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# Easements by Necessity: A Threshold for Inholder Access Rights under the Alaska National Interest Lands Conservation Act

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# EASEMENTS BY NECESSITY: A THRESHOLD FOR INHOLDER ACCESS RIGHTS UNDER THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

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*Abstract*: Nineteenth Century federal land grants created a legacy of private lands surrounded by federal land in the American West. Owners of such lands (inholders) were routinely granted access across federal land by implicit common law rights until the 1960s when federal land policy became more restrictive. In 1981, the Ninth Circuit held that the Alaska National Interest Lands Conservation Act (ANILCA) provided a statutory entitlement for inholder access. Since then, the Ninth Circuit also has held that ANILCA preempts any common law access rights. This Comment argues that the common law doctrine of easements by necessity remains a threshold basis for inholder access, and that ANILCA must be carefully construed to protect the property rights of inholders.

In 1960, a member of the *Washington Law Review* asked, "Is an easement across federal lands implied when the United States has granted a tract of land to which the grantee would otherwise have no practical means of access?"[1] Based on the common law doctrine of easements by necessity,[2] she concluded that such grantees, called inholders, were owners of easements across federal land.[3] More than thirty years later, however, inholder access across public lands remains an unresolved legal controversy.

The heart of this controversy is evident in an emerging split between the Ninth and Tenth Circuits of the U.S. Court of Appeals. The Ninth Circuit has held that the Alaska National Interest Lands Conservation Act[4] (ANILCA) provides inholders with a statutory entitlement to access across federal land,[5] but that ANILCA also preempts any common law property claims by inholders.[6] The Tenth Circuit agrees that ANILCA provides a statutory basis for inholder access, but it maintains that

1. Marjorie D. Rombauer, Comment, *Easements By Way of Necessity Across Federal Lands*, 35 Wash. L. Rev. 105, 105 (1960).

2. *See* 3 Richard R. Powell & Patrick J. Rohan, *The Law of Real Property* ¶ 410, at 34-62 to 34-64 ("When an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor . . . a right of access across the retained land of the conveyor is normally found."). *See also infra* part IV.A.

3. Rombauer, *supra* note 1, at 112–13.

4. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

5. *See infra* note 36 and accompanying text.

6. *See* Adams v. United States, 3 F.3d 1254, 1259 (9th Cir. 1993).

inholder access rights based on the common law are not preempted by ANILCA and may exist apart from ANILCA.[7] This distinction is critical because the discretion of a federal agency to grant and regulate inholder access is more limited if inholder access rights are real property rather than statutory entitlements.[8]

The discretion of federal agencies is of paramount importance when the access claims of inholders are complicated by encounters with the Endangered Species Act[9] (ESA) and the National Environmental Policy Act[10] (NEPA). District courts have attempted to resolve these controversies without applying the doctrine of easements by necessity.[11] Yet, the failure to directly confront the issue of common law property rights in access across the public domain has spawned new legal questions that are still most appropriately answered by reference to the doctrine of easements by necessity.

This Comment reviews the history of federal law and policy governing the access rights of inholders in Part I. It then critiques the Ninth Circuit's treatment of inholder access claims under current law in Part II. Part III argues that the doctrine of easements by necessity remains a valid threshold for inholder access rights. Finally, Part IV explains how federal land-management agencies and courts should regulate and adjudicate access claims of inholders with the common law doctrine of easements by necessity as a threshold for ANILCA entitlements.

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7. *See* United States v. Jenks, 22 F.3d 1513, 1518 (10th Cir. 1994).

8. *See, e.g.*, Shultz v. Department of Army, 10 F.3d 649, 662 (9th Cir. 1993) (holding that the Army took property subject to easements and may not assert that easement holders cross land subject to the Army's permission); Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978) (distinguishing between a private easement and a public entitlement to use a road).

9. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1543 (1989)). Plum Creek Timber Company's request for access to its "Hemlock Point" timber harvest in Montana was delayed for more than seven years by grizzly bear concerns. Plum Creek alone has approximately 210,000 acres of timberland inholdings requiring access across federal land. Telephone interview with James Kraft, Vice President of Corporate and Legal Affairs, Plum Creek Timber Company (Feb. 7, 1994).

10. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–4361 (1989)).

11. *See, e.g.*, Alpine Lakes Protection Soc'y v. U.S. Forest Serv., 838 F. Supp. 478 (W.D. Wash. 1993) (requiring more extensive NEPA review for 0.23 mile logging road easement granted to an inholder by the Forest Service); Mountain States Legal Found. v. Espy, 833 F. Supp. 808 (D. Idaho 1993) (holding U.S. Forest Service may reasonably restrict inholder access to protect critical habitat for chinook salmon); Sierra Club v. Lujan, No. 92-248-MA Civ. (D. Ore. 1992) (enjoining access rights because Bureau of Land Management failed to consult Fish and Wildlife Service regarding the Northern Spotted Owl).

## I. THE HISTORY AND STATUS OF INHOLDER ACCESS RIGHTS

Nineteenth Century land-grant policies of the United States government created a legacy of intermingled public and private land ownership where state and private inholdings are completely surrounded by federal lands.[12] Because of checkerboard-pattern land grants from Congress, railroad companies became owners of a large share of these inholdings.[13] Other inholdings were created through mining claims and various settlement acts.[14]

Until about 1960, the land management agencies of the federal government routinely granted access rights across the public domain to inholders.[15] Since then, efforts to preserve wilderness areas, protect endangered species, and conserve public resources have made the federal government more reluctant to grant access rights.[16] Consequently, inholder access disputes frequently appear before the federal courts. At the core of these disputes is the question whether access rights for inholders arise from the common law doctrine of easements by necessity or from federal statutes.

### *A. The Easement-by-Necessity Line of Authority*

While there has never been a controlling decision holding that an easement by necessity may be had across federal land, several courts have dealt with the question. The easement-by-necessity argument made

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12. Approximately seventeen percent of the space within National Forest boundaries and forty percent of the space within Bureau of Land Management district boundaries is private or state land. Marion Clawson, *The Federal Lands Revisited* 230–33 (1983). *See also* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (reviewing the history of land grants and sales from the public domain).

13. The railroads received a total of 131,350,534 acres from the public domain. Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, in *The Public Lands: Studies in the History of the Public Domain* 121, 122 (Vernon Carstensen ed., 1963).

14. *See, e.g.*, Mining Act of 1866, 14 Stat. 251 (July 26, 1866); Homestead Act of 1862, 12 Stat. 392 (May 20, 1862).

15. "The Forest Service and the Department of Agriculture have taken the position that under the Forest Management Act of 1897 they lack the authority to deny a right of way to anyone requesting it." Marion Clawson & Burnell Held, *The Federal Lands: Their Use and Management* 216 (1957).

16. *See* Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–1136 (1989)). *See also* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1543 (1989)). *See also* Stephen P. Quarles and Thomas R. Lundquist, *You* Can *Get There From Here: The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands*, 22 Land & Water L. Rev. 346, 349–50 (1987).

its federal court debut in *Bydlon v. United States*,[17] where the Court of Claims found a taking because an easement by necessity for aircraft access had been proscribed by the United States. In *Mackie v. United States*,[18] a federal district court used an easement-by-necessity test, but found the element of necessity lacking due to the existence of alternative access. The first appellate decision acknowledging that an easement by necessity may be had across a servient estate owned by the United States was *United States v. Dunn*.[19] The Ninth Circuit remanded *Dunn* for a factual determination of necessity, and therefore did not decide whether an easement existed. In *Utah v. Andrus*,[20] an easement by implication and necessity was found, but it was appurtenant to state-owned school trust lands, and possibly distinguishable as a special feature of federalism.[21] Finally, in *Brendale v. Olney*,[22] an easement by necessity across Yakima Indian Reservation land was found by a federal district court. *Brendale* held that an implied easement was created when the federal government granted the patent for an allotment inholding.[23]

The easement-by-necessity line of authority reached its zenith in the district court decision of *Montana Wilderness Association v. U.S. Forest Service*.[24] This controversy arose when the Burlington Northern Railroad (BNRR) sought access across a wilderness study area to harvest timber from an inholding. The district court held that BNRR had an access right alternatively founded on an easement by necessity or an easement by implication in the terms of the Northern Pacific Railroad land grant.[25] This victory for easements by necessity was brief, however, as the case

17. 175 F. Supp. 891 (Ct. Cl. 1959).

18. 194 F. Supp. 306 (D. Minn. 1961).

19. 478 F.2d 443 (9th Cir. 1973).

20. 486 F. Supp. 995 (D. Utah 1979).

21. School trust lands are a unique class of property granted to states by the federal government upon statehood. Trust lands are managed in trust for the purpose of generating revenues for public education. *Cf.* James R. Johnston, *The Legal Framework for the Management of Washington's Forested Trust Lands: Limits and Imperatives* 1–2 (1994).

22. No. C-78-145 Civ. (E.D. Wash. 1981).

23. The origin of Brendale's title was the Dawes or Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887), which provided allotments of Indian land to individual tribal members. *See* No. C-78-145 Civ. (E.D. Wash., March 3, 1981). *Brendale* is perhaps distinguishable as a peculiarity of Indian law, but it is a strong endorsement of easements by necessity because it held that the doctrine applies even where the federal government's grant created an easement across land held in trust by the United States for the quasi-sovereign Indians.

24. 496 F. Supp. 880 (D. Mont. 1980), *aff'd in part and rev'd in part*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

25. *Id.* at 885. *See also* 13 Stat. 365 (July 2, 1864).

was appealed, reversed, and then affirmed on other grounds.[26] In the Ninth Circuit, the easement-by-necessity line of authority was preempted by a statutory entitlement.[27]

### *B. The Statutory-Entitlement Line of Authority*

The statutory-entitlement line of authority begins with the long-standing policy of the U.S. Forest Service to grant access to inholders under the Forest Reserve Organic Act of 1897.[28] When the Attorney General advised the Forest Service in 1962 that the Organic Act protected only inholders who were "actual settlers,"[29] the Forest Service continued to grant access based upon an alternative clause of the same law that allowed access for any "lawful" activity.[30] In 1980, the Attorney General criticized this path chosen by the Forest Service, but suggested the Wilderness Act as another, more limited statutory entitlement to access.[31] Other statutes authorize the Secretaries of Interior and Agriculture to grant access across federal lands, but such access is discretionary and not an entitlement.[32]

The 1962 and 1980 Attorney General opinions reflect increasingly restrictive views on inholder access. The 1962 Opinion treats inholder access rights as strictly statutory in origin and therefore subject to regulatory conditions and exactions of fees or reciprocal easements.[33] The 1980 Opinion finds that the Forest Service may completely deny access if it would harm the public interest.[34] The 1980 Opinion also declares that there can be no easement by necessity over lands of the federal government.[35] If this is true, then federal statutes are the sole source of inholder access rights.

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26. *See infra* notes 37–38 and accompanying text.

27. *Id.*

28. *See* 16 U.S.C. § 478 (1989). *See also* Clawson & Held, *supra* note 15, at 216.

29. *Rights-of-Way Across Nat'l Forests*, 42 Op. Att'y Gen. 127, 134–35 (1962) [hereinafter *Rights-of-Way, 1962*].

30. *Rights-of-Way Across Nat'l Forests*, 4A Op. Off. Legal Counsel 30, 32 (1980) [hereinafter *Rights-of-Way, 1980*]. *See also* 16 U.S.C. § 478 (1989).

31. *Rights-of-Way, 1980*, *supra* note 30, at 47–54. *See also* 16 U.S.C. § 1134(a) (1989).

32. *See* 16 U.S.C. § 533 (1989). *See also* 43 U.S.C. §§ 1761–1771 (1989). These statutes allow wide discretion in granting and regulating new easements, renewing expired easements for a term, and granting special-use permits that are more akin to licenses than to property interests. Nowhere do these statutes suggest that the applicant is entitled to receive the access permit.

33. *Rights-of-Way, 1962*, *supra* note 29, at 140.

34. *Rights-of-Way, 1980*, *supra* note 30, at 38–39.

35. *Id.* at 43.

For many inholders, however, there were no statutes that secured them access rights—that is, until the Ninth Circuit decided *Montana Wilderness Association v. U.S. Forest Service*.[36] In *Montana Wilderness*, the Ninth Circuit initially reversed the district court's decision that BNRR had access rights by implied easement or easement by necessity.[37] On a motion for reconsideration, however, the court affirmed on the ground that the ANILCA, which was enacted while the appeal was pending, granted access rights.[38] ANILCA provides that "[n]otwithstanding any other provision of law . . . the Secretary of Agriculture shall provide such access to nonfederally owned land surrounded by public land . . . as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof."[39]

The Ninth Circuit's interpretation of ANILCA has given Forest Service inholders a statutory entitlement to access. Indeed, subsequent court decisions have invoked ANILCA in support of access rights for inholders.[40] Yet, an essential question remains whether ANILCA supports or supplants the common law access rights of inholders.

## II. THE NINTH CIRCUIT HAS OBSCURED THE NATURE AND SCOPE OF INHOLDER ACCESS RIGHTS UNDER ANILCA

At the urging of the *Montana Wilderness* defendant and intervenor (the U.S. Forest Service and BNRR, respectively), the Ninth Circuit found an access entitlement under ANILCA.[41] This was an apparent victory for inholder access rights, but it prevented resolution of the critical issue whether easements by necessity are the foundation of inholder access rights. Consequently, there are tremendous

36. 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

37. The Ninth Circuit's first ruling on *Montana Wilderness* was issued on May 14, 1981 but was never placed in official reporters because the Ninth Circuit reversed itself on August 19, 1981. Quarles & Lundquist, *supra* note 16, at 363.

38. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

39. 16 U.S.C. § 3210(a) (1989).

40. *See, e.g.*, Adams v. United States, 3 F.3d 1254 (9th Cir. 1993). *Accord*, Mountain States Legal Found. v. Espy, 833 F. Supp. 808 (D. Idaho 1993); Native Ams. for Enola v. U.S. Forest Serv., 832 F. Supp. 297 (D. Ore. 1993).

41. *Montana Wilderness* has been criticized as an abuse of legislative process by private interests seeking to gain statutory rights of access. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 294 (1988) (calling the ANILCA access provision "a great giveaway of federal property interests to western landowners"). Ironically, rather than a "giveaway" of rights, ANILCA has been held to preempt common law access rights. *See infra* note 97 and accompanying text.

inconsistencies when the executive branch implements and the courts interpret ANILCA without reference to underlying common law property rights.

### *A. Geographic and Jurisdictional Inconsistencies*

Although the title of ANILCA suggests that it only applies to Alaska, *Montana Wilderness* held that the subsection on access to nonfederal inholdings applied to the entire "National Forest System."[42] The court was able to reach this conclusion because ANILCA did not incorporate a definition of "National Forest System," which is defined elsewhere as federally owned forests "throughout the United States."[43] Although the court found the legislative history of ANILCA to be "sparse" and "ambiguous," it considered the legislative history of the Colorado Wilderness Act, passed three weeks later, to be "decisive" in extending ANILCA-based access to National Forest System inholders anywhere in the United States.[44]

The Ninth Circuit's strained interpretation of ANILCA has resulted in inholder access rights that vary by geographic location and by executive agency administering the lands surrounding an inholding. In *Montana Wilderness*, the Ninth Circuit extended ANILCA-based access rights to all National Forest System inholders, but it was reluctant to extend those same rights to Department of Interior inholders outside Alaska even though Interior lands were addressed in a parallel subsection of the same statute.[45] The Interior Department has interpreted ANILCA as granting access rights to Interior inholders nationwide,[46] but the Supreme Court's

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42. Montana Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 954 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). In its first ruling, the Ninth Circuit found that ANILCA only applied to the State of Alaska and was of no relevance. Upon motion for reconsideration, however, the Ninth Circuit agreed to review the legislative history and found that the relevant Forest Service clause of the Act applied nationwide. Quarles & Lundquist, *supra* note 16, at 363–64.

43. *See Montana Wilderness Ass'n*, 655 F.2d at 954 (interpreting the meaning of 16 U.S.C. § 3210(a) in light of 16 U.S.C. § 1609).

44. *Id.* at 955–57. *Montana Wilderness* has been criticized as an abuse of legislative records to find a dubious intent for a statute. *See, e.g.*, Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1370 (1990).

45. 16 U.S.C. § 3210(b) pertains to "lands managed by the Secretary [of Interior]" while 16 U.S.C. § 3210(a) applies to the "National Forest System." In dictum, *Montana Wilderness* stated, "Subsection (b), therefore, is arguably limited by its terms to Alaska . . . ." *Montana Wilderness*, 655 F.2d at 954.

46. *See Utah Wilderness Ass'n*, 91 I.D. 165 (1984). The concurring opinion, however, finds access rights by implication of necessity and rejects access rights for Interior inholders under

decision in *Amoco Production Co. v. Village of Gambell*[47] casts doubt on whether ANILCA applies so broadly.[48] As such, outside of Alaska, inholder access rights across Department of Interior lands probably exist under common law while inholder access rights across National Forest System lands are found under ANILCA.[49] The only legal principle that provides a unified and consistent standard for access under all contingencies of geography, statute, and agency jurisdiction is the common law doctrine of easements by necessity.

### *B. The Uncertain Nature and Scope of Access Rights Under ANILCA*

The ANILCA subsection that grants access to inholders also provides that access is "subject to such terms and conditions as the Secretary of Agriculture may prescribe . . . ."[50] This language allows broad agency discretion that may conflict with any common law property rights of inholders.[51] The limits of the Secretary's discretion to impose terms and conditions on access can only be understood by answering whether ANILCA protects and supplements preexisting property rights or merely provides a statutory entitlement that is independent and preemptive of any common law property rights.[52] The Ninth Circuit's most recent decision on ANILCA access rights, *Adams v. United States*,[53] offers a confused and unsatisfactory answer to this question.

*Adams* found that, under ANILCA, an inholder had an easement over a Forest Service road. After this finding, the court wrote the following:

> Our finding of an easement does not end our inquiry. This conclusion leads inevitably to the question of the extent of the

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ANILCA. *Id.* at 174–77.

47. 480 U.S. 531 (1987).

48. *Id.* at 546–47, 550–51. The Court found that ANILCA defines "public lands" as "land situated in Alaska" and added that this definition "applies as well to the rest of the statute." *See also* Quarles & Lundquist, *supra* note 16, at 364 n.81 (explaining the *Village of Gambell* decision).

49. *See* George E. Powers, Jr., Comment, *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located Within the Pacific Railroad Land Grants*, 17 Land & Water L. Rev. 429, 463 (1982).

50. 16 U.S.C. § 3210(a) (1989). A potential problem arising from *Montana Wilderness* is that it creates two classes of land: one favored by common law access rights and the other without them.

51. *See* Quarles & Lundquist, *supra* note 16, at 360 (noting that federal land managers may have the discretion to declare a proposed development activity unreasonable and to refuse to grant access).

52. *See* United States v. Jenks, 22 F.3d 1513, 1518 (10th Cir. 1994) ("A determination of . . . [an inholder's] patent or common law rights will play a pivotal role during the [ANILCA] permit process the Forest Service seeks to enforce . . . .").

53. 3 F.3d 1254 (9th Cir. 1993).

> easement. Under common law, a party having an easement by necessity is entitled to only one route, is entitled to reasonable use, and is entitled to an easement width that allows such reasonable use.[54]

In this passage, the *Adams* court uses the common law to define the nature and scope of access rights under ANILCA, but then seems to contradict itself:

> The Adamses [inholders] contend that an easement by implication or by necessity was created when the United States granted the land to their predecessors. Although the Adamses *may have such an easement under common law*, we need not analyze this issue . . . . Common law rules are applicable only when not preempted by statute.[55]

In this sequence, the court first asks the appropriate question and draws an answer from the common law doctrine. *Adams* then dismisses that doctrine, and remands the case for "an order clearly delineating the rights and responsibilities of both parties."[56] "On what basis?" one might very well ask.

The *Adams* decision raises three fundamental questions. First, if the inholder once owned a common law easement (the Ninth Circuit suggests that they did), may federal law preempt that property interest without committing an uncompensated taking in violation of the Fifth Amendment? Second, did Congress clearly intend that ANILCA preempt property interests in implied easements? And third, if ANILCA preempts the common law, by what standard should the rights and responsibilities of the dominant and servient estates be decided? The risk of uncompensated takings and a dubious preemptory intent of Congress weigh against the summary dismissal of the doctrine of easement by necessity. Moreover, federal agencies and courts will find it difficult to define the limits of regulatory discretion without reference to some standard that defines the nature and scope of inholder access rights. Easement by necessity provides a ready standard and is arguably what was intended by Congress when ANILCA was enacted.

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54. *Id.* at 1259.

55. *Id.* (emphasis added). *Contra Jenks*, 22 F.3d at 1518 (holding that, notwithstanding ANILCA, "the district court erred in declining to address . . . [inholder's] patent or common law claims.").

56. *Adams*, 3 F.3d at 1259.

## III. A PERMISSIBLE INTERPRETATION OF ANILCA: THE DOCTRINE OF EASEMENTS BY NECESSITY REMAINS A THRESHOLD FOR ANILCA-BASED ACCESS RIGHTS ACROSS FEDERAL LAND

Although the Ninth Circuit decisions in *Montana Wilderness* and *Adams* implicitly reject the doctrine of easement by necessity,[57] it remains a threshold for inholder access rights.[58] There is no valid reason to exempt the federal government from the doctrine,[59] and there is a long history of preserving the common law as it applies to federal lands and conveyances.[60] To hold that ANILCA preempts common law rights is contrary to this history and an impermissible, uncompensated taking of private property.[61]

### *A. Easements By Necessity Should Apply to Federal Lands*

It has been suggested that sovereign immunity exempts the federal government from easements by necessity.[62] The federal courts have never ruled on this exception, but commentators have overwhelmingly criticized such an exemption.[63] When the federal government enters into agreements to sell land to private individuals, it steps down as sovereign and acts in the same capacity as any other person.[64] Thus, when the federal government grants lands that become inholdings, it is subject to

57. *See supra* notes 37, 55 and accompanying text.

58. *See supra* note 52.

59. *See infra* note 63.

60. *See infra* notes 65, 76, 87, 106.

61. *See infra* note 98 and accompanying text.

62. *See* 3 Powell & Rohan, *supra* note 2, ¶ 410, at 34-84. *See also* 3 Herbert T. Tiffany, *The Law of Real Property* § 793, at 290 (3d ed. 1939).

63. *See* 3 Powell & Rohan, *supra* note 2, ¶ 410, at 34-84 (concluding that allowing easements by necessity over lands of the sovereign "is believed to represent the wiser holding."). *Accord* Rombauer, *supra* note 1, at 113 (concluding "there is every reason, historically, to apply the doctrine in favor of the grantee and his successors, even though the grantor is the federal government."); 3 Tiffany, *supra* note 62, § 793 at 290 (arguing that the doctrine of easements by necessity should apply to government conveyances); James W. Simonton, *Ways By Necessity*, 25 Colum. L. Rev. 571, 580 (1925) ("There is no good reason why the doctrine should not apply to state and federal lands.").

64. *See* Camfield v. United States, 167 U.S. 518, 524 (1897) (holding that when the United States disposes of the public domain, it "may deal with such lands precisely as a private individual may deal with his farming property."). *See also* Richard White, *It's Your Misfortune and None of My Own* 138 (1991). Addressing the historic land grant policy of the United States, White says, "The federal government would, in effect, serve as a real estate agent instead of a landlord." *Id.*

the common law for interpretation of its conveyances.[65]

Authorities that have clearly exempted the federal government from the doctrine of easements by necessity have only done so by refusing such easements when they favor the federal government.[66] For example, in *Leo Sheep Co. v. United States*,[67] the Supreme Court held that the United States could not claim an easement by necessity across private inholdings. In 1980, the Attorney General argued that *Leo Sheep* decisively eliminated all easements by necessity over federal land,[68] but the Attorney General misapplied the case. *Leo Sheep* was decided on the ground that the federal government had the power of eminent domain, and therefore could not assert necessity.[69] Indeed, the district court decision in *Montana Wilderness* distinguished *Leo Sheep* as denying easements by necessity to the federal government because of its power of eminent domain.[70] *Leo Sheep* is also distinguishable because the asserted easement by necessity was reserved rather than granted. The rule of construing an easement by necessity in favor of the grantee and not the grantor arguably limits *Leo Sheep* to denying easements by necessity where they are reserved by the federal government as grantor.[71] Strictly interpreted, *Leo Sheep* has not eliminated the doctrine of easements by necessity where a grantee of the federal government seeks access over federal lands.[72]

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65. "It is true . . . that the disposition of such lands is a matter of the intention of the grantor, the United States, and 'if its intention be not otherwise shown it will be taken to have assented that its conveyance should be construed and given effect . . . according to the law of the state in which the land lies.'" United States v. Oregon, 295 U.S. 1, 27 (1935) (quoting Oklahoma v. Texas, 258 U.S. 574, 595 (1922)).

66. *See* United States v. Rindge, 208 F. 611, 619 (S.D. Cal. 1913) (denying an easement by necessity sought by the federal government and concluding it was "doubtful whether the doctrine of implied ways of necessity has any application to grants from the federal government under public land laws.").

67. 440 U.S. 668 (1979).

68. *Rights-of-Way, 1980*, *supra* note 30, at 43. *See also* Quarles & Lundquist, *supra* note 16, at 350 (arguing that *Leo Sheep* suggests that the doctrine of easements by necessity does not apply to federal lands).

69. *Leo Sheep Co.*, 440 U.S. at 680 ("Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to effect the same result.").

70. Montana Wilderness Ass'n v. U.S. Forest Serv., 496 F. Supp. 880, 884 (D. Mont. 1980), *aff'd in part and rev'd in part*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

71. *See* 3 Powell & Rohan, *supra* note 2, ¶410, at 34-67 (grantor may not derogate from his own grant). *See also* Ralph E. Boyer, *Survey of the Law of Property* 594 (3d ed. 1981) (explaining that the doctrine of easements by necessity favors grantees rather than grantors).

72. *See* Powers, *supra* note 49, at 464.

### *B. Common Law Doctrines Often Apply to Federal Lands*

The 1980 Opinion of the Attorney General on inholder access is probably the most authoritative and comprehensive criticism of easements by necessity across federal lands.[73] The Opinion maintained that the "application of the common law doctrine [of easement by necessity] would be inconsistent with the established principles that the intent of Congress in disposing of federal land must control, and that rights in government land cannot be presumed to pass by implication."[74] In a seemingly contradictory statement, however, the Opinion concluded that "access may be implied if it is necessary to effectuate the purpose for which the land was granted."[75] This concession to implied access was necessary to accommodate federal court decisions allowing implied easements by necessity across federal land.[76]

With hair-splitting reasoning, the Attorney General argued that a fine distinction separates the permissible "implied easement defined by the actual intent of Congress" from the "easement by necessity, which relies on a presumed intent of the parties."[77] Yet, according to the Attorney General, the so-called "actual intent of Congress" is implied from the "condition of the country when the grant was made, as well as the declared purpose of the grant."[78] This conclusion simply favors one form of common law implied easement over another.[79]

The Attorney General argued that the common law cannot serve as an independent basis for inholder access because the intent of Congress, found in a statute, controls land grants.[80] But this does not preclude the use of the common law to discern congressional intent and to interpret a

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73. *Rights-of-Way, 1980*, *supra* note 30.

74. *Id.* at 42.

75. *Id.* at 39.

76. "An easement by necessity *for some purposes* could possibly have arisen when the United States granted the patent to plaintiffs' predecessor in interest . . . . While nothing ordinarily passes by implication in a patent, *Walton v. United States*, 415 F.2d 121 (10th Cir.), an implied easement may arise *within the scope of the patent*." *Id.* at 44 (emphasis in original) (quoting Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978)).

77. *Id.* at 41.

78. *Id.* at 43.

79. The doctrines of easement by necessity and easement by implication are both implied easements and are often treated as one and the same doctrine. *See* Boyer, *supra* note 71, at 592 ("An implied easement is created and proved not by the words of the deed or conveyance but by the circumstances surrounding the execution of the deed or conveyance."). *See also* 3 Powell & Rohan, *supra* note 2, ¶ 411.

80. *See supra* note 74 and accompanying text.

controlling federal statute when it is an instrument of property conveyance.[81] The statute is simply subject to common law rules of construction that are essentially no different from those advocated by the Attorney General. It is only a question whether one presumes congressional intent on the basis of immutable facts founded in physical geography and legal boundaries (easement by necessity) or one implies congressional intent by resorting to circumstances surrounding a federal land grant (easement by implication). In either case, a legal fiction from the common law is used to find an implied easement.[82]

Contrary to the Attorney General's opinion that only federal law controls questions of private property interests in federal lands, the federal courts, including the Ninth Circuit, have continued to use state common law to interpret federal statutes granting access. In *United States v. 9,947.71 Acres*[83] and *Wilkenson v. Department of Interior*,[84] federal courts construed access rights granted under Revised Statute 2477 (R.S. 2477)[85] as private property rights defined by state law. In *United States v. Gates of the Mountains Lakeshore Homes, Inc.*,[86] the Ninth Circuit assented to the use of state law in the construction of federal conveyances under R.S. 2477.[87] In *Sierra Club v. Hodel*,[88] the Tenth Circuit rejected an argument that state law does not control the existence and scope of an R.S. 2477 right-of-way across Bureau of Land Management (BLM) lands. *Sierra Club* held that refusing to apply state law would conflict with "more than four decades of agency precedent, . . . and over a century of state court jurisprudence."[89] And, in

81. *See infra* note 87.

82. *See* 3 Powell & Rohan, *supra* note 2, ¶ 410, at 34-66, 34-84 (explaining that intent is considered to be a fictional substitute for necessity, and necessity alone is presumed sufficient "unless a contrary intent is inescapably manifested . . . ."). *See also* 3 Herbert T. Tiffany, *The Law of Real Property* § 793 (3d ed. Supp. 1994).

83. 220 F. Supp. 328, 331 (D. Nev. 1963).

84. 634 F. Supp. 1265 (D. Colo. 1986).

85. Mining Act of 1866, 16 Stat. 251 (July 26, 1866). Commonly known as R.S. 2477, the Mining Act of 1866 granted rights-of-way across the public domain. R.S. 2477 was codified at 43 U.S.C. § 932, and repealed by the Federal Land Policy Management Act of 1976, § 706(a), Pub. L. No. 94-579, 90 Stat. 2793. All rights-of-way vested prior to 1976 were, however, expressly preserved. *See infra* note 106 and accompanying text.

86. 732 F.2d 1411 (9th Cir. 1984).

87. *Id.* at 1413 (noting that while the scope of a federal land grant is a question of federal law, such federal law may implicitly adopt a state rule of construction for its conveyances of property).

88. 848 F.2d 1068 (10th Cir. 1988).

89. *Id.* at 1081.

*Shultz v. Department of Army*,[90] an Alaska inholder obtained an R.S. 2477 right-of-way across Department of Defense land because the Ninth Circuit found that a prescriptive easement had been established under state law.

The federal courts have also found common law easements created by federal grants outside the context of R.S. 2477. In *Burdess v. United States*,[91] a federal district court found an easement by necessity where a portion of an inholder's land was condemned by the United States, leaving the remaining land inaccessible. In *Adams v. United States*,[92] the Ninth Circuit's decision was strongly influenced by the common law, and the court virtually admitted that inholders once owned easements by necessity across federal land.[93] The access right found by *Adams* was an "easement,"[94] suggesting a property interest that is more than a license, privilege, or entitlement granted under statute.[95] At the very least, *Adams* seemed to acknowledge that, before ANILCA, inholders could legitimately claim property rights in easements by necessity. Finally, in *United States v. Jenks*,[96] the Tenth Circuit held that, even after ANILCA, inholders may have common law property rights in easements. These cases raise a substantial question whether it is permissible for the Ninth Circuit to interpret ANILCA as preempting common law easements by necessity.

### C. *Preemption Is an Impermissible Interpretation of ANILCA*

In *Adams*, the Ninth Circuit summarily dismissed the relevance of easements by necessity with the assertion that "[c]ommon law rules are applicable only when not preempted by statute."[97] This statement is misleading, however, because a statute may not simply preempt an

90. 10 F.3d 649, 660 (9th Cir. 1993) (holding that a homesteader obtained a prescriptive easement even though he never pleaded that theory of common law and concluding that the law "does not require him to prove that the right of way he asserts . . . is wholly based on one property law theory or another.").

91. 553 F. Supp. 646 (E.D. Ark. 1982).

92. 3 F.3d 1254 (9th Cir. 1993).

93. *See supra* notes 54–55 and accompanying text.

94. *Adams*, 3 F.3d at 1259.

95. An easement is "[a]n interest in land in and over which it is to be enjoyed, and is distinguishable from a 'license' which merely confers personal privilege to do some act on the land." *Black's Law Dictionary* 509 (6th ed. 1990).

96. 22 F.3d 1513 (10th Cir. 1994).

97. 3 F.3d at 1259.

existing easement without compensation.[98] Where ANILCA might otherwise commit a taking requiring compensation, it is more reasonable to interpret the statute as incorporating rather than preempting the common law. An investigation of preemption supports this conclusion.

Preemption analysis must address three questions. (1) Did Congress expressly preempt common law easements in the language of ANILCA; (2) Do common-law easements conflict in fact with ANILCA; (3) Does federal law occupy the field with regard to easements across the public domain? [99]

The first and second questions can be addressed by reference to the language of ANILCA and the Forest Service rules implementing ANILCA. Preemption seems quite obvious where ANILCA begins: "Notwithstanding any other provision of law, . . . ."[100] But immediately thereafter, Congress adopts the language of the common law by guaranteeing access adequate for the "reasonable use and enjoyment" of the inholder.[101] Moreover, the Forest Service's interpretation of ANILCA suggests that, rather than creating a conflict in fact, ANILCA accommodates the dictates of common law.[102] Under the common law, "the scope of the way should be expansive enough to allow the dominant owner the reasonable enjoyment of his land. At the same time, the expansion of the way must be consistent with the full reasonable enjoyment of the servient estate . . . ."[103]

Under the federal rules implementing ANILCA, "adequate access" is "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with

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98. United States v. Welch, 217 U.S. 333 (1910) (holding that the United States cannot take an easement without compensating the owner for the value of the easement and the diminished value of the dominant estate). *Accord* United States v. Grizzard, 219 U.S. 180 (1911); United States v. 57.09 Acres, 706 F.2d 280 (9th Cir. 1983); United States v. Pope & Talbot, Inc., 293 F.2d 822 (9th Cir. 1961).

99. *See generally* R. David Allnutt, Comment, *FIFRA Preemption of State Common Law Claims After* Cipollone v. Liggett Group, Inc., 68 Wash. L. Rev. 859, 860–62 (1993) (describing the preemption tests).

100. 16 U.S.C. § 3210(a) (1989).

101. Under ANILCA, 16 U.S.C. § 3210(a) (1989), the inholder receives "access . . . adequate to secure to the owner the reasonable use and enjoyment [of land]." Similarly, under common law, the inholder has "rights . . . necessary for the reasonable and proper enjoyment of the easement." 3 Tiffany, *supra* note 82, § 802 at 196.

102. *See* United States v. Jenks, 22 F.3d 1513, 1518 (10th Cir. 1994) ("The Forest Service itself recognizes that any deed or common law access rights a landowner possesses may affect the terms of the [ANILCA] permit . . . .").

103. 3 Tiffany, *supra* note 82, § 793, at 173. *See also* 3 Powell & Rohan, *supra* note 2, ¶416.

similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources."[104] In short, both ANILCA and the federal rules on inholder access functionally affirm rather than preempt the common law.

As to the third question, whether federal law has "occupied the field," there is a consistent pattern of assent to the common law in the construction of federal statutes governing access over the public domain.[105] Each of the statutes reserving public land for management by the Forest Service and BLM contains a savings clause recognizing preexisting access rights across the public domain.[106] The Wilderness Act also evinces a common law intent in its savings clause for access rights.[107] It reserves rights "necessary to assure adequate access;" those access rights run with the land to "successors in interest;" and it compensates the inholder if access is taken away.[108] Rather than occupy the field, it appears that Congress has intentionally preserved common law property rights in the context of federal land statutes. Considering the broad application of common law principles to access rights under a variety of statutes, it is unlikely that Congress intended ANILCA to be an exceptional preemption of common law property rights.

Recently, in *United States v. Jenks*, the Tenth Circuit implicitly rejected the notion that ANILCA preempts the common law.[109] Instead, it held that the Forest Service's regulatory duties under ANILCA are correlative with the property rights of inholders.[110] At best, ANILCA's

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104. 36 C.F.R. § 251.111 (1993).

105. *See, e.g., supra* notes 65, 76, 87.

106. *See* 16 U.S.C. § 478 (1989) ("Nothing in . . . this title shall be construed as prohibiting the egress or ingress of actual settlers . . . [n]or . . . prohibit any person from entering upon such national forests for all proper and lawful purposes . . ."); 43 U.S.C. § 1769 (1989) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.").

107. The Wilderness Act provides that:

> In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value . . . .

16 U.S.C. § 1134(a) (1989).

108. *Id.*

109. *See* United States v. Jenks, 22 F.3d 1513 (10th Cir. 1994). *See also supra* notes 52, 55 and accompanying text.

110 *Jenks*, 22 F.3d at 1513.

preemption of the common law is dubious. At worst, preemption is simply an impermissible interpretation of ANILCA because it results in uncompensated takings of property.[111]

## IV. ADJUDICATING ANILCA-BASED ACCESS RIGHTS ACROSS FEDERAL LANDS WITH THE DOCTRINE OF EASEMENT BY NECESSITY AS A THRESHOLD

Under ANILCA, inholder access is provided subject to the terms and conditions of the Forest Service.[112] It is true that the right of access under ANILCA is not absolute.[113] But if the assertion that ANILCA protects common law access rights is valid, then it is true that the discretion of the Forest Service in regulating inholder access rights is also not absolute. What exists is a condition of correlative rights and duties that are jointly determined by the common law and ANILCA.[114]

### *A. Determining Necessity*

When an inholder brings a claim for access under ANILCA, the Forest Service must first determine whether the inholder qualifies for access. The Forest Service, in essence, adjudicates a claim to a valuable property right, and it is limited in its discretion to a factual determination of inholder rights under the common law and ANILCA.

There are three elements that must be present for an easement by necessity: (1) original unity of ownership, (2) severed through conveyance, and (3) necessity.[115] The fact that the party seeking an easement was not a party to the original conveyance is immaterial.[116] Furthermore, the fact that the landlocked parcel has never been used does not indicate that the easement by necessity has been abandoned or

111. *See supra* note 98 and accompanying text.

112. *See* 16 U.S.C. § 3210(a) (1989). *See also* 36 C.F.R. § 251 (1993).

113. *See* Adams v. United States, 3 F.3d 1254, 1259 (9th Cir. 1993).

114. *See supra* note 110 and accompanying text. *See also* 3 Tiffany, *supra* note 82, § 802, at 196 ("[R]ights and duties of dominant and servient owner are correlative, and neither may unreasonably exercise rights to the injury of the other.").

115. *See* 3 Powell & Rohan, *supra* note 2, ¶ 410, at 34-68 to 34-79. *See also* 3 Tiffany, *supra* note 62, § 793, at 289. *See also* Roger A. Cunningham et al., *The Law of Property* § 8.5, at 447 (1984).

116. *See* 3 Tiffany, *supra* note 62, § 793, at 290, 293 (the appurtenant easement by necessity passes with the dominant estate).

terminated.[117] For inholders whose title originates in a grant from the federal government, access rights will usually turn on the element of necessity.

In those cases where there is absolute physical necessity, the Forest Service has no discretion and must grant a right-of-way.[118] The fact-finding role of the Forest Service becomes somewhat discretionary, however, where the inholder claims a "reasonable necessity" caused by conditions such as insurmountable physical barriers.[119] When reasonable necessity is asserted, the Forest Service need not grant access merely on the grounds of convenience.[120] The burden is upon the inholder claimant to show why the requested route of access is necessary and not merely convenient.[121]

Consistent with the common law, Forest Service regulations require an inholder to apply for access by disclosing any historic access to the inholding and rights of access that exist over non-federal land.[122] This facilitates a threshold determination whether necessity exists. The regulations should be carefully limited, however, where they require the inholder to demonstrate a "lack of any existing rights or routes of access available by deed or under State *or common law*."[123] If the inholder owns an easement by necessity across federal lands, an application for access under ANILCA should not be a waiver of that common law right.[124] Additionally, even if the inholder may use a state law such as private condemnation of access across nonfederal lands, the inholder is not obligated to exhaust that remedy.[125] The Forest Service's discretion in finding alternative means of access is constrained where a conveyance

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117. *Id.* at 292. *See also id.* § 819, at 374 ("A way of necessity has been regarded as coming to an end when the necessity ceases.").

118. *See* Cunningham et al., *supra* note 115, § 8.5 at 447.

119. *Id. See, e.g.*, Alpine-Sisters Right-of-Way Environmental Assessment, Avery Ranger District, Idaho Panhandle National Forest (January 1994) (recommending a 200-foot alternative when the inholder claims a 0.6 mile right-of-way as necessary for profitable logging).

120. *See* 3 Tiffany, *supra* note 62, § 794 at 295.

121. *See* 3 Tiffany, *supra* note 82, § 793 at 171.

122. 36 C.F.R. § 251.112(b) (1993).

123. 36 C.F.R. § 251.114(f)(1) (1993) (emphasis added).

124. The Justice Department has argued that an application for access under ANILCA extinguishes any claim of prior inholder access rights. United States v. Jenks, 804 F. Supp. 232, 233 (D. N.M. 1992), *aff'd in part and rev'd in part*, 22 F.3d 1513 (10th Cir. 1994).

125. *See* 36 C.F.R. § 251.114(f)(4) (1993) (requiring the Forest Service to "ensure that: (4) When . . . the best route . . . is across non-Federal lands, the applicant landowner has demonstrated that all legal recourse to obtain reasonable access across adjacent non-Federal lands has been exhausted or has little chance of success.").

by the federal government created the necessity, and thus, the federal government can have no legal expectation that the inholder will obtain access across the land of a third party.[126]

### *B. Location*

One matter clearly within the initial discretion of the Forest Service is the selection of the location of the easement. The common law upholds the right of the servient estate to fix the location of the easement provided the route selected gives reasonable access.[127] This protects the correlative rights to reasonable enjoyment of the servient estate, and it fulfills the statutory and regulatory duties of the Forest Service to minimize impacts on federal resources.[128] The route selected for the way of necessity is not necessarily the shortest, but rather the most suitable.[129]

### *C. Conditions for Use*

Once an easement has been located under ANILCA, the Forest Service has limited discretion in establishing conditions for use.[130] Under the common law:

> [T]he only restrictions on the mode of use is [sic] that it shall not interfere unreasonably with the rights of the owner of the servient estate, and . . . in the absence of its creation for any specific purpose, to further any legitimate and useful purpose to which the dominant tenant may naturally and reasonably be devoted . . . .[131]

The correlative duty of the Forest Service is to provide only such access as is reasonable. It has the right to demand that access not damage the land or its resources.[132]

Whether by statute, regulation, or otherwise, the government may not diminish inholder access rights to less than those of an implied

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126. *See* 3 Tiffany, *supra* note 62, § 793, at 292.

127. *Id.* § 804, at 329.

128. The Forest Service is required to locate easements so as to minimize adverse impacts on soils, fish and wildlife, threatened and endangered species, scenic, cultural, and other values of federal land. 36 C.F.R. § 251.114(f)(2) (1993).

129. *See* Cunningham et al., *supra* note 115, § 8.5. *See also supra* note 119.

130. *See supra* note 112 and accompanying text.

131. 3 Tiffany, *supra* note 62, § 803, at 322–23.

132. *See* United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

easement.[133] However, ANILCA regulations require the Forest Service to obtain either a monetary fee or reciprocal right of way at "fair market value" from the inholder.[134] If the regulated inholder is already the owner of an easement by necessity, the government may not impose a fee for its use,[135] nor may it exact a reciprocal easement for which it has no legitimate claim.[136]

### *D. Balancing Inholder Rights and Agency Discretion*

When ANILCA is implemented without the common law as a threshold for inholder rights, Forest Service discretion goes too far. In *United States v. Jenks*,[137] an inholder was required to apply for an access permit to use an existing road across National Forest lands. The inholder conceded that some regulation is allowed, but objected to regulations that "(1) impose a fee; (2) make use of the easements conditional; (3) allow the Forest Service to terminate the easements; and (4) make the transfer of easements discretionary."[138] Insofar as easements by necessity are a real property interest, the district court's reply was either evasive or simply wrong. It stated: "Contrary to the defendant's contentions, I find that these regulations are reasonable and do not unlawfully infringe on the defendant's property rights."[139] The Tenth Circuit recently reversed the district court's finding regarding the reasonableness of the terms of the ANILCA permit.[140]

The limits of discretion are also a critical matter when ANILCA encounters the ESA or NEPA.[141] *Mountain States Legal Foundation v.*

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133. *See* 3 Tiffany, *supra* note 62, § 811, at 353–54. ("[N]or may [the owner of the servient estate] change or diminish the easement by rules or regulations affecting its use, in the absence of power so to do expressly or impliedly reserved in the grant of the easement.").

134. *See* 36 C.F.R. § 251.114(b), (c) (1993).

135. *See supra* note 98 and accompanying text.

136. *Cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that exaction of an easement is a taking). *Contra Rights-of-Way, 1962*, *supra* note 29, at 145–46.

137. 804 F. Supp. 232 (D. N.M. 1992), *aff'd in part and rev'd in part*, 22 F.3d 1513 (10th Cir. 1994).

138. *Id.* at 237.

139. *Id.*

140. The court declined ruling on the inholder's Fifth Amendment takings claim because "the Forest Service, in its brief . . . maintained for the first time that the special use permit . . . 'was merely a proposal and was subject to negotiation.'" United States v. Jenks, 22 F.3d 1513, 1520 (10th Cir. 1994).

141. *See supra* notes 9, 10.

*Espy*[142] exemplifies the careful balancing that courts must employ to protect the property rights of inholders while allowing agencies to protect public resources. *Mountain States* upheld the access rights of inholders while carefully circumscribing the road closure and snow plowing conditions that the Forest Service could impose to protect critical habitat for threatened chinook salmon.[143] When the courts do not recognize that property rights are the threshold for access under ANILCA, however, this balance is lost.

For example, in *Alpine Lakes Protection Society v. U.S. Forest Service*,[144] a grant of access was reversed on the ground that the Forest Service's analysis of cumulative effects was insufficient under NEPA. The court reasoned that the Forest Service's failure to consider cumulative impacts in the watershed "cannot be characterized as a 'truly informed exercise of discretion,' nor can it be said to amount to the requisite 'hard look' at the environmental consequences of *granting* the permits in question."[145] This statement suggests that the court ordered a more thorough analysis for a determination on the question of granting the permits rather than on the issue of locating the access route. The court either misunderstood agency discretion under ANILCA, or it ignored the rule that an agency's discretion limits the scope of inquiry under NEPA.[146]

Where an agency lacks discretion to refuse some compulsory act, it is considered a "ministerial action."[147] Such ministerial actions do not amount to "major federal action," and are therefore exempt from compliance with NEPA.[148] Under ANILCA, the Forest Service has no discretion to deny access for a qualified inholder.[149] Therefore, NEPA review of access rights under ANILCA is limited to the Forest Service decision on location and conditions of access.[150] *Alpine Lakes* extends

142. 833 F. Supp. 808 (D. Idaho 1993).

143. *Id.* at 817–21.

144. 838 F. Supp. 478 (W.D. Wash. 1993).

145. *Id.* at 484 (emphasis added).

146. *See* 40 C.F.R. §§ 1501.7, 1508.18, 1508.25 (1992).

147. Goos v. Interstate Commerce Comm'n., 911 F.2d 1283, 1295 (8th Cir. 1990).

148. *Id. Accord*, South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980).

149. *See* Native Ams. for Enola v. U.S. Forest Serv., 832 F. Supp. 297, 301 (D. Ore. 1993) (holding that refusal by the Forest Service to issue an ANILCA access permit would have been an abuse of discretion). *See also* 16 U.S.C. § 3210(a) (granting access to nonfederal inholdings "[n]otwithstanding any other provision of law").

150. *See* Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1217 (D. Idaho 1993) (holding

the scope of NEPA review to "cumulative impacts"[151] that cannot conceiveably affect the Forest Service's choice of location and conditions that minimize impacts to federal land. It is the duty of the Forest Service to minimize impacts on each access site regardless of cumulative impacts. When the scope of NEPA review is extended beyond agency discretion, it infringes on inholder property rights. Agency discretion goes too far when ANILCA is interpreted without the doctrine of easements by necessity as a threshold.

## V. CONCLUSION

The Ninth Circuit considers ANILCA an adequate basis for inholder access to private land completely surrounded by National Forest land. Yet, reliance on ANILCA alone creates inconsistencies in federal land management and engenders uncertainty regarding the breadth of agency discretion in granting and regulating access rights. Moreover, it risks infringement on the preexisting property rights of inholders. The Tenth Circuit recognizes this danger and upholds the property rights of inholders even where access is granted under ANILCA. In the interests of administrative consistency, judicial economy, and fairness to property owners, it is time for all courts to accept that the doctrine of easements by necessity provides the standard for determining the ultimate nature and scope of all inholder access rights, including those under ANILCA.

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that access under ANILCA is a "baseline" for NEPA analysis).

151. *See* 40 C.F.R. § 1508.25(a)(2) (1992).