fence with Mr. Jensen and his son, Neil, the day before our meeting. When I received a copy of Mr. Frame's report, I was unable to correlate the results of this investigation with what I had seen personally. Therefore, I recommended Mr. Jensen and his sons that they accomplish the very detailed inspection of the fence and note their findings in such a fashion that they could be correlated to the measurements given by Mr. Frame in his report to you of 24 February, 1972. I have just received a written report of the inspection of the fence accomplished on 11 March, 1972, by the three sons of Mr. Jensen. In order for you to have time to study this report prior to our next meeting, I am enclosing a copy herewith.

At the mutual convenience of your Board, Mr. Frame, and myself, I hereby request another meeting to discuss the matter of the fence and the usage of O'Brien Creek Road beyond section 30. In my opinion, the next meeting should be attended by Mr. Frame.

During our last meeting in your office on 17 February, I gained the impression that the County had not, and had

Mr. H. W. Stoutenberg, Chairman
Board of Commissioners
March 15, 1972
Page 2

never intended to, question the status of O'Brien Creek Road being open to the public from its beginning on the Big Flat Road all the way through to its terminus on Forest Service land somewhere beyond sections 30, 25, and 26. Yet, the Sunday Missoulian of 12 March, 1972, carried a news item purporting to quote your Board as being of the opinion that the public road along O'Brien Creek exists only to section 30. I fail to understand how it was possible to arrive at this conclusion.

My notes of our last meeting indicate that your Board had not directed their resolution to Klapwyck and his closed and locked gate because you had received no demand from the public for access into the public land beyond section 30. I took your statement to indicate that you would support the demands of the public if their demands were made known to you. In this connection, please be informed that I have advised Mr. Jensen to circulate petitions in an attempt to gain public support for his contention that the status of O'Brien Creek Road as being open to the public should extend to its terminus, on the Forest Service land. I have in my possession at this time petitions signed by 105 tax-paying residents of Missoula County, and expect to have more by the time our next meeting is scheduled. At that time, I will present them to you on behalf of the individuals signatory to the petitions.

Very truly yours,

MURRAY & HOLT

By

WILLIAM E. MURRAY

WEM:sm

cc: Mr. Hans E. Jensen
1221 Kent Street
Missoula, Montana 59801

ELMER M. FRAME
COUNTY SURVEYOR
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59801

April 5, 1971

Mrs. Elsie Whitman
O'Brien Creek Farm
Missoula, Montana

Dear Mrs. Whitman:

In January of this year, you asked the County Road Department to plow snow up to your gate. This road crosses private property which is posted "private."

This road up O'Brien Creek has been in use for many years, up to and beyond your gate. Your gate is now closed preventing the public from going beyond your gate. We must treat the entire road as public if part is public. If we expend public funds to plow snow, we must then allow the public to use the road in the summer months. This means you must eliminate the gate, and allow the public to cross your property to the public lands beyond.

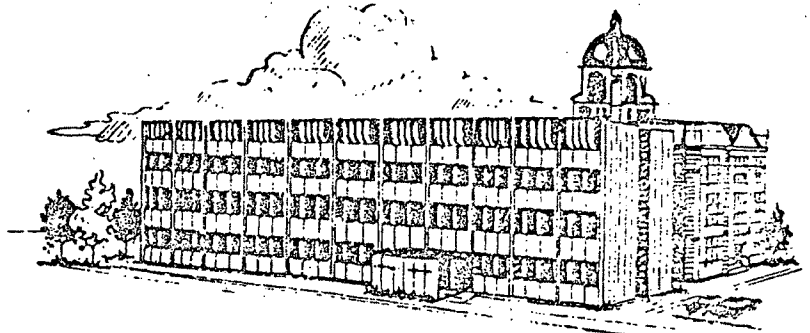
I would appreciate hearing from you and Mr. Klapwyk, as to your feelings on the O'Brien Creek Road.

Sincerely,

Elmer M. Frame
Elmer M. Frame
County Surveyor

EMF/brs

cc: John Klapwyk
Hans E. Jensen
Commissioners



May 11, 1971

Board of County Commissioners
Missoula County Courthouse
Missoula, Montana

Gentlemen:

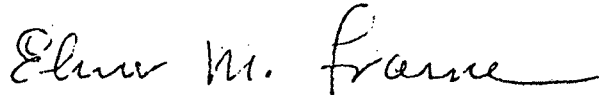
I have gone over the O'Brien Creek Road, County Route 31, and reached the conclusion that this road has been under continuous County maintenance up to Mrs. Whitmans property. Her property is located in Section 35, T. 13 N., R. 21 W.

Mrs. Whitman grew up on the ranch, and I have talked with her and her brother, Mr. Charles Graves.

Mr. Jensen has erected an arch gate over the road, which poses a problem for our maintenance equipment. He also contends it is not a County road through his property; however, he has sold a parcel of land just below Mrs. Whitmans to a Mr. Al Johnson. This means Mr. Johnson must have access also.

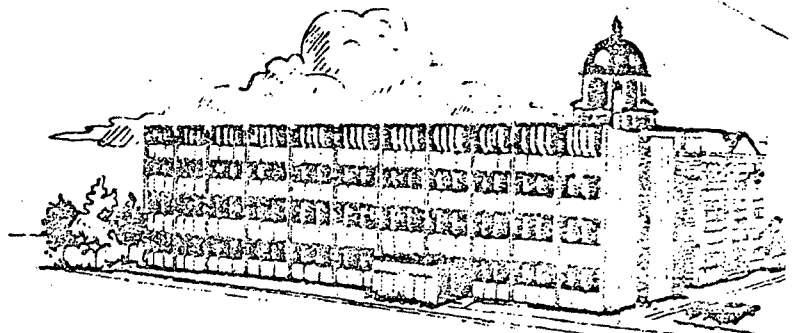
In view of the above, can the County ask Mr. Jensen to remove the overhead gateway or possibly remove it for him.

Sincerely,



Elmer M. Frame
County Surveyor

EMF/brs



OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59801

ROBERT L. DESCHAMPS III
M. GENE MCLATCHY, CHIEF DEPUTY
MICHAEL J. MILODRAGOVICH, DEPUTY
DOUGLAS G. HARKIN, DEPUTY
RUSSELL R. ANDREWS, DEPUTY

93

May 10, 1972

Hans E. Jensen
Box 133
Browning, Montana

Dear Mr. Jensen:

This office has been contacted by John Klapwyk who alleges that three of your boys, namely: Neil, Lee and Dave, have been trespassing on his land in the O'Brien Creek area, and in addition, have been deporting themselves in a matter which, if continued, could lead to their criminal prosecution for disturbing the peace, and conceivably, if such a prosecution was not successful, an injunction action brought by Mr. Klapwyk to prevent you or anyone acting under your authority from entering upon his property.

I am well aware of the volatile nature of the situation which exists up O'Brien Creek, and am not totally unsympathetic with your views. However, your position at the present time is totally inconsistent with a position you assumed in 1946, and furthermore, your current position does not appear to be supported by the facts or the law. Nevertheless, whatever the relative merits of the arguments on both sides are, good sense, common decency, and the law, all indicate that this petty harassment will not solve anything. In fact, continued harassment tactics by members of your family will only complicate the situation by bringing criminal action on the part of this office.

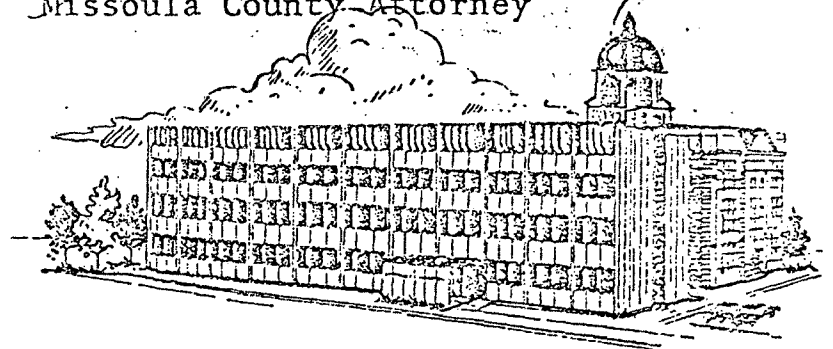
Accordingly, I strongly suggest that you advise the members of your family, to leave Mr. Klapwyk alone, and that you pursue any legal remedies that you may have through the appropriate courts.

Sincerely,

Robert L. Deschamps III
Robert L. Deschamps III
Missoula County Attorney

RLD/rf

cc. John Klapwyk
cc. Bill Murray



Neil H. Jensen
Rt. 1, O'Brien Cr.
Missoula, Montana
August 24, 1972

94

Vito Ciliberti
School of Forestry
University of Montana
Missoula, Montana

Dear Mr. Ciliberti;

In our recent discussion concerning the O'Brien Cr. Road you mentioned the need to supply access to public lands. As you are aware there is considerable controversy regarding the recent locking of this road. To help you gain knowledge of this area I have written a history of the main events leading to the closure of this road. Please consider the following factual history of this road carefully:

In 1946 Hans E. Jensen bought his land in O'Brien Creek, including that portion of land in section 30 where Mr. John Klapwyk now maintains a locked gate across the O'Brien Cr. road. At the time of his purchase, Hans Jensen was led to believe that the O'Brien Cr. road had been kept locked at the beginning of section 30. He intended to do likewise and constructed a gate with a NO TRESSPASSING sign on it in front of his house at the beginning of section 30. But, he never locked that gate. The County Commissioners at that time, acting in the public interest, ordered him not to. In fact a sheriff's Order was issued to remove the entire gate. Hans Jensen was living in Browning, Montana at the time and wrote a couple of angry letters protesting these actions. However, after talking to dozens of local people in the Missoula area, Mr. Jensen learned that this road had been used by the public for years as an access to Forest Service lands above. This public usage of the entire O'Brien Cr. road dated back to the time of the first settlers in the valley and the early logging camps of the late 1800's.

The problem was resolved by allowing Mr. Jensen to maintain an unlocked gate for the purpose of containing stock. During the period Mr. Jensen owned this land in section 30 (from 1946 until Oct. of 1953) and for a good many years thereafter this road was never locked. This fact can be attested to by hundreds of people in the Missoula area who have used this road for many years.

A few years after the above problem and until about 1960, first Mr. Klapwyk and later the Jensens maintained an unlocked gate across the O'Brien Cr. road at the lower end of the Jensen property. At this time Mr. Klapwyk owned land to the north and west of this unlocked gate in section 23 and apparently it was in his interest to keep a gate across the road at this point. Interestingly enough, during the years Mr. Klapwyk maintained this unlocked gate, the County of Missoula never questioned his right to do so. The entire O'Brien Cr. road of course was still open to public travel as it had always been.

In October of 1953 the Jensens traded their portion of land in section 30 for that piece of land Mr. Klapwyk owned in section 23 to the north of the above mentioned unlocked gate. Now the Jensens owned land on both sides of the O'Brien Cr. road in section 23 and it was in their interest to continue to maintain an unlocked gate at the lower end of their property to allow stock to cross the road for water. This they did.

In 1960 Mr. Klapwyk objected to this same gate despite the fact that he himself had maintained one there for years. The County of Missoula also did an about face and demanded that this gate be removed. The problem was finally

resolved when the County agreed to supply material for two cattle guards which would replace this unlocked gate and allow the Jensen stock to cross the road to water. These cattle guards would also facilitate public access being easier to use than the gate.

The Jensens were a bit naive at dealing with the County and entered into this agreement in good faith and the County delivered the material. Just before the Jensens could start construction however, County Commissioner Hy Stoutenburg advised them to hold off as Mr. Klapwyk did not approve of the idea. The Jensens complied with this request and awaited further instructions. Meanwhile all the material for the cattle guards disappeared and the County chose to ignore the Jensens and their agreement.

It wasn't until last summer that Mr. Jensen, during a conversation with Mr. Stoutenburg, learned that the County had quietly removed this material themselves. Typically the Jensens were never notified until years later when this information slipped out.

From this time until about the summer of 1968 the public continued to use the entire O'Brien Cr. road freely. From 1968 until the fire season of 1970, Mr. Klapwyk began to place an occasional lock on the road at the beginning of section 30. The public, believing it to be a public road, frequently broke these locks and for the most part Mr. Klapwyk left the gate open.

Sometime early in 1970 Mrs. Elsie Whitman apparently either bought or began leasing, from Mr. Klapwyk, a piece of that land formerly belonging to the Jensens in section 30. The extent of her ownership in this property is not clear; although she has represented herself to be a land owner, no deed has been recorded in her name.

In the summer of 1970 Mrs. Whitman approached Neil and Hans Jensen and requested permission to let down some of the Jensen fences and also widen a few spots on the O'Brien Cr. road through the Jensen property so that she could move a trailer up to section 30. She was apparently aware of the Jensen ownership of this road, although it had always been open to public travel. Permission was granted and she moved her trailer and commenced to live on this property.

During this same summer of 1970, the weather turned quite hot and the Forest Service decided to temporarily close the O'Brien Cr. drainage due to fire danger. They allowed Mr. Klapwyk to place a temporary U. S. Forest Service padlock on his gate at section 30 during this critical period. Much later that fall the lock had still not been removed and the Forest Service received complaints over it. They quickly removed their lock. At this time Mr. Klapwyk replaced the Forest Service lock with one of his own. With Mrs. Whitman living behind the gate the lock stayed, and from that summer of 1970 until the present this long time access road to public lands has remained closed.

The following winter of 1970 - 71, the County of Missoula began a series of strange actions. In 1946 the very mention of a locked gate on the O'Brien Cr. road had been enough to cause the County to move swiftly in defense of public access rights in O'Brien Cr. Now, despite mounting protest over this locked gate, the County rewarded the owners by lavishing services upon them including continual and unprecedented grading and widening of the O'Brien Cr. road through the Jensen property along with knocking down fences belonging to the Jensens wherever they desired a wider road. The Jensens protested this waste of public funds strongly, pointing out that the public derived no benefit from this expenditure as long as the gate remained locked at section 30. All the public lands along this road lie beyond that gate. It was also pointed out that while there was a long history of public usage over the entire road, the County of Missoula had never had an easement or

right of way through the Jensen property. The Jensens believed that if all these years of public usage meant nothing on the road above them, then in all fairness, it shouldn't apply on their portion of the road either.

At this time the Jensens felt they were entitled to again maintain an unlocked gate on the lower end of their property where several years previously they had constructed an arch across the O'Brien Cr. road. There was still the problem of getting their stock to water in this area and now the County patrol was causing considerable damage to their fences. They placed a large sign stating PRIVATE ROAD, NO TRESSPASSING and two steel gates on this arch across the road. The gates were left open and despite the sign and the fact that the road was already locked above them, the Jensens continued to allow the public to use their road.

Damage to the Jensen fences caused by County equipment was becoming intolerable and in January of 1971 Mrs. S. Lynn Jensen protested in person at the County Surveyors office. She was told some incredible things including the statement that, "There was a court case over this road a number of years ago and the Jensens had lost their portion of it." It is strange that the Jensens were never invited to attend this 'case'. Stranger still is the fact that the County cannot document these statements with any records.

A few days later the PRIVATE ROAD sign Neil Jensen had placed on the arch across the road was torn down and a County sign was put in its place. Neil's wife, Lynn, in talking with Mrs. Whitman, learned that the County had torn this sign down. Apparently no one from the County felt it necessary to discuss this action with any of the Jensens.

Neil Jensen wrote a letter protesting this action to both the County Surveyor and the Board of County Commissioners. He demanded an explanation. Why was the County destroying the Jensens' property when it wasn't the Jensens who had locked the road? Why was the county maintaining this road anyway when it no longer served the public interest and the Jensens had ordered them to stay off it until the entire road was again open to the public? In this same letter Neil again stated the willingness of the Jensens to give the County of Missoula their road if the locked gate above was removed. The Jensens did not however, intend to see their road sacrificed for the benefit of two people who had, with the help of the county, thwarted the public's desires in regards to the O'Brien Cr. road.

A few days later Mr. Frame, the County Surveyor, discussed this problem at some lengths with Neil Jensen at his home in O'Brien Creek. Mr. Frame was new to the office and admitted his lack of knowledge concerning the O'Brien Cr. road. He apologized for having had the sign torn down and agreed to remove the County sign he had attached to private property. He further agreed with Neil that if Mr. Klapwyk could lock this road, then certainly the Jensens were entitled to maintain a gate across the road as well. It is to Mr. Frame's credit that he has consistently recommended that this entire road be opened to public travel.

Later Mr. Frame did ask the Jensens if they could substantiate their claims of public usage on the O'Brien Cr. road above section 30 by having some of the people who had used this road stop in at his office or drop him a letter or phone him as he still pleaded ignorance of the situation. Mr. Frame also told the Jensens that both Mr. Klapwyk and Mrs. Whitman had told him that "the road had always been locked and no one had ever used it." Quite a few people told Mr. Frame the truth, that this road had been open for years and Mr. Frame wrote a letter to Mrs. Whitman and Mr. Klapwyk explaining that he could not justify spending public monies on a road that was not open to the public.

In November of 1971, Neil Jensen was returning from a hunting trip and was shocked to see that the County patrol had again been on their road, this time widening it a great deal and knocking down more fences belonging to the Jensens. To top it off the gate at section 30 was still locked despite Mr. Frame's letter stating he couldn't justify spending public monies on a road that was not open to the public.

The Jensens and others continued to protest this waste of public funds and on Dec. 29, 1971 the County made the first of several 'resolutions' concerning the O'Brien Cr. road. Stating that the O'Brien Cr. road through sections 30, 25, and 26 had been recognized as a county road since the late 1800's and because county equipment had serviced this road it was resolved that the portion of this road through the Jensen property was a public right-of-way up to section 30. The resolution further stated that "all obstacles on said right-of-way such as posts, cross members over the road, signs such as "No Trespassing", "private Property", etc. , be removed and that the public may enjoy unrestricted freedom of the use of O'Brien Creek Road." The resolution proper was poorly worded and concerned itself mostly with the Jensen property as though it was the Jensens who had been denying the public access rights. The intent of the opening statement however was quite clear; that the public would be allowed to travel the entire O'Brien Cr. road once again. Both the Jensens and the public viewed this resolution as a victory. On Dec. 31, 1971 the daily Missoulian and local radio stations carried the announcement that the road was now open. It appeared that the public interest had been served.

The County had already torn down the Jensens PRIVATE ROAD sign and since their gates were already open, they had only to remove the arch they had constructed across the road to comply with the resolution.

Something began to smell. A week went by and the locked gate at the beginning of section 30 had not been removed. Another week and then another week passed and still the locked gate remained and County continued to lavish services on the Jensen portion of the road leading to the locked gate.

On February 24, 1972 the County made another resolution concerning the O'Brien Cr. road. This time the O'Brien Cr. road through sections 30, 25, and 26 was merely recognized as 'a road'. No explanation was offered as to how "a county road since the late 1800's" could turn into just "a road" in less than a months time. The resolution did, however, reaffirm that the road through the Jensen property was a "public right-of-way". What wasn't mentioned in the resolution was that this was a 'public right-of-way' through private property to a locked gate??? To further confuse things, one of the County Commissioners told Hans Jensen that the intention of this resolution was not to stop public travel above section 30 but rather to limit County responsibility for maintenance to the road below section 30. Despite this assurance the gate remained locked and the County apparently let their 'power' to make resolutions go to their heads. Now they really took command of the Jensens' road. The County surveyor informed the Jensens that their arch across the road "would be removed as soon as practical by County forces". Although only one residence, that of Mrs. Whitman, requested their services on the Jensen portion of the road, the County began widening this road at every opportunity. Steel posts, treated railroad ties and whole stretches of fence were smashed as the County attempted to give Mrs. Whitman an ever wider 'private driveway' through the Jensen property. On one occasion the County spent 6 hours grading this road on the Jensen property. This was done despite the fact that there had always been ample room for two cars to pass on this road. Unfortunately the public derived no benefit from this costly service and worse, it is the public who will ultimately foot the bill for repairing these fences.

At this time the County Commissioners informed the Jensens that, before

They could open the locked gate at section 30, they would have to have a demand from the public. Of course they already knew there was a demand to re-open this road but the Jensens went ahead anyway and started a petition to have this locked gate removed. Everyone it seemed wanted their signature on this petition and with no effort the Jensens collected a number of signatures.

Then, on March 12, 1972, the Missoulian carried a short article entitled "County Amends O'Brien Ruling". According to this article the County Commissioners, after hearing protest from Mrs. Elsie Whitman, had amended their earlier decision and now were allowing the public to travel only to section 30. Or, in other words, to Mr. Klapwyks locked gate. Several false statements were attributed to Mrs. Whitman in this newspaper article including a statement that "the only public property past her land is 20 acres of leased Forest Service land". There is 7,000 or more acres of public land in the O'Brien Cr. drainage and most of it lies directly beyond this locked gate. It was also stated that she lived near the end of this road when in fact she lives only about half way up the road. Rather than act in the public interest, the county apparently chose to go along with these false statements and act in the interest of one or two people.

Shortly after this newspaper article, the Jensens turned in their petitions with the signatures of 544 residents of Missoula County requesting that this locked gate be removed. The County was on the spot; they had every reason to order this gate removed, but obviously this wasn't what they wanted to do. Instead they came up with the excuse that they had never maintained the road above section 30 but they did claim to have maintained the Jensen portion of the O'Brien Cr. road up to section 30. This statement should be considered carefully in light of the following facts; From 1953 until 1968, when Mr. and Mrs Neil H. Jensen moved up O'Brien Creek, nobody lived in O'Brien Cr. from the Jensen property west to the end of the entire drainage. Also the County of Missoula has never had an easement or right of way over either the Jensen portion of this road or that portion of road above their property. Is the County in the habit of servicing private roads where no one lives, or, was this done to facilitate public access to the public lands above due to the long history of public usage over this entire road? It wasn't until Mr. Klapwyk locked his gate and Mrs. Whitman moved her trailer above it that the County of Missoula did any noticeable maintenance on the Jensen property.

The Jensens sustained much fence damage during the winter of 1971 - 72 due to County maintenance of their road. For a while they were forced to forget about the public issue involved with this road and look after their own property. They had dealt with the County enough now to know their word, written or verbal, meant nothing. Despite assurances from the County that they would repair all the fences they had damaged, the Jensens compiled a photographic record of over 100 color transparencies documenting this destruction. Shown in these pictures was much deliberate damage where the County patrol left large areas of the road unplowed and instead chose to plow right up against the Jensens' fences causing much damage. These photographs may yet prove to be of value. On one occasion the County Surveyor told the Jensens that fence repair crews would be up within the week. On another occasion the County Surveyor was under the impression that his crew had already fixed these fences. This has been going on now for 4 months and as of this date (AUG. 24, 1972) the County has not fixed one bit of this fence. Although the County has not had time to fix the damage they have caused, they still find time to grade this road frequently whether it needs it or not. While this account covers the main events over the years on the O'Brien Cr. road, there are still other examples of questionable behavior on the part of

the County as well as other damages to the Jensen property not enumerated here. In the main though, it is all a continuation of the same story of the County trying to gain private property through harassment and intimidation while ignoring the public's desires in regards to the O'Brien Cr. road.

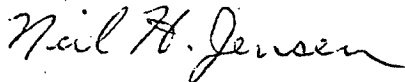
One more thing has come up now to make the County's behavior in this affair seem all the more strange. While the County of Missoula has never had an easement or right of way over the Jensen property, it was always assumed that they must have had one up to this property. Now the Jensens are unable to find any record of any easement to the County on the road leading to the Jensen property. Even so, the proposals from the County in regards to the Jensen property are for a 40 ft. right of way. Perhaps the County should acquire an easement up to the Jensen property before further harassing them.

Here briefly is the Jensens' proposal concerning the O'Brien Cr. road. This proposal has been submitted to the County by the Jensens attorney, Mr. Bill Murray. The Jensens will deed to the County free a 25 foot right of way through their property and they further agree to maintain their fences $2\frac{1}{2}$ feet back from this 25 foot right of way. This will leave a total of 30 ft. between fences along the road and will avoid any future damage from snowplowing. This right of way is to be computed by measuring a distance of $12\frac{1}{2}$ feet from both sides of the center of the existing road. This offer will be contingent upon the County obtaining a like right of way from Mr. John Klapwyk.

In return for this offer the Jensens ask that the County move for them any of their fences that fall within the above 30 foot total width between fences proposal. The County must also restore to their original condition all other fences that were damaged by County snowplowing operations during the winter of 1971 - 72. Finally the Jensens ask that the County install two cattle guards at the lower end of their property in section 28 so their stock may travel to water.

We believe this proposal to be more than fair and hope that the County will agree with us.

Sincerely yours,



Neil H. Jensen

APPENDIX C

Miscellaneous Correspondence
Relating to the Access Problem

410 Woodworth Ave.
Missoula, Montana
December 27, 1968

Mr. Gareth Moon — *Palma Tyack*
State Forester
2705 Spurgin Rd.
Missoula, Montana

Dear Gareth:

A concern for access to public lands capable of providing recreation was expressed in several resolutions passed by the Montana Wildlife Federation's Board of Directors.

Closure of private lands, public lands access blocked by private land, closure of roads that have provided access to public lands, land use changes that eliminate outdoor recreation and illegal "No Hunting" signs on BLM lands leased for grazing are the major reasons for taking a more intensive look at the public's opportunity to use its own lands.

The resolution requested the State and National Forest agencies and the Bureau of Land Management to (1) reopen lands that have been closed due to private ownership between public roads and public lands; (2) that rights-of-way be obtained on existing private roads to State or National lands; (3) acquire access to more public lands, and (4) development of roads to public lands when rights-of-way do exist.

The Bureau of Land Management was requested to positively identify their lands with durable signs, to provide penalties, such as revocation of lease if the lessee removed identification signs or put up "No Hunting" signs on public lands.

Your assistance in these matters will be appreciated.

Sincerely,

Donald Aldrich
Executive Secretary
Montana Wildlife Federation

- cc: Secretary Udall
- Secretary Freeman
- Governor-elect Anderson
- Senator Mansfield
- Senator Metcalf
- Representative Battin
- Representative Olsen

Dunkle
Miller
Pyman
Easton
Nalteman
Nalteman



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

IN REPLY REFER TO:

3: 6220
6424.1

STATE OFFICE
316 NORTH 26TH STREET
BILLINGS, MONTANA 59101

JAN 30 1969

Mr. Donald Aldrich
Executive Secretary
Montana Wildlife Federation
410 Woodworth Avenue
Missoula, Montana 59801

Dear Don:

I appreciate the concern shown by the Montana Wildlife Federation regarding access to public lands. Had your letter been written a couple months later, I would have had some specific information for you.

As part of preparing our FY 1970 program beginning July 1, next, the districts have been asked to submit specific data to us that will assist in evaluating the present situation.

First, the districts are directed to indicate what type and number of signs they anticipate putting out in FY 1970. Kinds of signs include directional, boundary, safety, identification, and so forth. An analysis of this information will be made to see if an adequate statewide program is being proposed and its implementation can be met within budget restraints.

Second, information regarding actual public lands now lacking proper access has also been requested. Emphasis is being placed on identifying those lands having prime wildlife or recreational values. Together with identification of these lands, estimates of the amount and location of roads or trails needed to "open" these lands will also be submitted. This should provide us with the first good look into the location and magnitude of the access problem and provide the basis for our program. When this information has been compiled, I will be happy to send you a copy if you so desire.

As you well know, Don, the problem of private land blocking access to public land is a tough one. It is, of course, entirely legal for a private landowner to post his land. This means access must be obtained, if required, either through agreement, the acquisition of easements

or through condemnation, any of which can require considerable money and time--the latter frequently being the most critical.

Erecting signs on public lands is no less a formidable task than easement acquisition--perhaps worse. You are well aware of how checkerboarded or scattered much of the public domain is in Montana, the boundaries of which are unmarked or unfenced. Even a reasonably thought out program would call for a massive expenditure of manpower to install. Frankly, Don, our present manpower ceiling is the limiting factor. As the next best substitute, we have been publishing our Recreation Access Guide maps to depict the extent and location of our National Resource lands.


Closely tied to this comes the problem of sign maintenance. If a "public land" sign disappears from a fence you may strongly suspect the party who may be guilty of its disappearance, but proving it is something else. Vandalism or thoughtless destruction is an obvious recurrent problem of posted signs.

New regulations presently published in the Federal Register, which you may have seen, are an encouraging aspect to this problem. Since they are too lengthy to explain in detail, a summary is attached. If you do not have a copy of the January 18 Federal Register, I will be glad to send you a few.

I have attempted to indicate some of the problems facing us and also what is being done at present. Although we may not be making the greatest strides in all aspects of this problem, we are moving forward to the extent possible. We would welcome your comments and suggestions, particularly as to specific areas where the problem of access is acute, in developing a meaningful public land access program.

If you need more specific information, please let me know.

Sincerely yours,


Harold Tysk
State Director

Enclosure - 1
Encl. 1-Summary

cc:
Director (712e)

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

2234 (320)

APR 10 1969

Hon. Arnold Olsen
House of Representatives
Washington, D. C. 20513

Dear Mr. Olsen:

This is in further reply to your referral of January 2 with an enclosure from Mr. Donald Aldrich, Executive Secretary, Montana Wildlife Federation, concerning access to the public lands. As promised in our acknowledgment of January 15, we are providing you with specific information.

We appreciate receiving the resolutions of the Board of Directors of the Montana Wildlife Federation. The resolutions point-up the intense interest in the availability of public lands to the general public for multiple use purposes. To the limit of present funds and manpower, the Bureau of Land Management is obtaining rights-of-way and constructing multiple use roads to the public lands where these projects can be fully justified. Also, action has been taken to strengthen the Bureau of Land Management's access and rights-of-way program at the Washington Office and field levels. This action includes an intensive training program of selected personnel in the area of easement and road purchase negotiation.

The State Director of Montana's reply of January 20, 1969, to Mr. Donald Aldrich's letter covers very well the issues he raised. A copy of Mr. Tysk's letter, a summary of the recreation regulations approved by the Secretary of the Interior on January 20, 1969, mentioned by Mr. Tysk, and a Montana recreation guide map are enclosed.

We appreciate the opportunity to provide you with this information.

Sincerely yours,

Boyd L. Rasmussen
Director

Enclosures

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
WASHINGTON, D.C. 20250

IN REPLY REFER TO
5460

MAR 16 1978

Honorable Lee Metcalf
United States Senate

Dear Senator Metcalf:

Our letter of January 14 acknowledged receiving your letter of January 6 concerning earlier correspondence with Mr. Dennis O. Espeland of White Sulphur Springs. We had to obtain additional information from the field before answering your questions.

Of the eight ranches listed by Mr. Espeland, all except the Zeig Ranch do have grazing permits on the Lewis and Clark National Forest. These ranches are located in the Smith River valley between the Lewis and Clark, and Helena National Forests. Most of the ranch lands are outside National Forest boundaries, but there are several sections belonging to four of the listed ranches which are inside the Lewis and Clark boundaries. The enclosed map shows the ownerships involved.

You will note there are existing primitive roads going eastward from the county road through these ranches to National Forest land in upper Eagle and Sheep Creeks. These are the roads which are closed. The Forest Service does not have easements.

We understand the Forest plans to provide access to this general area by constructing a road south from an existing road near Williams Mountain to connect with another existing road in upper Sheep Creek. A contract for the connecting link is scheduled to be let this fiscal year. With the completion of the connecting link it appears that the area of National Forest Mr. Espeland refers to will have reasonable public access via the Forest Service roads leading westward from U.S. 89, the White Sulphur Springs-Great Falls highway. This access is equivalent to or better than the access that would be provided by the roads leading from the county road eastward through the private ranch lands.



You asked whether the Forest Service has authority to require a grazing permittee to permit access across his land to those seeking to reach National Forest lands. You asked, specifically, whether the Attorney General's opinion of February 1, 1962, bears on this issue in any way.

We will answer the last part of your question first. The Attorney General's opinion was directed to a section of the Act of June 4, 1897 (30 Stat. 36; 16 U.S.C. 478) and dealt with the question of access to private property within the National Forests. The Attorney General said a permit to use an existing road or to build a road across National Forest land could require the permittee to grant reciprocal access across his lands. The opinion did not deal with the question of whether access across an applicant's land could be required as a condition of a permit for grazing use of National Forest lands.

The Secretary of Agriculture is authorized to regulate grazing on the National Forests and make rules and regulations for this purpose (16 U.S.C. 551, 580 1). The Secretary's grazing regulations are Part 231 of Title 36 of the Code of Federal Regulations. Section 231.3 deals with grazing permits.

Under given circumstances existing authority could be interpreted to authorize a requirement of the nature you describe as a condition for issuing a grazing permit. It is our position that this approach would be an inequitable and unworkable solution to the problem of providing access to the National Forests. Furthermore, we do have adequate authority and direction to provide access through construction of the Forest Development Road and Trail System and acquisition of needed rights-of-way across private lands. Condemnation authority is available for this purpose. This direct approach of acquiring the rights-of-way needed and paying for them is fair and involves none of the problems associated with an indirect solution.

There are many reasons why making the granting of access a requirement for obtaining a grazing permit is not an acceptable solution to access needs.

It is true that an applicant for a grazing permit must own base ranch property. This does not mean they are the ranches immediately adjacent to the National Forests. Quite often they are not. Sometimes, too, they may be adjacent but not at locations where access is needed. The burden of the requirement would fall unequally on those permittees who happen to have ranch property where access routes are needed. It would burden one group of National Forest users, grazing permittees, but not others.

A reciprocal revocable right for access upon which large expenditures would be made in the construction of roads would not be acceptable to the Government. To adequately serve the Government's access requirements an interest in the nature of a permanent easement is necessary. Adopting a system wherein a property conveyance is required for a grazing privilege allocation would tend strongly to imply that a National Forest grazing privilege is a grazing right.

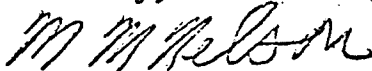
3

Depending on this device to obtain access would, to a degree, tie National Forest development programs to private owner decisions. The resulting planning and budgeting problems are apparent. A decision to provide access to meet a public need should not depend on the decision of a private individual.

In summary, it is our feeling that the Forest Service has the tools needed to provide public access to the National Forests, including the authority to condemn rights-of-way when necessary. It would be unwise to consider using an inherently unfair and unworkable method which would result in ill-feeling and insurmountable problems.

Thank you for your interest in the very important matter of public access to the National Forests.

Sincerely,



Deputy Chief

Enclosure

United States Senate

COMMITTEE ON
AGRICULTURE AND FORESTRY
WASHINGTON, D.C. 20510

August 3, 1971

Gentlemen:

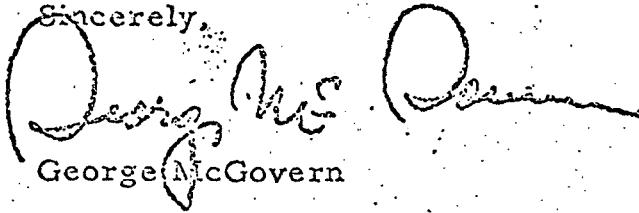
I am receiving a continuing number of complaints from South Dakota hunters and fishermen regarding the restricted access to public lands for their purposes. The issue is brought into focus, again, by an article in the July 1971 issue of OUTDOOR LIFE which describes the situation in Montana.

I certainly agree that these lands should be available for private leasing arrangements, but I do not feel that this should restrict the right of the public to use the public domain.

I regard the situation as serious enough to warrant the consideration of some legislative remedy if the matter cannot be handled administratively. In this regard, I would appreciate any comments that the Bureau may have on this situation.

With every good wish, I am

Sincerely,


George McGovern

Office of the Director
Bureau of Land Management
U. S. Department of the Interior
Washington, D. C.

109

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
WASHINGTON, D.C. 20250

IN REPLY REFER TO
5460

AUG 13 1971

Honorable Mike Mansfield
United States Senate

Dear Senator Mansfield:

This is the report promised in our July 30 letter responding to your request of July 20. You asked for the Forest Service position on matters discussed in an article in the July issue of Outdoor Life. The article discussed the lack of public access to a portion of the Gallatin National Forest and similar problems elsewhere on the public lands.

The Outdoor Life article deals with an issue of great concern to the Forest Service. The Gallatin case and others cited in the article are symptomatic of inadequate access to the National Forests in many areas. The problem is especially serious in regard to dispersed recreation use such as hunting and fishing. It is more serious in the Rocky Mountain Forests, the mountain and piedmont Forests of the East and the California Forests than it is elsewhere. In some areas there is a net decrease in accessibility. Access is being lost faster than new access is being provided.

Before commenting specifically on the Outdoor Life article we believe it will be helpful if we briefly describe the transportation system which serves the National Forests, and broadly outline the present situation and major problems.

National Forest access is provided by a combination of road (and trail) systems. The most important to development of the National Forests is the Forest Development Road and Trail System. This system is provided for by the Highways Act (23 U.S.C. 101, 205) and funded by annual appropriations. It is planned to efficiently provide for managing and utilizing all resources of the National Forests. Every facility must be analyzed, evaluated, developed, and operated from the standpoint of how well it serves a variety of resource objectives. The presently planned system consists of about 380,000 miles of roads and 123,000 miles of trails. Most of the planned system is inside National Forest boundaries. However, since there are about 39 million acres of non-Federal land within the boundaries (226 million acres gross, 187 million acres net), a substantial portion of the planned system will require rights-of-way across private lands even inside the Forests. Presently about 200,000 miles of roads and 100,000 miles of trails are in existence. Not all rights-of-way for the existing roads have been obtained.



Federal and State highways, including the Forest Highways which are 100 percent federally-financed, are the main arteries to and through the National Forests. Most Forest Highways are already in place. There are nearly 25,000 miles of Forest Highways, four-fifths of which are within the National Forests. The Forest Highways and the other Federal and State highways are under the jurisdiction and administration of the States. They present no problem as regards access.

The third category of roads serving the National Forests are the public roads under the jurisdiction of local governments. They are most commonly referred to as "county" roads. These roads are of special significance because they are often the connecting link between the Forest Development Road System and the Federal and State highways. To a large extent, people get to the Forests over these roads. In many areas the principal access problem is related to these roads. As a result of several interacting forces--social, economic and political--there is a continuing net shrinkage of local government roads within and leading to the Forests. The resulting gap is especially serious. We will return to this problem.

The last group of roads to be considered are those which are not on any system operated by a governmental agency but do provide access to National Forest land. They are across or partially across private lands. Usually they were built or "grew" many years ago, often predating the automobile. Many were once public roads, operated and maintained by a local public road agency. Many are on the route of planned Forest Development Roads. Usually they are low-standard roads, often passable only part of the year to ordinary vehicles. Nevertheless, they have been an important means of access to National Forest lands, especially for hunters and fishermen. These roads have substituted for Forest Service roads which have not yet been built and for the public roads which have been abandoned by local government.

Problems with this last class of roads are the source of most complaints from sportsmen. Their use is at the sufferance of the landowner. Until recent years public use was accepted by landowners and the using public as normal. Denials of access were infrequent. This was true in part because there were not as many people wanting to use National Forest lands for recreation. Private lands were mostly unposted. Hunters and fishermen were generally local people known to each other and the landowners.

The situation is changing because of population increases, greater mobility, more leisure time, and an increasing demand for outdoor recreation opportunities. Private lands close to National Forest lands have been closed to the public and posted, sometimes by individuals or groups for their private recreation. Many owners have closed the roads through their properties where there was no right-of-way owned by a public road agency. Unintentionally, local governments have sometimes cooperated by abandoning public roads which then became privately controlled.

There are cases where a principal objective in closing a road was to monopolize use of the adjacent National Forest. However, sportsmen sometimes abuse crossing privileges. Only a few instances of hunting without permission, fence cutting, and off-road vehicle travel provide the excuse for wholesale road closures where the private landowner has control.

We have tried to describe the complex of roads which provide access to the National Forests and how they are related to each other. We have also touched on the major problems affecting each of the road systems. We will now elaborate on some of these problems and indicate what is being done toward their solution.

One point should be made at the outset. Access is a matter of degree. Seldom is there an area in a National Forest that cannot be reached in some manner - by foot or horseback or by more or less circuitous or poor vehicular routes. At some point an area can be labeled as lacking access. The adequacy of access depends on the user's capabilities, needs, and attitudes. Trail or cross-country access is of no value to the hunter who cannot hike a considerable distance or cannot afford to use stock.

As said earlier, the access problem is worse in some areas than others. Unfortunately, the access situation is worse in those areas where it is already bad. We are probably losing county roads and what might be termed permissive access faster than replacement access in the form of Forest Development Roads is being provided. In areas where access is fairly adequate there is continuing improvement. This is because, in the latter case, these Forests have important timber resources which are vital to the local and National economy while at the same time the timber pays a large part of the cost of roads. In other areas the pressure to provide road access is not as great and the financing is not available.

The principal way the Forest Service meets access needs is through additions to the Forest Development Road and Trail System and by clearing up the right-of-way situation on these roads and trails. About 1,500 road rights-of-way (easements) are acquired each year. Most of these are for new roads to be constructed. Others are for relocation or reconstruction of existing roads. A few are acquired for roads which are claimed by the Forest Service but where we have an inadequate interest or no right-of-way. Some private roads are acquired after designating them as Forest Development Roads. These last two categories include acquisitions that relieve some of the worst access situations.

Additions to the transportation system depend very largely on the level of financing provided. In addition to roads constructed with appropriated funds timber purchasers build and improve many miles of roads to harvest timber they have bought. The costs incurred are reflected in a reduction of the price paid for the timber.

Another program that contributes materially toward improved access is construction of roads in cooperation with major timber companies and other owners of large acreages intermingled or checkerboarded with National Forest land. Joint ownership is obtained by exchange of easements. The Government obtains rights to use the road for all National Forest purposes and for the public to use the roads. Besides making the National Forest lands accessible, the cooperating landowner's lands are opened to extensive recreation use such as hunting, fishing, hiking, and riding. In sharing construction costs the Government bears the share attributable to recreation use regardless of ownership of the lands generating the use. Almost 3,800 miles providing access to several million acres in California, Oregon, Washington, Idaho, and Montana have been built under this program.

There is a problem in meshing the local public road systems and the Forest Development Road System. The area of juncture between these systems is where many of the access problems lie. There is need for agreement among Government levels on the demarcation of responsibilities. Legislation may be needed. Perhaps the most hopeful development is the "Functional Highway Classification Study" now being conducted by the State highway departments under direction from the Federal Highway Administration. The study may recommend establishing a pattern of responsibility and sources of financing which will go far toward resolving present problems. We are cooperating with the State highway departments in this study.

We have indicated that a higher funding level for development of the Forest Transportation System would allow better progress in areas where the stimulus of timber access needs is lacking. It should be noted that support for the Forest Development Road and Trail program and appropriations has come almost entirely from the timber industry and from individuals or groups interested in a particular road project. Sportsman support and interest has been notably lacking.

Following are some additional actions which can have a great effect in improving access and in mitigating the bad effects of inadequate access. Something is being done on all the items listed but a step-up in the effort is warranted and is being encouraged.

1. The public needs better maps for identification of National Forest land and available access in areas of intermingled ownership. The recreation maps available at Forest Service offices do part of this job. They can be improved, especially to better show access. The recreation user also needs to be able to find these lands on the ground and the roads and trails that will get him there. Better maps and more adequate signing of lands and roads are the principal means for doing this.
2. There needs to be more direct contact between sportsman organizations and Forest Service officials at the local level. Discussion of specific access situations can lead to actions which will help solve problems.

5

3. National Forest users need to take a greater interest in the local public road system and its relation to access to the public lands. Too often the parties requesting abandonment of public roads are the only parties heard from.

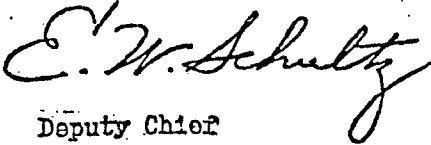
We now turn to the Fairhurst-East article in Outdoor Life. We believe the article will be helpful in focusing attention on the access problem. The Forest Service, of course, has the major responsibility for solving it insofar as the National Forests are concerned. However, to make progress the cooperation of landowners, State and local government, sportsmen and other National Forest users is needed. The basis for such cooperation is an understanding of the access problem in all its complexities.

Unfortunately, there are errors in the Outdoor Life article which detract in some degree from its effectiveness in informing sportsmen on the nature of the problem. The authors of the article (page 126) misunderstood the term "fee land" as used by Mr. Wheeler of the Irvine Company. He was referring to land owned by the company "in fee," not National Forest or other Federal land where the company may have grazing privileges.

The article then goes on to say the Forest Service may condone the closing of a road on National Forest land by the holder of a permit to graze stock on such land. This is not true. A grazing permit does not authorize interfering with use of a Forest Service road. Furthermore a grazing permit is not a lease as stated in the article. Rather it only authorizes the grazing of a specified number of livestock for a specified seasonal period on a described area or "allotment."

In spite of these errors the article serves very well to develop interest in a most serious problem affecting the public's right to use the public lands. The access situations described are illustrative of conditions that are widespread and growing in seriousness. The frustration experienced by sportsmen and expressed in the article is understandable. It is also felt by the Forest Service. We realize better than most the magnitude and complexities of the problem. There is no single, simple solution. Instead there are numerous partial solutions which must be applied over time to have results.

Sincerely,



Deputy Chief



United States Department of the Interior BIM
2130 (322)

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 30 1971 6 220

Dear Senator McGovern:

Thank you for your letter of August 3 concerning the barring of access to public lands from privately owned lands, as related in the July issue of Outdoor Life magazine in the article entitled "Cloud in the Big Sky."

The Bureau of Land Management is responsible for the administration of over 450 million acres of public domain lands throughout the west. These lands may be used by the public for hunting and other authorized uses. In some instances, privately owned lands are interspersed among the public lands, creating a situation where private lands must be crossed to gain access to the public lands. The local road system is also in public and private ownership and control, as determined by State and local laws and ordinances. "Prescriptive-right" roads fall within the local-law restrictions. The designation of such a road and control of its traffic are matters for determination under local law.

Much of the Federal public land is leased to private landowners for the grazing of livestock. Grazing permittees and licensees are prohibited from interfering with any authorized public use of these lands. This prohibition does not, however, prevent a landowner from controlling access to his privately owned lands.

With respect to the public lands, the policy of the Department of the Interior is stated in the regulations in 43 CFR Part 6250, as follows:

"§ 6250.0-6

(a) In cooperation with State and local governments and private individuals and associations, the Bureau will endeavor to provide access for public use and enjoyment of lands with outdoor recreation values.

(b) Roads and trails constructed by the Bureau shall normally be available for public access to the lands. However, lands and roads and trails may be restricted to specified authorized use or no use in the interest of public health and safety or preservation and protection of the lands."

M In addition, Section 1 of the Act of February 25, 1885 (23 Stat. 321; 43 U.S.C. 1661), declares any enclosure of public lands made or maintained by any party, association, or corporation who "had no claim or color of title made or acquired in good faith, or any asserted right thereto, by or under claim, made in good faith with a view to entry

thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made" to be unlawful and prohibits the maintenance or erection thereof. The regulations under this law, and other laws relating to fencing, etc., of the public domain, are contained in 43 CFR 9239.2, copy enclosed.

The Bureau of Land Management is working in cooperation with interested citizen organizations, State and local agencies, and stockmen to develop agreements providing for access into areas where recreation and other public values are high. The acquisition of road easements providing for rights for the public to traverse existing private roads, and for new road construction projects, are active programs of the Bureau and are proceeding as rapidly as funds and circumstances permit.

Sincerely yours,

(sgd) Harrison Loesch

Loesch

Assistant Secretary of the Interior

Hon. George McGovern
United States Senate
Washington, D. C. 20510

Enclosure

cc:
LM
CL
Rep. HW
RM

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State Director, Montana

3075

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8/16/71

§ 9239.2 Unlawful enclosures or occupancy.

§ 9239.2-1 Enclosures of public lands in specified cases declared unlawful.

(a) Section 1 of the act of February 25, 1885 (23 Stat. 321; 43 U.S.C. 1061), declares any enclosure of public lands made or maintained by any party, association, or corporation who "had no claim or color of title made or acquired in good faith, or an asserted right thereto, by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made" to be unlawful and prohibits the maintenance of erection thereof.

(b) Section 4 of the Taylor Grazing Act of June 23, 1934 (48 Stat. 1271; 43 U.S.C. 315a) provides:

Fences . . . and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve.

(c) Section 10, paragraph (4) of the Federal Range Code, § 4112.3 of this chapter, containing rules for the administration of grazing districts prohibits "Constructing or maintaining any kind of improvements, structures, fences, or enclosures on the Federal range, including stock driveways, without authority of law or a permit."

(d) Section 2 of the Taylor Grazing Act of June 23, 1934 (48 Stat. 1270; 43 U.S.C. 315a), provides that "any willful violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than \$500."

(e) Violations of any of the provisions of the act of February 25, 1885, constitute a misdemeanor (Sec. 4, 23 Stat. 322; 35 Stat. 40; 43 U.S.C. 1064).

§ 9239.2-2 Duty of district attorney.

Section 2 of the act of February 25, 1885 (23 Stat. 321; 43 U.S.C. 1062, 23 U.S.C. 41, Par. 21), provides that it shall be the duty of the district attorney of the United States for the proper district on affidavit filed with him by any citizen of the United States that such unlawful enclosure is being made or maintained, showing the description of the lands enclosed with reasonable certainty so that the enclosure may be identified, to insti-

tute a civil suit in the proper United States district or circuit court or territorial district court in the name of the United States and against the parties named or described who shall be in charge of or controlling the enclosure complained of.

§ 9239.2-3 Responsibility for execution of law.

The execution of this law devolves primarily upon the officers of the Department of Justice, but as it is the purpose, to free the public lands from unlawful enclosures and obstructions, it is deemed incumbent upon the officers of the Department of the Interior to furnish the officers of the Department of Justice with the evidence necessary to a successful prosecution of the law.

§ 9239.2-4 Filing of charges or complaints.

All charges or complaints against unlawful enclosures or obstructions upon the public lands should be filed with the proper State Director. Such charges or complaints, when possible, should give the name and address of the party or parties making or maintaining such enclosure or obstruction and should describe the land enclosed in such a way that it may be readily identified. The section, township, and range numbers should be given, if possible.

§ 9239.2-5 Settlement and free passage over public lands not to be obstructed.

Section 3 of the act of February 25, 1885 (23 Stat. 322; 43 U.S.C. 1063), provides that no person by force, threats, intimidation, or by any fencing or enclosing or any other unlawful means shall prevent or obstruct or shall combine or confederate with others to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon any tract of public land subject to settlement or entry under the public land laws of the United States or shall prevent or obstruct free passage or transit over or through the public lands.

§ 9239.3. Grazing.

§ 9239.3-1 Outside grazing districts.

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across lands that are subject to lease or permit under the provisions of this subpart or within a stock

driveway, without authorization from Management, is trespass. It is in damages to the forage consumed, general property, and and criminal pro lawful acts.

(b) A lessee violation of the t his lease by excu fied, or by allowi on Federal land i different from th in default and s provisions of § 4 In addition he me action in accord and procedures in 2(c) (1), (2), (3); 9239.3-2(g) of th far as practicabl clude Federal lan grazing districts.

(c) When the a lessee of land: of this subpart : take action agair cordance with t cedures in §§ 9 (1), (2), (3), 9239.3-2(g) of t far as practicabl clude lands with provisions of th stock driveway.

§ 9239.3-2 Ins

A grazing licen pended, reduced thereof denied i violation of the the license or pe the act or of any part, or of any a

(a) Violations Whenever it a exists, not clea manager shall s the alleged violc ested lian holdr tice of his lian w The notice shall sion constitutth ferring to the sp of the license o this part or of c alleged to have allow the licen s able specified th to demonstrate



COUNTY ATTORNEY

MEAGHER COUNTY
White Sulphur Springs, Montana 59645

Nov. 17, 1971

V. A. Ciliberti, Jr.
7 Greenbrier Drive
Missoula, Mont. 59801

Dear Mr. Ciliberti:

You have chosen the most interesting and highly controversial Master's thesis. While I cannot relate entirely to Forestry, I can give you my view concerning the matter. Let me first of all, remind you that I am an elected public official; that I rely on the will of the people to retain my job; that if I am unpopular in my position, I will be defeated and lose my job. As a consequence, I would be forced to move from the County since there isn't sufficient income outside of the job to maintain a residence here. This puts me in a peculiar position concerning actions which would be motivated by public interest. I am not speaking of criminal matters, I am speaking of civil matters and more specifically, access to land.

First of all, as a off-the-cuff sketch of our Montana Law, I find no trespass law that I could enforce as a County Attorney or any one simply fishing a stream. I would suggest that you research our Montana trespass laws, I think you will be rather surprised to see that there, in fact, very few instances wherein actual trespass can occur. This has not resulted in more people going upon land. As a matter of fact, though, we are still quite a group of people that respect individual land-owner's rights, even though the rights are not spelled out and protected by law.

As to the matter of road closures: if a road is a County road, and State or Federal tax money, as well as County monies, have been expended in its improvement, it would be wrong to close the same or attempt to close it. Yet I find in Meagher County, hundreds of miles of County Roads that fall into this category that have been closed by the simple expedient of stringing a gate across the road and putting a chain on it. People will constantly complain about the matter, but never come to this office to file a formal complaint. As a consequence, there is no action that I am able to take here. These situations are transitory, they last during the hunting season and as soon as the influx of hunters have disappeared which are ordinarily relieved by the owner of the chain, removing the same.

The next loss of access occurs when a public road, that has been

open to the public for an extended number of years without formal dedication, is closed by the ranchers. We have many instances of this occurring here, most notorious of which has been occurring in the Northwest part of our County, where roads that have been public roads servicing access to ranches that have been in the area for years and years, are now closed. Most specific closed by a local landowner with the co-operation or another landowner who is running a guide hunting business. To my knowledge, but not to my ability to prove, he is paying the adjacent landowner so much a head for elk and deer that his hunters stalk in the area. I am grossly insensed by this situation, but once again, have not received a single complaint from any citizen concerning this act. The only complaint I have is for myself. I have not been denied access to the area, but I am too proud to request access. As a consequence, I must decide whether, within the next four years, I will bring a Cause of Action to force my way upon the land in a civil manner or simply sit back and let the situation resolve itself by having the area closed permanently.

Another situation occurs wherein a County road, that has been a County road, dedicated and maintained by the County, can be closed by a petition of landowners adjacent to or near the area. These incidents have occurred and have resulted in private hunting privileges to several parties. The most heinous, of course, of these situations, is that very few people will take a public action or protest a closure of this petition form, unless a large amount of publicity and advertisement is engendered. In a County, such as ours, where the main City is dependant considerably upon agricultural produce and activities for income, very little opposition is ever heard.

All three of these incidents repeatedly deny public access to public land. If you would want specifics as to cases, I can certainly direct your attention to them as it would take a lot of correspondence to explain them. Since I am not specific in what you have in mind concerning your Masters, I give you the above outline and you can request such specific information in additional correspondence, or in an interview here in Meagher County, or possibly in Missoula on my next trip there. To summarize, I can give you specific instances of the above described circumstances. I can give you names, places and locations and actually take you out and show you the circumstances.

Next, I would suggest reference material for you Master's thesis in the following categories:

1. The approach of the English Common Law to the rights of the

people to public land and to wild game on these lands.

2. Next, Montana's present status in our approach to the use of public lands by the public and wild game upon public and private lands.

3. A review of the Montana Criminal Statutes which prohibit trespass upon lands or would be involved in the denial of access to public lands by private landowners adjacent thereto.

4. Finally, a brief review of the laws applicable to the closing of public roads for which you can appreciate that such circumstances may occur and how they may occur legitimately. You may also get some varying legal opinions as to what would be the result of such a closure. Also, as a matter of pure curiosity, you might get a few definitions from other Attorneys and other legal sources as to what a public, county, private, road or series of roads consist of.

If I can be of any further assistance, please don't hesitate to contact me.

Yours truly,



Richard J. Conklin

RJC/rc

School of Forestry
University of Montana
Missoula, Montana .
August 15, 1972

Solicitor General of the Department of Agriculture
U. S. Department of Agriculture
Washington, D. C. 20250

Dear Sir:

As a subject for a Master's thesis I am working on the problem of public access to public lands, lands that are made inaccessible by either road closures or by being enclosed by private lands.

The federal government made an attempt to resolve this problem by its passage of the Act of February 25, 1885 and for the next 30 - 40 years instituted a number of court cases based upon the provisions of this act. However since about 1925 there appears to be little or no federal activity in utilizing the act to resolve the increasingly severe problem of public access to public lands.

Can you tell me why the provisions of this act seem to have fallen into disuse and what you feel the general application of the act is today? I am only looking for generalizations regarding the act, its intended purpose and its present-day utility. Therefore any information or direction you can provide will be appreciated, particularly in contacting persons in federal agencies that can contribute to my request.

Sincerely yours,



V. A. Ciliberti

Attachment

Act of February 25, 1885 23 Stat. 321 Ch. 149

Cases:

Canfield v United States	167 U.S. 518
Potts v United States	114 U.S. 52
Thomas v United States	136 F. 159
Homer v United States	185 F 741
Colconda Cattle Co. v U. S.	201 Fed Rep 281
U. S. v Rindge	208 F 611
Cardwell v United States	13 F 593
Stoddard v United States	214 F 566

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
Washington, D. C. 20250

5460

August 30, 1972



Mr. V. A. Ciliberti
School of Forestry
University of Montana
Missoula, Montana 59801

Dear Mr. Ciliberti:

Your letter of August 15, 1972, has been referred by the Department General Counsel to the Forest Service for reply.

The Act of February 25, 1885, was intended to put an end to illegal fencing and enclosure of the public lands by stockmen and to prohibit any person from obstructing the entrance of settlers upon the public lands. The act was used successfully to open up the plains and other western rangelands to the homesteaders and to prevent appropriation and monopoly use of the public domain rangelands by the large cattle outfits.

The act was used to secure removal of fences on private lands when the purpose and intent of the fencing was enclosure of public lands or prevention of entry by settlers. However, it is clear the act was not intended to interfere with use and enjoyment of private property unless such use was a mere subterfuge for enclosing or preventing access to the public domain. Nor was it concerned with creation of a means of access to public lands. It is not a statute under which an agency administering public lands could acquire rights-of-way.

The law fell into disuse as settlement of suitable public lands was completed and as grazing of the public lands gradually was brought under the permit system. The two abuses, illegal enclosure and prevention of settlement, disappeared as conditions changed over the years. The era of disposal of the public domain came to an end. Likewise the policy of free and unrestricted grazing was replaced by a permit system first on the National Forests and later on the remaining unappropriated public domain with passage of the Taylor Grazing Act.

2

We do not see how the 1885 Act could be used today to require owners of private land to allow access across their lands to National Forest lands or to open up their privately-owned roads to use by the public in reaching the public land. Furthermore, the Forest Service does have specific and adequate authority to build roads and trails for access to the National Forests and to acquire rights-of-way across private lands, by condemnation if necessary. Likewise State and local governments have similar authority to acquire rights-of-way and build roads within and adjacent to National Forests.

We believe that providing access to the public lands is a public responsibility shared by the Federal Agency administering such lands and by State and local governments responsible for a system of public roads serving their jurisdiction.

Enclosed is a statement we have used in replying to questions about the problem of providing public access to the National Forests. It should help in understanding the problem and indicates where we think the solutions lie.

You have chosen for your thesis a problem which is of great concern to the Forest Service. We will be glad to supply information bearing on the problem as it affects the National Forests. The best local source of information is the Division of Recreation and Lands in the Forest Service Regional Office. Mr. William C. A. Enke in that Division is particularly knowledgeable on the access situation in the Northern Region. He will be glad to help you with information and in contacting other people you may want to write or talk to.

This office will gladly supply additional information and answer questions on the access problem at the national level. Address your letter to:

Director of Lands
Forest Service, USDA
12th & Independence Avenue, S.W.
Washington, D. C. 20250

Sincerely,



G. W. VAN GILST
Director of Lands

Enclosure

NATIONAL FOREST ACCESS PROBLEMS

National Forest access is provided by a combination of road (and trail) systems. The most important to development of the National Forests is the Forest Development Road and Trail System. This system is provided for by the Highways Act (23 U.S.C. 101, 205) and funded by annual appropriations. It is planned to efficiently provide for managing and utilizing all resources of the National Forests. Every facility must be analyzed, evaluated, developed, and operated from the standpoint of how well it serves a variety of resource objectives. The presently planned system consists of about 380,000 miles of roads and 123,000 miles of trails. Most of the planned system is inside National Forest boundaries. However, since there are about 39 million acres of non-Federal land within the boundaries (226 million acres gross, 187 million acres net), a substantial portion of the planned system will require rights-of-way across private lands even inside the Forests. Presently about 200,000 miles of roads and 100,000 miles of trails are in existence. Not all rights-of-way for the existing roads have been obtained.

Federal and State highways, including the Forest Highways which are 100 percent federally-financed, are the main arteries to and through the National Forests. Most Forest Highways are already in place. There are nearly 25,000 miles of Forest Highways, four-fifths of which are within the National Forests. The Forest Highways and the other Federal and State highways are under the jurisdiction and administration of the States. They present no problem as regards access.

The third category of roads serving the National Forests are the public roads under the jurisdiction of local governments. They are most commonly referred to as "county" roads. These roads are of special significance because they are often the connecting link between the Forest Development Road System and the Federal and State highways. To a large extent, people get to the Forests over these roads. In many areas the principal access problem is related to these roads. As a result of several interacting forces--social, economic and political--there is a continuing net shrinkage of local government roads within and leading to the Forests. The resulting gap is especially serious. We will return to this problem.

The last group of roads to be considered are those which are not on any system operated by a governmental agency but do provide access to National Forest land. They are across or partially across private lands. Usually they were built or "grew" many years ago, often predating the automobile. Many were once public roads, operated and maintained by a local public road agency. Many are on the route of planned Forest Development Roads. Usually they are low-standard roads, often passable only part of the year to ordinary vehicles. Nevertheless, they have been an important means of access to National Forest lands, especially for hunters and fishermen. These roads have substituted for Forest Service roads which have not yet been built and for the public roads which have been abandoned by local government.

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Problems with this last class of roads are the source of most complaints from sportsmen. Their use is at the sufferance of the landowner. Until recent years public use was accepted by landowners and the using public as normal. Denials of access were infrequent. This was true in part because there were not as many people wanting to use National Forest lands for recreation. Private lands were mostly unposted. Hunters and fishermen were generally local people known to each other and the landowners.

The situation is changing because of population increases, greater mobility, more leisure time, and an increasing demand for outdoor recreation opportunities. Private lands close to National Forest lands have been closed to the public and posted, sometimes by individuals or groups for their private recreation. Many owners have closed the roads through their properties where there was no right-of-way owned by a public road agency. Unintentionally, local governments have sometimes cooperated by abandoning public roads which then became privately controlled.

There are cases where a principal objective in closing a road was to monopolize use of the adjacent National Forest. However, sportsmen sometimes abuse crossing privileges. Only a few instances of hunting without permission, fence cutting, and off-road vehicle travel provide the excuse for wholesale road closures where the private landowner has control.

We have tried to describe the complex of roads which provide access to the National Forests and how they are related to each other. We have also touched on the major problems affecting each of the road systems. We will now elaborate on some of these problems and indicate what is being done toward their solution.

One point should be made at the outset. Access is a matter of degree. Seldom is there an area in a National Forest that cannot be reached in some manner - by foot or horseback or by more or less circuitous or poor vehicular routes. At some point an area can be labeled as lacking access. The adequacy of access depends on the user's capabilities, needs, and attitudes. Trail or cross-country access is of no value to the hunter who cannot hike a considerable distance or cannot afford to use stock.

As said earlier, the access problem is worse in some areas than others. Unfortunately, the access situation is growing worse in those areas where it is already bad. We are probably losing county roads and what might be termed permissive access faster than replacement access in the form of Forest Development Roads is being provided. In areas where access is fairly adequate there is continuing improvement. This is because, in the latter case, these Forests have important timber resources which are vital to the local and national economy while at the same time the timber pays a large part of the cost of roads. In other areas the pressure to provide road access is not as great and the financing is not available.

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Additions to the transportation system depend very largely on the level of financing provided. In addition to roads constructed with appropriated funds timber purchasers build and improve many miles of roads to harvest timber they have bought. The costs incurred are reflected in a reduction of the price paid for the timber.

Another program that contributes materially toward improved access is construction of roads in cooperation with major timber companies and other owners of large acreages intermingled or checkerboarded with National Forest land. Joint ownership is obtained by exchange of easements. The Government obtains rights to use the road for all National Forest purposes and for the public to use the roads. Besides making the National Forest lands accessible, the cooperating landowner's lands are opened to extensive recreation use such as hunting, fishing, hiking, and riding. In sharing construction costs the Government bears the share attributable to recreation use regardless of ownership of the lands generating the use. Almost 3,800 miles providing access to several million acres in California, Oregon, Washington, Idaho, and Montana have been built under this program.

There is a problem in meshing the local public road systems and the Forest Development Road System. The area of juncture between these systems is where many of the access problems lie. There is need for agreement among Government levels on the demarcation of responsibilities. Legislation may be needed. Perhaps the most hopeful development is the "Functional Highway Classification Study" now being conducted by the State highway departments under direction from the Federal Highway Administration. The study may recommend establishing a pattern of responsibility and sources of financing which will go far toward resolving present problems. We are cooperating with the State highway departments in this study.

We have indicated that a higher funding level for development of the Forest Transportation System would allow better progress in areas where the stimulus of timber access needs is lacking. It should be noted that support for the Forest Development Road and Trail program and appropriations has come almost entirely from the timber industry and from individuals or groups interested in a particular road project. Sportsman support and interest have been notably lacking.

4

Following are some additional actions which can have a great effect in improving access and in mitigating the bad effects of inadequate access. Something is being done on all the items listed but a step-up in the effort is warranted and is being encouraged.

1. The public needs better maps for identification of National Forest land and available access in areas of intermingled ownership. The recreation maps available at Forest Service offices do part of this job. They can be improved, especially to better show access. The recreation user also needs to be able to find these lands on the ground and the roads and trails that will get him there. Better maps and more adequate signing of lands and roads are the principal means for doing this.

2. There needs to be more direct contact between sportsmen organizations and Forest Service officials at the local level. Discussion of specific access situations can lead to actions which will help solve problems.

3. National Forest users need to take a greater interest in the local public road system and its relation to access to the public lands. Too often the parties requesting abandonment of public roads are the only parties heard from.

The Forest Service as the agency charged with administering the National Forests has primary responsibility for solving the access problem. There is no single, simple solution. Instead, there are numerous partial solutions which must be applied over time to have results. To make progress the cooperation of landowners, State and local governments, sportsmen and other National Forest users is needed. The basis for such cooperation is an understanding of the access problem in all its complexities.

10/13/71

RICHARD J. CONKLIN

ATTORNEY AT LAW

BOX 629

WHITE SULPHUR SPRINGS, MONTANA 59845

September 20, 1972

Mr. V. A. Ciliberti
School of Forestry
University of Montana
Missoula, Montana 59801

Dear Vito:

First of all, my apologies for not answering your letter. I threw away the envelope it came in and I don't have your home address so I am going to send this to your address listed on the correspondence.

First of all, I read through the act of 1885, and I am impressed. I think you have got the makings of a conservation fish and game article here that you could sell to almost any of the big publications including Readers Digest. I think the re-action would be fantastic but let me do a little bit of dissecting of the act. First of all, it is not a criminal act, it is a civil act and it calls for a person to file an Affidavit- issue noted before the Federal District Attorney, and a civil action commenced and an injunction issued. Once this adjudication, once the injunction is issued, and then persons are served with it, anyone that ignores it may be tried criminally for the ignoring of the injunction issued under the fact, that doesn't mean that the act itself has criminal teeth. You first have to go through a civil trial to establish some rights that you can breach by the criminal trial. Nevertheless, it seems to me to be effective because it takes precedent over all the other cases or the rest of the calendar, and that means a speedy adjudication of the same.

Each time a statute or law is passed, it is enacted with a history or an intent. The session laws, or laws as passed, are therefore recorded historically in the session laws or the Congressional Record. A person can examine the Congressional Record and determine what the intent was of that particular law at the time it was passed. As a consequence, when the income tax law was passed, it was a revenue measure. The purpose of the income tax was to secure revenue for the

United States, when it was adjudicated and someone had been proven to have helped him to avoid the revenue, a secondary criminal action could take place. The Internal Revenue Statutes were never designed to capture Al Capone and I presume if you had written to an Internal Revenue Agent about the time Al Capone was going on, you would have gotten the same sort of Mickey Mouse run around that you got from the Department of Agriculture concerning the application of the 1885 Act. It has simply told you the Internal Revenue Act was just not designed to capture men like Al Capone. It was, nevertheless, used specifically for that purpose and it was the greatest breaker of the Teapot Dome, etc. scandals that could come up. They couldn't convict them of the crimes they were guilty of, so they got them on Income Tax Evasion. It seems to me the analysis between those cases is too extreme to apply to this situation in that the 1885 Act prohibits exactly what these people are doing. I think this Department of Agriculture statement is Mickey Mouse; that history designed the Act of getting it into enforcement. I think probably the real nitty gritty test of the thing is going to be to have someone go and file a complaint before the Federal District Attorney on an Affidavit charging a specific violation of the Act of 1885, and when the Federal Attorney fails to prosecute, then you go to the District Judge, get a little act called a Writ of Mandamus compelling him to do his job. That should be really be wild, and you should have all kinds of push behind you before you even file the original cause. I think a newspaper article would be a good way but I think a magazine edition publication would be far better. My attitude towards the Department of Agriculture is that this is a sick excuse for their not doing their job. I think Mr. G. W. Van Gilst just plain missed the whole point. You have a beautiful statute, a beautiful bit of research, and they simply are not using it. It is not condemnations you are talking about, it is simply access of a simple nature to public lands. Now, there is a point here when he mentions condemnation in an illusion to what the Federal might say now that you are denying these people their property without due process of law, therefore you have to pay them, and they water down the interpretation of the Act as you have researched it, but that is still for the Court to decide so for the the Judges to determine, and not for someone to decide by merely saying it doesn't apply and they don't want to use it.

Next, as to letter to Stevenson and the reply by Ciliberti in re the O'Brien Creek Road. Window dressing aside, it

seems that they are thinking about road access, they may have given it some priority. It is unfortunate they have to give it so much priority in thought before they take action. His next statement that they checked into the circumstance to determine whether or not prescriptive right to use by the general public had existed is redundant. In fact, it is childish. I challenge the Forest Service to show any place, way, shape or form, where they have resisted a denial of access to the general public or where they have determined by their examinations that such a prescriptive right has not been denied. I have never heard of, seen, or encountered Forest Service taking any activity on the part of the general public to insist upon the continuation and preservation of a general public access which could be lost by prescriptive rights. To suggest such a matter is ludicrous; it is simply not Forest Service policy to "interfere" in these private land rights squabbles. It may have since occurred to the extent that a prescriptive easement and right over a public use has been established, thereby effectively cutting off the public's use and all you really have to do is wait five years and dilly, dally around while you are making thoughts of great high priority concerning the project and the prescriptive easement is extinguished so his solution to the problem seems somewhat pass the buckish. Need more time for additional planning, will look into it when we finish our Petty Mountain Planning Unit, need more information and it has to fit into the whole picture of multiple use planning before we can get a right of way. His final statement that he hasn't got funds, I think I concur with. I think, however, this is another place where you can specifically show that the 1885 Act can be applied.

Once again, let me recommend Dale Burk as a good author and one who has a real in for this sort of controversial material. He can use it and develop it effectively in a series of editorials in the Missoulian and in his private writings. If you are not interested in developing this on a private writing basis, please let me know since I feel obliged to hold the matter is somewhat a confidential private relationship in respect to the amount of research and work that you have done. If you do not feel this way, that is to say that you wish to publish as you advised me when you were here before, then I think I will probably use the Act myself by filing an Affidavit of Restriction of Easement before Otis Packwood, concerning some private isle of access in our area.

Will try to drop in and see you later this fall, and pick up a copy of that treatise. Kindest personal regards,

Yours truly,

Richard J. Conklin/RJC

Richard J. Conklin

APPENDIX D

Excerpts from the California
Constitution and Codes

California Constitution

Article I, Section 25

The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

Article XV, Section 2

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be obtainable for the people thereof.

Lands lying between high and low tide, as well as those within a bay, which are permanently covered by water, are held by the state for the public purposes of navigation and fishery, and a public easement exists in such land for such purposes. Hunting is a privilege incidental to the public right of navigation over tidelands and navigable waters, and anyone may exercise that privilege as a public right.

California Codes

Civil:

Section 813. The holder of record title to land may record in the office of the recorder of any county in which any part of the land is situated.....description of said land and a notice reading substantially as follows: "the right of the public or any person to make any use whatsoever of the above described land or any portion thereof..... (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control of owner".

The recorded notice is conclusive evidence that subsequent use of the land during the time such notice is in effect by the public or any user for any purpose is permissive and with consent in any judicial proceeding involving the issue as to whether all or any portion of such land has been dedicated to public use or whether any user has a prescriptive right in such land or any portion thereof. The notice may be revoked by the holder of the record title by recording a notice of revocation in the office of the recorder wherein the notice is recorded. After recording a notice pursuant to this section, and prior to any revocation thereof; the owner shall not prevent any public use appropriate thereto by physical obstruction, notice or otherwise.

The permission for public use of real property provided for in such a recorded notice may be conditioned upon reasonable restrictions on the time, place, and manner of such public use, and no use in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication.

Section 1009. The Legislature find that:

1. It is in the best interests of the State to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax supported publicly owned facilities.

2. Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy, or pass over their property for recreational purposes.

3. The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from its property.

Government:

Section 6210.4. No lands owned by the State, which lands front upon or are near to any lake, navigable stream, or other body of navigable water, convenient access to which is not provided by public roads or roads, or otherwise, shall ever be sold, leased, or rented, without reserving to the people of the state an easement across the lands for convenient access to such waters.

Section 6210.4a. All conveyances by the State of the sixteenth and thirty-sixth sections, or lands acquired in lieu thereof, or of swamp and overflowed lands shall be made subject to any existing easements or rights of way issued by the State prior to the time of conveyance.

Section 39933. All navigable waters situated within or adjacent to city shall remain open to be free and unobstructed navigation of the,

public. Such waters and the waterfront of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city. Public streets, highways, and other public rights of way shall remain open to the free and unobstructed use of the public from such waters and waterfront to the public streets and highways.

Section 39937. When by ordinance a city declares that any right of way to a body of navigable water in the city over, upon, or along the frontage of city tidelands is required for any public purpose, a person claiming or possessing such frontage or tidelands shall not:

1. Hinder the city in laying out, establishing, opening, constructing, or otherwise improving or maintaining the right of way.
2. Exclude the right of way.
3. Obstruct or prevent its free use by the city or the public generally.

Public Resources:

Section 6008. In order to protect the public's access to, and use of, all state-owned lands in Humboldt Bay, no right to the use of any State lands, including but not limited to tide and submerged lands, in and adjacent to Humboldt Bay south of the entrance to the bay shall be sold, leased, rented or otherwise conveyed or granted.