

The Federal Land Rights Series Edition 11 - Mr. Grill meets modern bureaucracy -  
The importance of understanding the legal implications of federal law pertaining to  
access rights

Among the most fascinating aspects of federal land rights law is the amazingly dramatic scope of the changes in federal policy relating to land rights which have taken place over the course of our nation's history. During the Nineteenth Century and the early Twentieth Century, as most westerners with ancestral roots stretching back to those times or beyond know, land was virtually given away by the federal government, in the national drive to establish and secure political control over the full width of our continent simply by populating it. Congress often treated land rights in a remarkably casual manner during the Nineteenth Century, when formulating the language of many federal land grant statutes, the goal being to get the land into the hands of people and corporations expediently, in support of a broad range of land development purposes, motivated by the primary objective of growing the nation as rapidly as possible. Once a population base had been established from coast to coast however, which had been substantially accomplished by the end of the post Civil War era, federal land policy began to gradually tighten, and the intensity of federal regulation of the public domain steadily increased over the ensuing decades, with the creation of numerous federal agencies, each having extensive regulatory authority over the particular federal lands within their jurisdiction. During the post World War I period, as our modern society took shape and the 7 decade long homesteading era came to an end, it became clear that use of the remaining public domain and reserved federal lands would need to be handled quite differently going forward, with an enhanced focus upon balancing land use or development and land preservation. For about half century our national leaders struggled to determine how to best legislate such a balance, in a manner that would accord with the changing will of the people, culminating in 1976, when the enactment of FLPMA (FN 1). That key development heralded the dawn of a new era in federal land use policy, which would see environmental concerns play an increasingly dominant role in limiting further exploitation of the valuable resources that reside in both the unsold remainder of the original public domain and the federally protected portions of our national landscape.

Herein, we continue our ongoing examination of the highly problematic legal interaction between private and federal land rights in the context of access to private land across federal land (FN 2). As a result of the dramatic national shift away from the once exceedingly liberal federal stance on the creation of permanent access rights in the form of easements, which played out during the latter portion of the last century, stern limits upon federal issuance of easements are now enshrined in federal law, in accord with restrictive modern land use policy. Permitting therefore, has become the primary, if not the sole, option for most people who can demonstrate that they have a genuine need to travel through federal land in any location where no documented route of travel has ever been created in easement form. While actual travel across the vast remnants of the original public domain has been incapable of producing any easements rights, of either a public or private nature, since the repeal of RS 2477 in 1976, travel upon protected federal lands has been even more narrowly limited and more intensely scrutinized for an even longer time period, dating back to the origination of the National Park and National Forest systems, late in the Nineteenth Century. Anyone seeking to establish a new route of access today, or

wishing to improve a typical old trail that happens to run through protected federal land, to make it useful for the typical passenger vehicles of today, faces serious regulatory hurdles, which are designed to make such a proposal feasible, while also accommodating the larger and broader federal land use policy goals of environmental protection and habitat preservation. In a mountainous landscape, where building typical section line roads would be nonsensical if not impossible, the options for realistic and useful routes of travel are obviously quite limited by the topography, and it was just such a scenario which produced the conflict we are about to review. Although no land surveyors are directly involved in the series of cases we will see unfold here, and no disputed boundaries are in play, there are several valuable lessons to be garnered by the thoughtful reader, one of which is certainly the importance of recognizing just how intensely problematic any form of land development can become, when the only way to reach the subject property is by crossing federally protected land, in a location where no access easement exists.

Early in 2017 a particularly lengthy battle over access to private land, which required crossing federal land, finally ended, as our plucky protagonist J. S. Grill exhausted the last of his legal options, concluding a classic struggle centered upon vehicular land use, which played out over a quarter of a century, resulting from one individual's desire to obtain some form of definitive access rights to his property. The site of this episode is the beautiful slopes that rise steeply from the banks of the South Yuba River, overlooking the sleepy rural hamlet of Washington, near the center of Nevada County, California, which area has historically been the scene of substantial mining activity. Had Grill arrived and sought to utilize his land during the pioneer era, when it was still surrounded by public domain, he would have encountered no legal obstacles whatsoever in gaining legal access to his property, in fact the relevant area was first probed by miners, who used or created trails, which would go on to become public roads under the laws of that earlier time, during their arduous exploits in the wilderness, but our modern day adventurer was destined to experience difficulties of a very different variety (FN 3). Although the number of land acquisitions made by Grill, the size and exact location of his property, and who he acquired his land from, are all unknown, by 1991 he had become the owner of real property situated within the Tahoe National Forest (NF) which he could access from the lone public highway serving the area only by using a private road of unknown origin. The road Grill needed to use passes through both private lands and NF land, and crosses a creek within the NF land, so the creek crossing point comes under United States Forest Service (USFS) jurisdiction. Grill also obtained a title insurance policy from Ticor, so when he was told by his new neighbors that his property had no route of legal access, thereby learning that he had no right to travel through their properties, he promptly informed his insurance company about that problem. After reviewing this scenario from a legal perspective, Ticor attorneys agreed that the Grill property was indeed landlocked, and confirmed that his title insurance covered that situation, so a team representing Ticor promptly engaged on Grill's behalf, in an effort to acquire a series of access easements, to provide him with the legal access he needed to reach his land from a nearby public highway (FN 4).

Unable to acquire the required access easements from the owners of the several private properties that were crossed by the road in question, in 1992 Ticor filed a legal action against those parties on Grill's behalf in the California state court system. Under such convincing pressure, Grill's neighbors soon ceased their resistance to the Ticor easement

proposal, choosing to settle the matter by signing the proposed easement documents, rather than opting to take their chances litigating against the powerful resources and superior legal expertise which had been brought to bear upon them by Ticor. Importantly however, Ticor apparently made no effort to prove that the road at issue was in fact an undocumented existing public right-of-way created under RS 2477, based on the company's accurate determination that obtaining a series of private access easements would prove to be simpler, quicker and cheaper than the alternative, which was engaging the US in RS 2477 litigation in federal court. Thus it was at this point in time when Grill first learned that he would have to settle for something less than an easement as a means of gaining access to his property by way of the relevant NF land. In 1993 the legal action filed by Ticor the previous year was judicially dismissed, without any need for adjudication, since the easements enabling Grill to use all of the private portions of the relevant road had already been legally documented and put in place by Ticor for his benefit. Since Ticor had acquired no access easement for his use from the USFS, in 1994 Grill and representatives of Ticor engaged in negotiations with unspecified USFS employees, seeking information on exactly what steps were necessary to enable Grill to utilize the federally controlled portion of the road, lying within the NF boundaries, for access purposes. After some protracted wrangling, the parties eventually agreed that although the USFS personnel were not authorized to convey an access easement to Grill under the modern federal regulatory regime, he did qualify for an access permit under ANILCA (FN 5). With further assistance from Ticor, Grill then proceeded to prepare the documentation which he was told would be necessary to support the anticipated federal review and approval of such a permit, including the development of road improvement plans and a bridge construction plan.

In 1995 Grill filed an official application with the USFS, formally requesting a Special Use Permit (SUP) for access and utilities, to support proposed development of a portion of his property. In 1996 a USFS ranger reviewed Grill's project plans and informed him that they "appear to be acceptable" suggesting that he should have no difficulty in securing the desired permit. Evidently disappointed however, about being unable to obtain an easement rather than a permit, Grill responded by complaining that because a SUP is not permanent by definition it may not fully meet his needs, expressing serious consternation over the USFS refusal to grant him an easement. Whether or not Grill's persistent complaints operated to alienate the federal personnel who were working on his application and delay the federal processing of his permit application is unknown, but for well over a year nothing occurred, until in 1998 he finally acquiesced and agreed to settle for the SUP, on the terms that were proposed by the USFS. The SUP which Grill signed expressly allowed him to build a bridge over the creek in the designated location, but it also provided that "all construction or reconstruction of the road shall be in accordance with plans, specifications and written stipulations approved by the USFS prior to beginning such reconstruction". In addition, Grill's SUP specified that it "shall expire and terminate on 12/31/07", but went on to state that upon expiration it would "be reissued for successive periods of 10 years", if the grantee should still need the permit at that date, while also stating that "the terms and conditions may be modified and new conditions or stipulations added at the discretion of USFS" at the time of each such renewal. Quite understandably, Grill took no immediate steps to use the permitted road, since his real estate remained vacant and undeveloped, but he continued to work on his site development plans, apparently confident that his access woes were behind him. In 2000, Ticor confirmed that all of the access issues between Grill

and his private neighbors, associated in any way with the road leading to the subject property, had been fully resolved, and expressly informed Grill that the company's obligation to assist him in securing legal access had been fully met. Ticor then closed its file pertaining to the Grill property access issue, after having invested very substantial funds securing the access rights he needed upon all of the relevant private properties.

Between 2000 & 2006 Grill evidently engaged in some ancillary activities involving the legal interest in his Nevada County land, which included forming one or more trusts or corporations with family members, subdividing and platting at least part of his land, and possibly acquiring additional land. Thus the ownership status of the Grill property underwent a sequence of unspecified changes during this period, which would later cause some legal complications for Grill, yet he apparently remained the principal holder of the primary interest in the subject property at all times. At an unspecified date during this period however, Grill executed a deed of trust, placing the subject property at risk of foreclosure, in which he contractually agreed that his land had valid legal access, based upon the assurances that had been provided to him in 2000 by Ticor, and that decision would subsequently haunt him. Early in 2007, presumably aware that the construction permit embodied in his 1998 SUP was set to expire at year end, Grill took steps to finalize his plans, in anticipation of beginning his bridge construction work during the summer. In July, Grill's project plans were fully approved by both the county and the state, and he was informed by a USFS Minerals Officer that everything appeared to be on track, so he prepared to commence the construction work on the bridge, waiting only on a final official green light from the USFS. In September however, the USFS informed the California Fish & Game Department that there were some problems with Grill's plans, leading the state to withdraw its approval for his project, citing concerns about the impact of "surface disturbing activities" on the "aquatic habitat" in and around the creek, placing the fate of Grill's development project in limbo. Then in October Grill was formally notified by the USFS that his plans would need to be modified, citing changes since the 1990s to an official list of endangered plants and animals that might be impacted by his proposal, requiring further federal evaluation of his project. Grill was thus prevented from commencing any work, just as his SUP was about to expire, placing him in danger of disqualification for a SUP renewal, based upon his failure to perform the designated work within the 10 year period which had been specified in 1998. Yet he was required by the terms of his SUP to continue to wait for final authorization to proceed from the USFS, so he could only hope that the federal personnel who were currently handling his proposal would deem it to be acceptable, as their predecessors had a decade before.

Early in 2008 Grill was notified by the USFS that since he had allowed his permit to expire without taking any action upon it he was out of compliance so his SUP could not be renewed, in addition he was told at this time that he would need to "start over" by filing a new permit application, and he was warned that his new application would be subject to more rigorous scrutiny than his original application. Grill responded by repeatedly requesting an opportunity to register a formal appeal of this decision, but he was told by various USFS employees that such decisions are final, and that by failing to complete the bridge construction within the 10 year permit window, in accordance with the terms of his SUP, he had forfeited any right he may have had to file an administrative appeal. Later in the year, acting on his own behalf (FN 6) Grill filed an action in state court against Ticor,

alleging that Ticor failed to fully meet its legal obligation to him with regard to access, by closing his case without obtaining any form of permanent access rights on his behalf from the USFS, thereby forcing him to personally embark upon an effort to secure access rights over the portion of his access route lying within federal land, which effort on his part had proven to be fruitless. In 2009 Grill tasted defeat in court for the first time, as Ticor prevailed in his state court action, but undaunted, Grill promptly filed an appeal, sending that controversy to the California Court of Appeals (CCOA) and we will later review the outcome of that legal action. While awaiting word on the fate of that appeal however, and again electing to serve as his own legal counsel, Grill proceeded to file another action, this time in federal court, not against Ticor, but against the US, accusing Quinn, who was the Acting Tahoe NF Supervisor at that date, of breach of contract and a taking of his land rights (FN 7). Assuming that Grill was aware of the existence of the federal Quiet Title Act (QTA) he either correctly recognized, or he was correctly advised, that the QTA was of no use to him, because although that federal statute enables private parties to challenge the federal government in the boundary and title context, and therefore covers disputes involving easements, the QTA has no application to permitting issues (FN 8). Therefore, Grill had to find another more appropriate and viable avenue of legal attack, in order to have any chance of success in the federal court system, and his choice in that regard would prove to be a fateful one.

Quite logically, since Grill sought to challenge the validity or legitimacy of an administrative decision made by a federal agency, he chose to file his federal action under the APA (FN 9). Unfortunately for Grill, his APA action was neither well framed nor well targeted, in fact his assertion that the USFS had committed a taking of his land rights was dead on arrival, because he had filed it in the wrong court, evidently unaware that federal district courts have no jurisdiction over takings. In addition, in 2010 Grill informed the federal judge that he was not seeking any financial compensation, clarifying that he was seeking access rights rather than money, and in so doing he asserted that the USFS was contractually obligated to grant him such rights. After reviewing the scenario and the events which had transpired, as outlined above, the court rejected Grill's breach of contract assertion, deeming the contractual aspect of the controversy to be "irrelevant", because Grill was actually seeking to judicially "enforce his statutory right of access" under ANILCA. The court also rejected the USFS assertion that Grill had no valid basis for any federal action however, accurately identifying the sole issue as whether or not the USFS had violated the APA, and in so doing deprived Grill of any rights to which he was entitled. As the court correctly noted, Grill had mischaracterized his cause of action as a contractual matter, when in reality the only question to be adjudicated was the compliance or non-compliance, on the part of the USFS, with federal law in the course of dealing with the issue of access to the Grill property. Rather than simply dismissing Grill's case however, the judge saw fit to advise him to pursue his case on "lack of procedural due process" grounds, since the evidence plainly suggested that his constitutional right to due process may have been violated, at one or more times, and in one or more ways, by those who handled his SUP. In 2011 another federal judge reviewed Grill's case against the USFS and verified that he was free to attempt to prove that the USFS was guilty of violating the APA by improperly handling his permit request (FN 10). Also during 2011, the CCOA reversed the lower court decision against Grill in the Ticor case, sending Grill's California court action back to the lower court judge with directions to conduct further proceedings,

thereby providing Grill with another opportunity to make a sound liability case against Tigor in state court, while simultaneously engaging the USFS in the federal court system (FN 11).

Early in 2012, having amended his federal case, and taking the position that his right to due process had been violated, Grill garnered the support of the federal court in his quest to obtain certain USFS internal communications that were associated with his permit application. At this time Grill expressly charged the USFS with bad faith, maintaining that information pertinent to his case had been either negligently or deliberately hidden from him by federal personnel (FN 12). Following the judicial guidance that had been provided to him in 2010, on this occasion Grill successfully leveraged his constitutional right to due process as a means of accessing federal records for evidentiary purposes. At this point in the legal proceedings, the court clarified that Grill's real issue was not with the mechanism of the APA process itself, instead he was asserting that the APA process was either not fully carried out or had been unjustifiably abandoned, without the requisite notice of his rights and options ever being communicated to him by any federal personnel, until it was too late for him to effectively respond, preventing him from formally contesting the adverse federal permitting decision. In essence, Grill was challenging the authority of certain USFS employees to make conclusive decisions that adversely impacted his rights, and the court wisely recognized the propriety and significance of such accusations. Nonetheless, even at this moment, which was as close as Grill would ever come to prevailing in any legal arena, he was clearly not yet fully cognizant of the true nature of the access rights to which he was entitled, and his ignorance of the law would soon lead him to make another serious mistake, rendering all of the valuable information he had just acquired useless. Later in 2012, having concluded that the subject property was unmarketable, Grill ceased to make the payments required by his trust deed, so he lost the subject property to foreclosure, making the SUP renewal issue meaningless to him for all personal and practical purposes. Yet he was compelled to continue to seek to secure judicial enforcement of his access proposal across the relevant federal land, in order to escape liability pursuant to the trust deed, in which he had unwisely "personally guaranteed" that the subject property had legal access. So even though he no longer had any capacity to utilize the land at issue, as he did several years before when he sought and acquired the problematic SUP, he still had a major financial interest in the accessibility of the subject property, because he was under a self-imposed contractual duty to provide definitive verification of its legal accessibility.

In June of 2013, the consequences of Grill's various mistakes aligned to bring about his downfall, as the federal judge determined that Grill was correct in his assertion that the USFS had improperly handled his bridge construction permit application, finding that his constitutional right to due process of law had been violated, yet then proceeded to award summary judgment to the USFS rather than to Grill (FN 13). Because Grill elected to relinquish his title to the subject property before the litigation that he initiated was complete, and he was therefore no longer a property owner, the judge observed, his opportunity to make any use of that land ended, and he no longer had any need to cross the federal land or to build a bridge over the creek. As an owner of no land, the judge explained, Grill was no longer the holder of any appurtenant land rights and had no basis upon which to seek an access permit of the kind at issue, under ANILCA or any other federal statute, so even if the court were to rule in his favor, and order the USFS to

re-engage with him for the purpose of properly completing the APA permitting process, nothing would be accomplished, since no permit could be issued to him. Thus the court informed Grill that as a direct legal consequence of his own decision to voluntarily give up his ownership of the subject property he no longer qualified as a permit applicant under the APA, so the only option left to him would be to seek a monetary award, for the damage he suffered due to the mishandling of his access proposal. As can readily be seen, Grill had failed to realize that by sacrificing his title he was cutting off his own judicial remedy, just as he had arrived on the doorstep of success, through his own action he had made it impossible for the judge to continue to treat him as an injured property owner. To keep his APA case alive, Grill had to maintain his legal interest in the subject property, because the only remedy he could obtain under the APA was one which would operate to effectively rectify the errors or deficiencies that had resulted in the demise of his SUP, thereby enabling him to have the access he desired, without fear of being accused of trespassing on federal land. Once his actual need to cross the NF land had vanished, his legal options were curtailed, and as he learned at this point, his initial decision to file his action under the APA was a viable one only if he intended to keep the subject property, if he did not intend to keep the land he should have selected another legal channel, such as the Tucker Act, which offered him a shot at a financial remedy, as opposed to an access remedy (FN 14).

Emphasizing that once a SUP was issued to Grill in 1998, regardless of whether it was correctly or mistakenly issued, the USFS had a duty to work collaboratively with him to fully understand and evaluate his access needs and to squarely address them, the court determined that USFS personnel had failed to do so, and had created unnecessary problems for the applicant, in violation of his right to due process of law. If Grill's original permit request had been rejected for any legitimate reason and never fulfilled, no such federal duty would have arisen, but once he was deemed worthy of a permit and official action was taken, in recognition of his federally created statutory rights under ANILCA, it became incumbent upon the federal employees handling Grill's case to do so with both complete diligence and genuine respect for his rights. In the eyes of the court, after evaluating all of the evidence presented, the proverbial ball had clearly been dropped, resulting in financial damage to Grill, for which he was entitled to compensation. The court found that USFS personnel were guilty of meddling and had effectively stabbed Grill in the back, although perhaps unintentionally, by first requiring him to get a "Streambed Alteration Permit" from California, as a condition for renewal of his SUP, and then proceeding to inform the California Fish & Game personnel that his bridge plans were inadequate, leading them to rescind the California permit, after it had been successfully obtained by Grill, leaving him disqualified for SUP renewal. Due to his own ignorance of the judicial standards and rules applicable to APA litigation however, Grill had effectively forced the federal judge to rule against him, on the grounds that through his own failure to comprehend the full scope of his rights, he had let the USFS off the hook. While the court observed that typical bureaucratic bungling had clearly occurred, and concluded that it represented a major causative factor leading to the permit renewal conflict, which had proven to be seriously injurious to Grill from an economic perspective, it was equally clear that Grill's own ineptitude in navigating the federal legal system had effectively rendered all of the various errors made by the federal employees who handled this matter moot. The refusal of the USFS personnel to provide Grill with any avenue of administrative appeal, confronting him with a virtual stone wall when he communicated his desire for an

objective review of their decisions to them in 2008, was the most serious violation of his constitutional rights, but even that transgression had been rendered irrelevant, within the parameters of APA litigation, by Grill's own subsequent acts.

Not every individual is entitled to due process of law in the federal land rights context under all circumstances, the court noted, only those who hold a valid real property interest are qualified to successfully assert that they are entitled to a compensatory award from the federal government, due to demonstrable damage resulting from federal activities adversely impacting their land rights, and just as importantly even those qualified parties must utilize the appropriate legal pathway in order to succeed. Although federal land use permits are not equivalent to easements and generally do not constitute a substantive interest in real property under the law, the court recognized, the SUP which was issued to Grill in 1998 was exceptional and did in fact represent such an interest, because by its own federally composed terms that permit was to be renewed every 10 years, as long as Grill had any need for it, which he clearly still did on 12/31/07, the expiration date of the initial 10 year term. As the grantee, Grill had obtained a SUP which was, in the view of this scenario taken by the federal judge, legally very closely "akin to an easement", and the USFS, as the grantor, had reserved only the right to review and renew the SUP every 10 years, no right to terminate the SUP, unless it had been abused or abandoned by Grill, had been federally retained. As a result, Grill became qualified to seek a damage award at the moment, early in 2008, when he was officially informed that his SUP was dead, and the actions of the relevant federal personnel at that point in time appeared to the federal judge to be decidedly inappropriate, revealing that the USFS had "ignored its own regulations" relating to complete and objective review of complaints from private property owners like Grill concerning permitting issues. Although he apparently failed to realize it at the most crucial times, first in 2008 when his rights were expressly denied, and again in 2012 when he effectively abandoned the subject property, as the grantee of a uniquely crafted SUP, Grill had since 1998 held highly valuable land rights, with a rock solid foundation in ANILCA, which were thus supported by all of the legal force and effect embodied in that federal Act. Unfortunately, since he did not recognize the legal status of his access rights until 2013, and for that reason he evidently never alluded to the statutory scope of his rights in his communications with the relevant USFS personnel, who apparently also failed to acknowledge the true extent of his rights, Grill's protests over the federal revocation of his SUP were essentially trivialized and disregarded, leading directly to this federal litigation.

Thus on this occasion the court set forth a poignant reminder that typical properly documented easements are not the only relevant form of land rights in the federal context, and no deliberate, unilateral or arbitrary extinction of private land rights of any variety by the federal government without due compensation is authorized under the law. Despite federal supremacy, sovereign immunity and the nullum tempus concept (FN 15) federal land rights are not truly absolute, and as the court quite properly indicated here, federal employees who have made grants to private parties involving the use of federal land are statutorily obligated to treat any such privately held land rights respectfully. The dense morass of federal regulations regarding land use however, along with the convoluted bureaucratic structure of the numerous federal agencies charged with implementing regulatory law, often makes properly navigating complex land rights issues highly problematic, even for completely honest and genuinely devoted federal employees, leading



to friction with private land holders over seemingly unjustified delays in federally mandated processes such as permitting. In addition, it is unrealistic to presume that every federal employee has been fully trained or accurately instructed on the precise nature and limits of their authority, and as federal personnel move from one position to another during the course of a typical career, as is quite frequently the case, their understanding of the authority embodied in any given position that they may hold can be deficient. In this instance, the evidence revealed that Grill had clearly and promptly protested the federal refusal to renew his permit, and due to apparent confusion or uncertainty over the proper interpretation or application of modified federal standards for permit approval related to stream crossings, federal personnel had adamantly rejected Grill's assertion that he held valid rights under his 1998 SUP even after its expiration date had passed, refusing to honor his rights on that basis. Thus the critical question of whether or not Grill had any right to appeal that USFS decision had plainly arisen, and the federal employees handling his case had either failed to inform him that he had any such right of appeal, or they had mistakenly told him that he had no such right, exhibiting a serious misconception of their authority. In either event, it was not the correctness of the USFS decision regarding the validity or invalidity of Grill's permit that represented the most serious source of judicial concern, it was the federal failure to provide him with any viable avenue for appeal that plainly constituted a distinct violation of his right to due process of law.

Nonetheless, as noted above, the mere fact that Grill was able to prove that he had plainly experienced some degree of mistreatment in his dealings with federal personnel, regardless of whether the mishandling of his permit was intentional or unintentional, was insufficient to pave a path to success for the APA litigation which he had launched. As Grill was destined to learn, timing is everything for any typical private party who takes on the federal government in the judicial arena, and a private litigant's own unwise acts, carried out in ignorance of their legal ramifications, can effectively negate his or her own rights, by eliminating the capacity of our judicial system to provide any legal or equitable remedy under the law for any damage suffered by the private party. Having concluded that Grill held a valid property interest under his SUP, and that his interest had been wrongly discarded, without due process of law, by the successors of the federal personnel who had granted that interest to him, the court could have completed the adjudication of his case by instructing the USFS to objectively revisit his SUP, mindful of the mandatory right of renewal to which he was entitled under ANILCA, if he still owned the land which the SUP was created to enable him to utilize. Since Grill no longer held any legal interest in the subject property however, and therefore had no interest in the access route which he had once needed to make use of that property, he no longer had judicial standing for APA purposes, because he could derive no benefit from any land rights decree that a federal court might issue in his favor under the APA, only a monetary award could ameliorate his loss. Once again at this juncture Grill was burned by his own choice to abandon or bypass his taking claim and steer his litigation down the APA pathway instead, which he evidently elected to do in the futile hope of being awarded an access easement, due to the fact that the legal value and sufficiency of his SUP was unknown to him, because the APA legal channel provides no option for financial compensation. Although private parties can certainly obtain compensation for a proven federal taking of their real property or their land rights, they are able to do so only in the absence of the primary federal escape hatch - sovereign immunity - and the APA contains no federal waiver of sovereign immunity in the

monetary context. As the federal judge very succinctly put it "... having traveled the due process path for all this distance, plaintiff now runs into the impenetrable wall of sovereign immunity ... it is well established that federal agencies cannot be sued for money damages for constitutional violations."

Less than one month after the June 2013 ruling discussed above, in July of that year, Grill submitted a request to the federal judge for reconsideration of his case, pointing out that not all of his property was lost to foreclosure, indicating that he still owned other land in the vicinity of the contested stream crossing, and suggesting on that basis that he could in fact make use of the road and bridge in contention, if the court were to order the USFS to revive his SUP (FN 16). The judge was entirely unreceptive to this suggestion however, correctly noting that Grill had an ample opportunity to present any evidence reflecting the presence of extenuating circumstances which might be relevant to the outcome of his case much earlier in this litigation, and he had utterly failed to do so, once again highlighting the detrimental consequences of his unwise decision to serve as his own attorney. Because Grill had openly conceded during the litigation that he had abandoned his development plan for the subject property, and therefore no longer had any need to build a bridge over the problematic stream, as part of his futile effort to obtain a damage award, stemming from the adamant refusal of the USFS to renew his SUP, the judge was understandably unwilling to allow him to change course, by switching his litigation strategy back to the pursuit of actual land rights, as opposed to the pursuit of compensation. In addition, the judge undoubtedly recognized, if Grill's other land adjoined the subject property, and he had owned it at all times throughout the litigation, that circumstance actually operated against Grill, because it suggested that the USFS personnel, who had asserted that Grill's property was not truly landlocked, and that he never really qualified for a federal permit under ANILCA to begin with for that reason, may have actually been right. Moreover, even if Grill was in fact still a holder of some other genuinely landlocked property in the same area, even after losing the subject property to foreclosure, or if he acquired additional property in the relevant area during the litigation, neither of those circumstances could be of any assistance to him in seeking judicial enforcement of the SUP renewal clause. Grill's SUP was specifically limited to access to the subject property, and was based upon the necessity and appurtenance of access across federal land to reach that particular property, so even a renewal of the SUP in its original form would not enable Grill to build the bridge or cross the creek for purposes of access to any land other than the subject property, as he had described it in his 1995 permit application.

Just a matter of days later, in August of 2013, another federal judge reviewed Grill's case, for the purpose of finalizing the outcome on summary judgment and confirming the federal ruling in favor of the USFS (FN 17). Recognizing that Grill's SUP represented only a very narrowly limited grant of access to one specific property, which was never intended to facilitate the construction of a highway through federal land for purposes of access to multiple properties, this judge also plainly realized that Grill should have understood the inherently limited nature of his federally granted access, and he should have known that his SUP was irrelevant to any other land which he may have owned at that time, or to any land in the same vicinity which he might later acquire. Grill's main concern appears to have been an absence of perpetuity or permanence from his SUP, and that concern seems to have motivated him to strive for an easement, to avoid the federal requirement for periodic

review of his land use. In truth however, his SUP was not deficient in terms of permanence, because it was founded upon the congressionally assured right of access which is implicitly recognized as an appurtenance in ANILCA, yet that rather obscure facet of federal law was evidently unclear to Grill, and that proved to be quite costly to him. Faced with the reality that his SUP was truly dead, and that he would never be allowed to build a bridge in the proposed location, Grill evidently ceased his efforts to utilize his Nevada county land, and at some unspecified subsequent date he apparently sold off whatever land he may have still owned in the subject area. His lack of success in federal litigation did not induce him to completely vacate the judicial arena however, he elected instead to continue to pursue his state court action against Ticor at this time, in the hope that he could recoup his losses by obtaining a damage award in state court, on the grounds that the title personnel who had assisted him during the 1990s had negligently breached their contractual duty to him. As will be recalled, Grill's legal action against Ticor was originally filed in 2008, shortly after he learned that his SUP had just been officially proclaimed to be dead, then in 2011 the CCOA reversed a lower court ruling in favor of Ticor, as described above, effectively giving Grill a second shot at proving that his insurer had let him down in some respect. The second lower court ruling on his case against Ticor, when it was finally made, was once again adverse to Grill however, and again he responded to defeat by filing what would prove to be his last appeal, bringing the matter back to the attention of the CCOA.

In 2017, the CCOA placed the capstone upon the tower of litigation which Grill had erected over the previous 9 years, by holding that he could not maintain any legal action against Ticor because he had not filed his accusations of improper conduct against his title company with the requisite degree of promptness, so his action was time barred, making it impossible for him to prevail, regardless of any merit that might be found in any of the arguments which he had presented (FN 18). At least 3 California statutes of limitation were in play, the CCOA noted in so ruling, all operating to limit various aspects of Grill's opportunity to successfully charge Ticor with inadequately handling his access issue, including limitation periods of 4 years on breach of contract, 2 years on negligence, and 2 years on actions against title insurers. To escape the fatal consequences of failing to act within any of those periods, Grill had to prove that his cause of action had not actually arisen several years prior to 2008, the date when he filed his action against Ticor. In this last effort to preserve his case, Grill quite understandably and predictably contended that he had no valid grounds upon which to launch a legal action against Ticor until his SUP was pronounced dead by the USFS early in 2008, insisting that he had in fact taken very prompt action against the company, once he was informed by federal personnel that he had no access rights upon the relevant federal land. Unfortunately for Grill however, this superficially sensible and seemingly reasonable contention on his part could not withstand astute legally scrutiny, because in reality it was deeply flawed on multiple levels. The termination of Grill's SUP by the USFS in 2008 may well have given him a valid basis upon which to take legal action against the US, as he had done, but since it marked a federal decision concerning a proposed use of federal property, over which Ticor obviously had no control, that event could not operate to generate a cause of legal action against Ticor. Thus the position taken here by Grill yet again revealed the fundamental inadequacy of his understanding of the land rights that were in play, as in his mind he associated the access rights that were defined in his SUP with the efforts of Ticor, therefore he mistakenly believed that Ticor was responsible for any subsequent problems associated with his SUP.

Any role which Ticor played in helping Grill negotiate the terms of his SUP was purely incidental however, because as we have seen Grill's right to obtain a SUP under ANILCA was an independent right of federal origin which was legally vested in him, and no Ticor personnel were ever capable of creating any right of access for him upon any federal land.

Grill was plainly either uninformed or misguided about the nature of the federally defined access rights, relating to the relevant NF land, which he held as a typical owner of adjoining private land having no documented means of legal access. From the outset, he had sought, and at times even demanded, an easement across the NF land, demonstrating that he failed to understand that an easement was not necessary to facilitate his proposed use of the federal land, while also confirming that for several years he did not appreciate the value of the alternative that was readily available to him under the law, in the form of an ANILCA access permit. In reality, Grill had all of the access rights he needed by 2000, when Ticor completed the task of acquiring the series of easements that he needed to cross all of the relevant private properties, and there was never any reason for Ticor to seek an access easement on Grill's behalf from the USFS, because he already held federally assured rights of access under ANILCA, which he was free to exercise upon obtaining a SUP. Thus Ticor never had any legal obligation to interact with the USFS on Grill's behalf, and all of the assistance that Ticor provided to him with regard to the federal portion of his access route was above and beyond the contractual duty which the company owed to him. So even though Grill was correct that Ticor had never acquired any permanent access rights for his benefit from the USFS, that fact did not represent a failure on the part of Ticor, since the company was incapable of acquiring an easement for his use in that location. Moreover, Ticor had no contractual obligation to even try to do so, given the fact that Grill already had legitimately useful access rights within the NF boundaries, which were outlined in federal law, and all he was required to do prior to utilizing those access rights was to meet the requirements of the federal permitting process. As can readily be seen, Grill's right of access upon the NF land existed from the moment he acquired his land, as a congressionally authorized appurtenance thereto, and this controversy arose only because neither Grill nor the relevant USFS personnel paused to cogitate or seek wise guidance upon the full scope of those federally mandated rights. Since no absence of access rights had ever existed with respect to the NF land in question, Ticor was legally blameless, and the title personnel who had worked with Grill were at the most guilty of neglecting to advise him in sufficient detail about the true nature of his rights, when he turned to them seeking their assistance in obtaining an access easement from the federal government.

Although Grill's legal assault on his title insurer was largely baseless, for the reasons just cited, as previously indicated the CCOA found it unnecessary to give any consideration to the presence or absence of merit in any of his arguments, or to rule upon any of the specific issues he raised regarding the performance of the title personnel who had helped him secure access to the subject property, because he had failed to act within the statutorily mandated time period. Prior to accepting the problematic SUP in 1998, Grill had openly and repeatedly maintained during the early 1990s that nothing short of an easement across the federal land at issue would be sufficient to meet his needs, the CCOA observed upon reviewing the documentary evidence of Grill's communications. Therefore his cause of action against Ticor, predicated as it was upon Ticor's failure to obtain an easement from the USFS, first arose not in 2008 but in 1992, when it was determined that no such

easement could be created, and it became clear that Grill would have to settle for a permit instead of an easement. However, even if Grill had been unaware during the 1990s that it was not possible to get the desired easement, in 2000 he was directly informed by Ticor that the company had closed his file and would take no further action for his benefit, so by 2000 at the latest Grill knew that he was never going to have an easement across the NF land. Therefore, the CCOA correctly indicated, the statutory period of limitation began to run, and to accrue adversely to Grill, no later than 2000, so by 2008 any opportunity he had to litigate any aspect of the access controversy against Ticor had already legally vaporized years earlier, and in 2017 he was at last advised accordingly by the CCOA, finally bringing this agonizingly protracted period of his life to an end. From the standpoint of irony, it's also worthy of note that Grill's insistence on an access easement, as opposed to an access permit, although quite reasonable and sound in most similar scenarios, was completely pointless in this particular instance. Even if Grill had been granted an easement upon the NF land, as opposed to a mere permit, all use of that easement would have been subject to the regulatory authority of the USFS, so it would have been subject to provisions which would have been analogous if not identical to the terms of his SUP. Had the NF land been private land, Grill's insistence on an easement would have been wise and perfectly appropriate, due to the absence of federal authority over such land, but since he was confronted with a need to cross federal property, he should have realized, before he ever even made his acquisition, that he had no chance of ever obtaining unregulated access to the property he wished to utilize.

As can readily be seen, it was Grill's failure to comprehend the full legal implications of the presence of federal land, intervening between the site which he sought to acquire in 1990 and the public highway serving the relevant area, that ultimately led to his downfall and financial ruin. Whether Grill was guilty of procrastination or was simply victimized by the sheer complexity of federal law is subject to debate, but there can be no doubt that this costly debacle was triggered by his exceedingly unwise decision to acquire land without first verifying the presence or actual availability of satisfactory legal access to that land. Moreover, once Grill found himself immersed in a controversy over access rights, the fact that he did not have the knowledge to ascertain exactly what kind of legal action he needed to take, in order to give himself a realistic shot at success under the law, proved to be disastrous, ultimately causing him to miss his statutory window of opportunity, in both the state and federal judicial systems. He missed any chance to pin liability upon Ticor in state court because he acted too late, and he missed his chance to prove in federal court that the USFS had committed an unjustified taking of his rights through deprivation of due process because, not being an attorney, he chose the wrong form of action, and thus wasted the time comprising his window of opportunity engaging in useless legal machinations which ultimately brought him to a dead end. Interestingly, some of the remarks made by Grill suggest that he may have known of the existence of RS 2477, and he may even have ascertained that it could represent yet another avenue of potential easement litigation to be pursued, as at one juncture he stated that his goal was "irrevocable acknowledgement by the Forest Service of the historical right of way". Thus it appears that the real reason for the exasperation which drove Grill to litigate his access issue so intensively may well have been his belief that the route in question represented one of the many locations throughout the west in which an undocumented public right-of-way actually exists. But if that was in fact his position, he would have had to take several steps which he apparently never took in

order to prevail on that point, including gathering and assembling convincing historical evidence, securing the support and participation of the county attorney to assert the public position, and filing an action under the QTA. Whether Grill was aware of the numerous hurdles he would have to overcome to prove the existence of a historically established right-of-way, formed through use of the road by the public prior to the inclusion of the relevant land in a NF, we will never know, perhaps he explored that option and simply deemed it to be too challenging to pursue.

In conclusion, having tracked the Grill saga from start to finish, we can see that knowing the specifically applicable federal law and the proper form of action under which to proceed when taking legal action against any federal agency is absolutely vital, both in the context of land rights and otherwise, because nothing can be accomplished in our federal court system if jurisdiction over the subject matter at hand cannot be judicially confirmed. The complexity of determining the proper channel of litigation has proven to be the downfall of many claimants like Grill in the federal land rights arena, who had potentially legitimate positions on various land rights issues and might have prevailed, had they made the correct procedural choices, reminding us of the essential nature of astute professional advice. With respect to access permit applications under ANILCA, as we have observed, the federal review of proposals requesting a grant of access to privately held lands through federal land is not a simple matter of acceptance or refusal, which can be decided by federal employees on any arbitrary basis, because the concept that access to land, when genuinely necessary, is a matter of right, has been incorporated into federal law. In addition, we have learned that the difference between an easement and a permit or other form of license is also not as clear or simplistic as one might imagine when federal land is part of the equation. By definition, an easement represents a right, while a permit represents only a privilege, and this is among the most universal tenets of the law concerning land rights in the private sector, but as we have noted, federal land rights are governed by federal statutory law, and the congressional intent embodied in federal law can elevate certain permits to a higher status, equivalent in durability to an easement, although lacking the element of transferability. Although land surveyors are obviously not qualified or authorized to conclusively ascertain or state the legal status of any existing road or access route which is unsupported by any definitive documentation, there can be no doubt that many practitioners of the land surveying profession have the capacity, by virtue of their knowledge of resources which are obscure and arcane to others, to bring forth key evidence pertaining to the legal status of historical roads. Thus anyone in a position comparable to that in which Grill found himself, confronted with access issues involving federal land, would be well advised to enlist the supporting services of a licensed professional surveyor, as well as a land rights attorney with advanced knowledge of federal land rights law, before proposing to create any access plan that envisions private use of federal land.

#### Footnotes

1) The Federal Land Policy and Management Act of 1976 (FLPMA) repealed numerous long standing federal laws pertaining to both the use and the potential acquisition of federal land and land rights by the public, private individuals and corporate interests, essentially establishing a new bureaucratic regime, targeted at reducing degradation of federal land and the associated resources found therein. Many subsequent federal laws, along with

federal administrative measures that were authorized by FLPMA, have been added to the mix over the ensuing decades, effectively strengthening federal protection of land in its natural state in a wide variety of ways, but also giving rise to an endless stream of controversies comparable to the one reviewed here.

2) For an interesting prior discussion of the legal consequences of friction between federal regulations and use of federal land by the general public, see the fourth edition of this series of articles, entitled "Examining the applicability of the federal Quiet Title Act to easement litigation - What factors control judicial implementation of the QTA?", published by Multibriefs for NSPS News & Views in January 2016. That article, which is focused upon access issues arising under RS 2477 and explains the historical context surrounding that highly controversial federal statute, can be readily obtained at no charge through the web in pdf form by means of a keyword search, or directly from this author upon request.

3) Nothing is known regarding Grill's past life experiences or the level of personal knowledge he possessed, he may have been a savvy land acquisition veteran or he may have been a completely innocent neophyte who had never before acquired any land, but there is no indication that he was an attorney, a legal scholar or an expert on real property law. Be that as it may however, a combination of personal ignorance of the law and misguided advice with regard to the law was destined to bring him immense and extremely costly tribulation, which would consume a very large portion of his adult life, as we shall observe.

4) Ticor personnel assembling the data which was used in the composition of the title insurance policy that was issued to Grill evidently did not discover or realize that the subject property was landlocked, thus they failed to include a title exception specifically addressing the absence of legal access, so as Grill's insurer Ticor was legally obligated to take whatever steps might prove to be necessary to eliminate that title deficiency. No details specifying the exact location of the subject property or the route of physical access leading to it are known, so the physical arrangement and size of the relevant properties are unknown, but the road which Grill needed to use apparently crossed federal land for a total length of about half a mile, and no issues associated with the legal descriptions of either the Grill property or the relevant federal property are suggested by the known evidence.

5) The Alaska National Interest Land Conservation Act (ANILCA) which has been in place since 1980 and is not limited in application to Alaska, represents a milestone in wilderness protection and is one of the most significant laws pertaining to the use of federal land. Among the most pertinent of its provisions, with particular relevance to the matters discussed in the present article, is the fact that ANILCA mandates that the federal government must grant access permits to private property owners who demonstrate a genuine need for land access, and who comply with all relevant federal regulations, and who do not abuse such rights of access, enabling those qualified parties to pass through federal lands, in order to utilize their private lands.

6) Throughout all of the litigation cited herein, Grill acted "pro se", although there are some indications that he may have obtained some legal advice at various times on various matters from unspecified attorneys or others. The phrase "pro se" means to act in one's own favor,

and in the judicial context it refers to any individual who elects to personally advocate and argue his or her own legal position before a court, rather than obtaining the assistance of legal counsel for that purpose. Most pro se litigants are attorneys, who are qualified to represent themselves and therefore feel confident that they need no assistance in presenting their case, but those who are not attorneys can and do also sometimes choose to act pro se, as Grill did. The results achieved by pro se litigants are, not surprisingly, quite poor, they rarely prevail, and in many instances the insufficiency of their knowledge of the law leads directly to their defeat.

7) See Grill v Quinn - US District Court for the Eastern District of California - 12/29/10 - 2010 WL 5476614. All of the citations of this kind provided herein represent references to Westlaw (WL) documentation, which can be readily obtained at no charge by visiting any typical law library.

8) For prior articles in this series that focus upon the QTA, see "Does every issue generated by the presence of an easement constitute a title issue?" published by Multibriefs for NSPS News & Views in September of 2015, and see "Can ignorance of federal law carry implications that are powerful enough to effectively negate certain aspects of state law?" published by Multibriefs for NSPS News & Views in July of 2016. Both of these articles can be readily obtained at no charge through the web in pdf form by means of a keyword search or directly from this author upon request.

9) The Administrative Procedure Act (APA) which has been a major component of federal law since 1946, enables private parties to litigate certain decisions and actions that have been taken by federal personnel operating at the administrative levels of government, and thereby obtain judicial review of such matters, addressing the merits of the particular issue, where proper jurisdiction is shown to exist, and potentially resulting in a ruling favorable to the private claimant, if it is proven that the relevant federal personnel acted improperly in some respect. While most APA litigation involves no land rights issues, in the context of land use the APA serves as an alternative to other legal options that are available to private claimants, most notably the QTA and the Tucker Act, under circumstances which leave those options unavailable to the claimant.

10) See Grill v Quinn - 3/1/11 - 2011 WL 795534.

11) See Grill v Ticor - Court of Appeals of California, Third Appellate District - 2/2/11 - 2011 WL 320422.

12) See Grill v Quinn - 1/20/12 - 2012 WL 174873.

13) See Grill v Quinn - 6/18/13 - 2013 WL 3146803.

14) See "Examining adjudication pertaining to federal title interests beyond the federal Quiet Title Act" published by Multibriefs for NSPS News & Views in January of 2017, which can be readily obtained at no charge through the web in pdf form by means of a keyword search, or directly from this author upon request, for a review of a particularly fascinating riparian boundary case involving the Tucker Act.



15) For an introduction to the concepts of federal supremacy, sovereign immunity and nullum tempus in the context of title to real property, see "Does every issue generated by the presence of an easement constitute a title issue?" published by Multibriefs for NSPS News & Views in September of 2015, which can be readily obtained at no charge through the web in pdf form by means of a keyword search or directly from this author upon request.

16) See Grill v Quinn - 7/29/13 - 2013 WL 3934424.

17) See Grill v Quinn - 8/1/13 - 2013 WL 3992117.

18) See Grill v Ticor - Court of Appeals of California, Third Appellate District - 1/24/17 - 2017 WL 344326. On 4/12/17 the Supreme Court of California declined to review this appellate ruling, bringing the Grill litigation to a conclusion.

*(The author of this series of articles, Brian Portwood ([bportwood@mindspring.com](mailto:bportwood@mindspring.com)) is a licensed professional land surveyor and a federal employee who has also authored numerous other materials supporting advanced professional education.)*