When the Law is Silent, Trespassers W... : Law and Power in Implied Property Rights

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Abstract
In the daftly magical world of Winnie the Pooh, Piglet lives in a house signposted “TRESPASSERS W.” The golden silence that follows the W allows Pooh and his friends to wonder about the sign’s meaning, which Piglet insists honors his grandfather, Trespassers William. Piglet’s grandfather aside, silence in the law allows competing interpretations to arise and flourish in the realms of rhetoric, narrative, power and politics. In this paper we combine interest group politics, political ecology, property theory, and narrative assertion to propose a theory of implied property rights – how they work, whom they benefit, and when and why they solidify into explicit, black letter law.

Implied property would seem unpredictable because it is an amalgam of volatile elements: norms, not law; narratives, not principles; and the raw power of winners and losers, not the settled restraint of authority. Yet the doctrinal instability of implied property is easily manipulated, bringing theories of interest group politics and political ecology to bear. The case study of The New Zealand Fish and Game Council v Attorney General and Others (2009) illustrates our proposition – that power, narratives, assertion, strategy, and property itself work together to allow implied property to prevail over explicit law, and private desires over public interests. The story of access to the South Island high country also illustrates a broader pattern in implied property - that an assertion of exclusion establishes power that often becomes a private right recognized at law.

Table of Contents
I. Introduction 2
II. The law of implied property: a dearth of crystals and mud 5
III. The Power of Assertion: Narratives of Private Property and the Right to Exclude 6
IV. The Politics of Implied Property 11
IVA. Interest group politics of implied property 12
IVB. Political ecology of access 13
IVC. The Politics of Property: Norms, Custom, and Power 14
V. Trespass rights and the Crown pastoral estate in New Zealand’s South Island 17
VA. The evolution - property rights in pastoral leases 17
VB. Nascent assertions of an implied power to exclude 20
Vc. 1998 – 2008 Tenure Review 26
VD. Fish and Game Litigation 27
VI. Conclusions 32
I. Introduction

The Piglet lived in a very grand house in the middle of a beech-tree, and the beech-tree was in the middle of the forest, and the Piglet lived in the middle of the house. Next to his house was a piece of broken board which had: "TRESPASSERS W" on it. When Christopher Robin asked the Piglet what it meant, he said it was his grandfather’s name, and had been in the family for a long time. Christopher Robin said you couldn’t be called Trespassers W, and Piglet said yes, you could, because his grandfather was, and it was short for Trespassers Will, which was short for Trespassers William. And his grandfather had had two names in case he lost one—Trespassers after an uncle, and William after Trespassers.

"I've got two names," said Christopher Robin carelessly.

"Well, there you are, that proves it," said Piglet.


In the daftly magical world of Winnie the Pooh, Piglet lives in a house signposted “TRESPASSERS W.” The golden silence that follows the W allows Pooh and his friends to wonder about the sign’s meaning, which Piglet insists honors his grandfather, Trespassers William, or Trespassers Will for short. Piglet’s grandfather aside, silence in the law allows competing interpretations to arise and flourish in the realms of rhetoric, narrative, power and politics. In this paper we combine interest group politics, political ecology, property theory, narrative assertion, and a case study in New Zealand’s high country to suggest a theory of implied property rights – how they work, whom they benefit, and when and why they solidify into explicit, black letter law.

The disparity between implied meaning and explicit text is of paramount importance to legal interpretation in many fields of law, especially property. This paper examines the politics and law of “implied property,” an amorphous concept beyond the certainty of statute, and the logic of the common law. We describe “implied property” as “property,” not because of its de jure substance, but rather its proprietorial façade. And we call it “implied” because the “property right” claimed cannot be explicitly located.

Implied law invokes “the familiar fact that the law says more than it explicitly states, that there is more to its content than is explicitly stated in its sources, such as statutes and judicial decisions.”

Implied law is what is expected and believed to be law, and followed as if it were law, before the legislature passes a statute or a Court makes a decision.

Explicit law relies on the fundamental principle that the law is what it says. It is written – statute or case law. Of course case law and statute are often vague and unclear, thus clarity is not necessarily associated with explicit law. Indeed it is this lack of clarity that makes implied law possible and makes the law dynamic and responsive. But as a pattern of behavior becomes a norm, it becomes more normal and, if universal enough, eventually solidifies into law. Explicit law aims to be prescient, while implied law is post hoc, ad hoc, or both.

This article uses a case of trespass and access rights to state-owned grazing land in New Zealand to propose, illustrate and examine a theory of the politics of implied law of

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1 Joseph Raz, Review: Ronald Dworkin: A New Link in the Chain, 74(3) CALIFORNIA LAW REVIEW. 1103-119 (1986).

2 Or at its most expansive, what the law is understood to say, as interpreted by discipline-accepted canons of statutory construction such as the ejusdem generis rule.
property. The expectation of legal entitlements is often more persuasive than the actual entitlements themselves. These expectations and their influence create a pattern where private interests benefit at the expense of public interests. The law may lead or follow such a pattern. Key players in this pattern of distribution of benefits between private and public interests include: interest groups, power, political strategy, narratives, and the nature of property itself. Hence a theory of power and politics in implied property informs both legal and political science literatures.

In developing a theory, we seek to describe and explain the journey from indefinite property desire to definite property entitlement. Implied property would seem unpredictable because it is an amalgam of volatile elements: norms, not law; narratives, not principles; and the raw power of winners and losers, not the settled restraint of authority. Yet the doctrinal instability of implied property is easily manipulated, particularly where the private few are engaged and resourced, and the public many are disengaged, diffuse, or under-resourced. Thus implied property’s flow is mostly unidirectional, favoring private monopolistic capture of access to ambiguously public resources. Therefore our theory posits that its volatility is curiously predictable, such that implied property is frequently fertile ground to transform I want into I am entitled provided the law and politics of property are manipulated well.

What informs our observation that the trajectory of implied property is curiously predictable? Our basic tenet, derived by combining interest group politics and property, is that the few seeking private interests are more likely to imply a non-explicit property claim in the first place, and they are likely to advocate that claim, once implied, more strongly than the many seeking public benefits. This suggests implied rights are more likely to benefit the private interests of the few over publicly-oriented interests of the many, while explicit law has the potential to benefit public over private. While flexibility is better than stasis, interest group theory suggests that the law of property might be more flexible in one direction than the other, thereby benefitting private over public interests. Bringing in political ecology theory expands this basic tenet by adding political ecology’s bundle of powers to explicit property’s traditional bundle of rights, thus identifying social and political factors that shape property rights. Being an unstructured institution of norms, custom, rhetoric and narrative, implied property is a useful tool for an organized few intent on shifting the bundle of powers (principally the power of access) from public to private.

In Part II, we examine the doctrinal instability of implied property, and the risk it poses to property’s integrity. In Part III, we look at the influence of social and legal narratives on implied property, in particular the powers of access and exclusion in land. Part IV places implied property within the politics of property as a never-ending contest to transform individual desires into entitlements, affirmed and defended by the community and ultimately the state. We review theories of interest group politics that affect the relation between implied and explicit property law, then expand the interest group view of property to encompass the political ecology of access, and conclude with the impact of norms and customary practise. In Part V, our case study traces the historical development of one transformation: from the absence of a property right, to an implied property right, and

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3 In the inverse case, in which explicit rights favor the few while implied rights favor the many, interest group theory predicts the few will advocate their interests more strongly than the many.
finally to an explicit property right. In Part VI, we conclude that the story of access to state-owned land in New Zealand’s South Island lends support for parallel predictions of the victory of private over public and implied over explicit.

II. The law of implied property: a dearth of crystals and mud

In defining implied property we refer to those property uses and claims beyond the explicit wording of statute, or outside the clear and logical rationale of common law precedent. This is a zone where uses and claims to property are derived by inference, by reading between the lines of legislative fiat, or by presuming the intent of a line of case law authority. Such creation of property rights requires doctrinal rigor and intellectual consistency; the risk lies in the elevation of unworthy claims and uses to the status of property. The risk doubles because implied property looks and sounds like property proper, it adopts superficially its terminology and mimics its key attributes, such that perception can and sometimes does become reality. The inferential migration of claim to property to enforceable property right forms the basis for this analysis of the law of implied property.

If we were to place implied property on a property continuum, it would fall outside of Carol Rose’s oft cited “crystals and mud” paradigm. Crystals and mud is a metaphor for the symbiotic relationship between the crystalline certainty of statute, and the post-hoc readjustment of common law mud. Crystals and mud generally operate in a functional equilibrium. The harsh sharpness of statute often needs an ameliorating layer of case law mud, to provide relief to statute’s jagged, unintended consequence. Together they represent counter poise between property’s need for initial certainty and subsequent pragmatism. But implied property exists beyond this self-adjusting balance. Rather than the balm of mud, implied property exists in a vacuum where outcomes are ad hoc, property narratives distort, and yelling I want[^4] can be deafening. While mud provides reflective context and relief against rigidity, the vacuum is open to whoever can fill it. In this realm of vagary, claims of I want may flourish if their proponents are skilful, and lawmakers are not rigorously vigilant. To borrow another Carol Rose aphorism of “property is persuasion,” the “persuasion” needed to ground new property rights must be principled and consistent with the rationales of precedent. As English Law Lord Millett observed

> Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is “fair, just and reasonable.” Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.\(^5\)

In the absence of principled balance, it is open to claimants of implied property to exploit the discourse of property to the extent that “persuasion (becomes) property,” a perverse reversal. This is done by passing off the foundational narratives of property as the narratives of their particular claim.\(^6\) By staking a claim to the property narrative, and conflating their own narrative commensurately, they stake a claim to the property itself. This gives their previously dubious claims a gravitas beyond their substance as explicit law (if indeed there is any explicit law basis at all).

[^4]: Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985)
[^5]: Foskett v McKeown [2000] 1 AC 120, 127
[^6]: These narratives are explored in Part III.
III. The Power of Assertion: Narratives of Private Property and the Right to Exclude

Looking solely at explicit property rights, one will not understand the full gamut of power and control over resources. Just as explicit rights are one way of exerting control over resources, property narratives are another way of establishing implied property by the power of assertion. A powerful narrative of property is the private landowner’s “sole and despotic dominion,” the raw exclusionary power that negates public access in favor of private control. But this gatekeeper power to exclude is not always premised on an explicit right. Mere assertion of the power implies the right exists. Thus assertion becomes implied power, which becomes explicit right. To further an understanding of the power of assertion in the politics of implied property, we now examine narratives of private property and the right to exclude.

Private property has been the dominant (and domineering) form of property since at least the 18th century, when an intensive market-oriented economy supplanted a settled agrarian society. Property as an institution changed from a largely social construct into a tradeable commodity. In common law jurisdictions with a settler history, jurists such as John Locke and William Blackstone (amongst others) continue to hold disproportionate sway on the narrative of modern property, seen overwhelmingly through the prism of private property rights. It has successfully marginalized and discredited alternative forms of property, such that today we see property predominantly through a myopic prism of private property rights. For most people, the terms property and private property are synonymous.

Yet private property’s edifice of sole and despotic dominion is built on unconvincing foundations. Private property was never unqualified or absolute in its ambit; public and community rights and restraints consistently define (and defined) the extent of private rights. As many property theorists concur, the divide between private and public was never pure. Yet the contemporary irony of private property lies in its over-reliance on this flawed public-private dichotomy for its hallmark exclusionary powers. To conflate private rights on the premise of an illusory divide poses risks to the integrity of the inherent rationales of private property.

The qualitative substance of private property is the security it affords right holders in their exclusive use and enjoyment of their rights. Yet the narrative of private property has diverged from this central organizing basis; and the existence of the narrative allows private interests to assert some entitlement to resources they desire. Secure exclusivity of use has become exclusivity simpliciter. The paramount right to exclude has overshadowed the complexities and nuances of private property. In so doing, exclusion has become not only

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10 Carol Rose states “many of our modern views of property...come from the works of seventeenth and eighteenth century theorists...”, Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 Yale J.L. & Human. 37, 37 (1990).
11 Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges 305-321 (David Grinlinton & Prue Taylors eds., 2011)
12 Id.
singly dominant, but domineering. This perversion unduly distorts property discourse, and feeds a propensity for courts and legislatures to overstate private property rights.

In charting the rise of the right to exclude, it is convenient (but not contrived) to commence with the *Commentaries* of William Blackstone in 1760. Blackstone wrote his *Commentaries* at a crucial era as England vigorously expanded its colonial empire. Blackstone’s timely summation of the great body of common law jurisprudence enabled this important (and transportable) compendium to reach far beyond English shores, as Anglo-settler societies extended across North America and the Pacific Rim.\(^\text{13}\) Blackstone’s thinking thus proved foundational to many newly establishing jurisdictions.\(^\text{14}\) Indeed his summaries of the law were noetic. This was particularly so for concepts of property, as nascent societies struggled with the political and social imperatives of settling vast, empty hinterlands, whether in pursuit of Manifest Destiny, or more mundane, practical policies of closer settlement.\(^\text{15}\) Blackstone captured a notion of property that conformed to the spirit of the times, an articulation that matched the zealous conquering of frontier.

In writing of property, Blackstone famously observed

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of ay other individual in the universe.

Not surprisingly, much emphasis was placed on Blackstone’s sole and despotic prescription to justify an absolutist, highly individualized and exclusionary notion of property in settler societies. Moreover his definition divorced property from the things of the external world. But as Carol Rose observes, Blackstone’s definitive assertion (Rose called it the “Exclusivity Axiom”) was immediately followed by his own doubts as to the origin of such seemingly unequivocal rights (Rose’s “Ownership Anxiety”).\(^\text{16}\)

> And yet there are very few, that will give themselves the trouble to consider the origin and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in title...We think it enough that our title is derived by the grant of the former proprietor,...not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground...

Rose argues that the problem is that not enough property jurists “have read that *much* Blackstone. If those who quote Blackstone’s definition read further, they might come to think that Blackstone posed his definition more as a metaphor than a literal description....a

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\(^\text{13}\) See e.g. STUART BANNER, POSSESSING THE PACIFIC (2008)


\(^\text{15}\) The U.S. Homestead Act of 1862 limited fee grants to new settlers of (an often unviable parcel of) 160 acres, the objective to promote closer settlement.

Indeed, had scholars selectively preferred a later line in the same chapter, “so it is agreed...that occupancy gave...the original right to the permanent property in the substance of the earth itself; which excludes everyone else but the owner from the use (emphasis added) of it,” then perhaps the dominant narrative of private property rights may have been more usufruct than dominion-centric. Pointedly this alternative narrative would be far less helpful to the private few asserting an implied entitlement, for example those in our New Zealand high country case study in Part V. Rose concludes that Blackstone’s so-called “Exclusivity Axiom” is a metaphoric over-statement, a “trope,” that “conceal[s] the interactive character of property and give[s] an inappropriately individualistic patina to this most sociable of human institutions.”

Yet it is not just Blackstone’s text that was problematic, it was also the context in which he wrote. As Eric Freyfogle notes, Blackstone had different ideas about dominion derived from late 18th century English agrarian society, than we may understand the term in a 21st century urban environment. Freyfogle argues dominion to Blackstone meant “the right to quiet enjoyment...the right to halt any appreciable interference by a neighbor.” Pointedly this did not equate to the absolute right to exclude. Rather it contemplated contexts where multiple rights co-existed lawfully, where reasonable co-enjoyment was implied, but unreasonable interference with another’s peaceful use and enjoyment was an actionable breach of dominion, the sic utere principle. Carol Rose likewise factors in context, positing that Blackstone was aware of the “pervasive and serious qualifications on exclusive dominion” arising from then feudal and entailed limitations on estates, and the “general neighborly responsibilities of riparian and nuisance law.” Murray Raff places Blackstone in a political context, “at a time when common lands were being enclosed, and memory of the English Revolution was not so distant, it was not surprising that he would have in mind the power to exclude others from private property – especially the Crown.” Blackstone the alleged absolutist himself acknowledged the law of waste and nuisance as limits on the private owner’s dominion.

If William Blackstone articulated a key mantra, John Locke provided the theoretical underpinning for private property in the crucial early phases of settler society. Indeed Lockean notions of property continue to stress the primacy of individual dominion, and are often used to describe politically conservative approaches to private property rights. Locke wrote a century before Blackstone, but his themes of the inherent worth of individual labor struck an especial chord in republican America.

The basic Lockean system of property as a license for unlimited individual accumulation via unilateral action has held a powerful place in the American pantheon of political thought since the Revolution.

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18 Id. at 632.
19 Freyfogle, supra note 8, at 68.
20 Rose, supra note 17 at 603
22 Id.
23 LEIGH S. RAYMOND, PRIVATE RIGHTS IN PUBLIC RESOURCES 45 (2003).
According to Locke, ownership of one’s own body was the starting point to justify the private ownership of external things. When one mixed individual labor with things found in the common fund, or natural world, something of value was created. Morally the fruits of one’s labor justified that thing being owned by the person whose labor had created it. Locke’s “labor theory” thus corroborated the individual acquisition of private property transformed by sweat equity. This became the Lockean tradition, a vision of an idealized “agrarian democracy of small, self-sufficient property owners.” But Locke also recognized the qualifications to his theory, the famous proviso that there remained “enough and as good” land for others, and that there was to be no wasteful surplus in one’s acquisition, no “spoilage.” Absolutism was always tempered by limit.

Locke’s idealized agrarian democracy did not come to pass; rather the advent of the intensive capitalist/industrial age required a re-alignment of property that stressed the primacy of individual exclusionary power and the right to exploit. And inherent in the untrammeled right to exploit was a security of exclusive possession free from any interference. The right to exclude became unstoppable; it captured the full value of individual property investments and provided incentive for the efficient development of resources. What was once qualified (sic utere) became absolute, conveniently building on the simple (yet incomplete) narratives of Blackstone and Locke. The bundle of rights metaphor gathered much momentum in the late 19th century, in the process transforming modern property to conform to the economic imperatives of the new age.

The disjuncture between ownership and control can be attributed partially to the legal fragmentation of ownership rights in the nineteenth century, when property evolved from a unilateral and exclusive power over a material item, to a more malleable and divisible set of specific rights. Prior to the Civil War, property in the United States was generally viewed in terms discussed by John Locke....After the Civil War, America’s strong commitment to the Lockean view of ownership weakened, and our concept of property fragmented. The familiar “bundle of sticks” metaphor emerged, allowing society to treat rights as easily severable.

The bundle envisages a series of divisible rights or sticks, including rights to use and enjoy, transfer, possess, and of course, exclude. Some right holders (such as the fee simple owner) hold more sticks, while others (freehold life tenants) hold less. The paramount stick in the private owner’s bundle is the right to exclude, the hallmark right of property. Yet despite the heady claims of the US Supreme Court that the right to exclude is “one of the most essential sticks in the bundle of rights” or “one of the most treasured strands in an owner’s bundle of property rights.” doubts linger as to the right’s absolute dominance. The right to

24 ‘Thus the Grass my Horse has bit; the Turf my Servant has cut; and the Ore I have digg’d in any place where I have a right to them in common with others, become my Property, without the assignation or consent of any body.’ John Locke, Second Treatise of Government
25 Raymond, supra note 23 at 44-45; Freyfogle, supra note 8 at 110-115.
28 Fairfax, supra note 26 at 15-6.
29 Kaiser Aetna v United States 444 U.S. 164, 177; cited also in Dolan v City of Tigard 512 U.S. 374, 384 (1994); Lucas v South Carolina Coastal Council 505 U.S. 1003, 1044 (1992); and Nollan v California Coastal Commission 483 U.S. 825, 831 (1987); see also Nixon v United States 978 F.2d 1269, 1286 (D.C. Cir. 1992), ‘The right to exclude others is perhaps the quintessential property right’.
30 Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435.
exclude may sit uncomfortably with U.S. common law of public accommodations, in particular the rights of business property owners to exclude invitees on the basis of race. Joseph Singer compared public accommodations laws across numerous U.S. states, and in so doing made generic observations about the right to exclude in private property jurisprudence.

What can the history of public accommodations law teach us about private property? It suggests that there are substantial limitations to the classical conception of property as ownership. It further suggests that all rights — even the basic right to exclude — are limited by the rights of others and by social interests. They also reflect and structure the contours of social relationships. 31

Moreover in terms of the sticks found in a standard bundle, Singer did not assume that automatically the right to exclude was a given.

Yet if property involves a bundle of rights, it is not at all clear that all the sticks in the bundle fit comfortably together. The owner’s right to exclude may conflict with and may be limited by, the public’s right of access to the market without discrimination. If the individual entitlements comprising ownership constitute a family of rights of a certain class, the members of the family do not necessarily get along with each other all the time. 32

Interestingly Singer argues that where a fee simple owner invokes the state’s aid in enforcing trespass laws (presumably the common law of trespass enforced by litigation), the private owner’s interests inextricably overlap, or become “imbricated” with those of the state, 33 blending private and public, and diluting the absolutism of the right to exclude with legitimate interests of the state. More broadly Singer concentrated on the (often overlooked) sociability of property, that it needs to be understood as both contingent and contextually shaped, and conversely that property helps to structure and shape the contours of social relationships. 34

In the 21st century the bundle of rights remains a predominant articulation of property, although its dominance is increasingly questioned by alternative metaphors perceived as inclusive, contextual and with environmental resonance. 35 A re-appraisal of the arbitrary dominance of the right to exclude, as one stick in that slightly wavering bundle, has been mooted by Eric Freyfogle, who wrote in 2007 that “the right to exclude has not been absolute in American law, nor is it an inherent or necessary part of land ownership. Private ownership can function perfectly well with landowners possessing a limited right to keep outsiders away.” 36 Freyfogle suggests that a right to halt interferences may be more cogent than an absolute right to exclude, but he concludes that his arguments are unlikely to prevail while lawmakers “could not imagine and did not remember a different (pre-industrial) legal world.” 37

32 Id. at 1452.
33 Singer, supra note 31, at 1451.
34 Id., at 1462.
36 Freyfogle, supra note 8 at 57.
37 Id. at 60.
The narrative of the unfettered right to exclude is not entirely consistent with the theories of early private property proponents, nor necessarily its contemporary milieu. Blackstone and Locke were prepared to recognize qualification and context where appropriate. Social limitations on the right to exclude existed in the eighteenth century, and theoretically still exist today. But as Freyfogle instinctively surmises, courts cannot imagine and do not remember a different legal world where private property rights were more nuanced and less absolute. This particular exclusionary narrative has proved enduring. Why is this narrative so all persuasive?

The existence of a property regime is not predictable from a starting point of rational self-interest; and consequently from that perspective, property needs a tale, a story, a post-hoc explanation. That...is one reason Locke and Blackstone...are so fond of telling stories when they talk about the origin of property. It is the story that fills the gap in the classical theory...that makes property “plausible.”

In ex-settler societies, much of the property narrative stems from a formative nation-building era, when the settlement of empty hinterlands was a political imperative. Thus possession is the origin of property, landowners should not sleep on their rights, the law rewards the productive use of land,
and so forth. All tend to justify questionable title, to assuage Blackstone’s self-doubt or “ownership anxiety,” and serve to make private property plausible. Imagine conversely if the dominant narrative of property was one of self-deprecation, not absolutist exclusivity, how different would the institution of private property be? Would claims to implied property have been as compelling if the chief narrative had been one of inclusion rather than exclusion?

IV. The Politics of Implied Property

Property is a socially acknowledged right, whether by law, custom or convention.

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IV. The Politics of Implied Property

Property is a socially acknowledged right, whether by law, custom or convention. We examine how the latter transforms into the former. The fuzzy boundary between implied and explicit law brings to mind ideas of pluralism – both legal and political. The mere existence of implied and customary rights makes room for legal pluralism and informal forum shopping in which more powerful and resourceful actors can use and choose legal, social, and political fora – such as explicit, implied, and customary rights – at different times for different reasons to their advantage. In other words, when property law is ambiguous or implied, as is often the case, power, politics, and strategy matter.

38 Rose, supra note 10, at
41 The corollary to Rose’s “exclusivity axiom”.
42 Ribot & Peluso, supra note 7, at 156.
43 “[A]mbiguity also plays an important role in overlapping systems of legitimacy, i.e. where a plurality of legal, customary, or conventional notions of rights are used to make claims. ... Within this plurality, some actors may be able to enhance their own beliefs – to maintain their access or gain control over others’ access by choosing the forum in which to claim their rights, and wherein they seek to have these rights enforced or adjudicated ... (von Benda-Beckmann 1981; Lund 1994: 14). In all these cases, rights defined by law, custom, and convention are mechanisms that shape who controls and who maintains access.” (emphasis in original)
IVa. Interest group politics of implied property

As the line between law and politics is indistinct at best, understanding the politics of advocacy is necessary to understand property. With some exceptions, theories of economics and interest group politics predict that private interests seeking private benefits for a few will be more motivated, organized, and successful than public interests seeking benefits for the many. Thus in a legal dispute between implied and explicit law, we can expect the legal interpretation that benefits the private few to be advocated more forcefully, in and out of the courtroom, than the interpretation that benefits the many or the public at large. Further, we can expect that the few motivated to seek private benefits will be more likely in the first place to assert an implied right than the disorganized many seeking public benefits.

Disputes over private property claims in state-owned land in the US, Australia, and New Zealand share common characteristics that inform the politics of implied property. Private interests propounding a more generous grant of rights than a strict black-letter interpretation of statute would allow use similar strategies in the three countries. First, claimants cloak their claim (of I want) in legal rhetoric (of I am entitled), even when such terminology is constitutional hyperbole. Second, they bootstrap their private interest to the nebulous public interest by claiming that what is good for them is good for the nation. Third, claimants mobilize public sympathy by tying their desired end to well-loved cultural icons such as the cowboy, the Southern Man, and the Man from Snowy River. These strategies are also noted for their effectiveness, suggesting that clever rhetoric can create an implied property right where there was no explicit grant previously.

Thus the boundary between law and norms, and explicit and implied law appears porous. This porosity makes for a legal system that is responsive and dynamic, but also one vulnerable to benefitting a self-interested, strategic few at the expense of the many. At its best, the stated raison d’etre of the law is to create and maintain societal order that benefits all equitably; but agency theorists observed that even the best intentioned explicit law is

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Id. at 163
44 Brower et al, supra note 39, at 455.
45 Elinor Ostrom, James Walker, and Roy Gardner, Covenants with and without a sword: Self-governance is possible, 86(2) AMERICAN POLITICAL SCIENCE REVIEW 404-417 (1992)
46 MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Interest-group theory and power asymmetry has been applied analogously to environmental disputes. “[A] group whose interests are diffuse and have less marginal impact on each individual member will have far more difficulty organizing into an effective pressure group than a smaller group in which each member suffers substantial economic harm.” Amy Sinden, In Defense of Absolutes: Combating the Politics of Power in Environmental Law, 90 IOWA L. REV. 1405, 1438 (2005).
47 Brower et al, supra note 39, at 460.
48 The “public good” is oft-cited as a justification for various forms of property, in the case of private property see e.g. ERIC T. FREYFOGLE, ON PRIVATE PROPERTY FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007). In the case of collective property, see e.g. RICHARD BARNES, PROPERTY RIGHTS AND NATURAL RESOURCES 154 (2009); or Jeremy Waldron, What is Private Property? 5 OXFORD J. LEGAL STUD. 313, 328 (1985).
subject to capture such that it privileges the motivated few over the apathetic many.49

If we consider private interests to correspond to Mancur Olson’s “few” and public interests to correspond to his “many,”50 theories of jurisprudence and interest group politics lead us to posit that an implied law interpretation of property rights often benefits private interests and right-holders to the expense of the public, while explicit law has the potential to benefit the public over private interests. Further, because the few usually prevail over the many, we predict that implied law will usually prevail over explicit law. Explicit law will prevail in situations in which the many mobilize, when the few are not engaged, or when explicit law benefits the few.

IVb. Political ecology of access

In examining the proposed almost uni-directional flow between implied and explicit in which politics influences which implied right-holders graduate to explicit right holders, which stay in the implied realm, and which get demoted, it seems useful to expand our scope from the traditional legal bundle of rights to political ecology’s bundle of powers and to identify some of the social and political factors that shape the bundle and its constitutive powers. Explicit property rights are only one of many ways of gaining, controlling and maintaining access to resources.51

Political ecologists Ribot and Peluso conceive of access as the ability to control a resource and its benefit flows, while property is the right to do so. In this paper we explore the mechanisms for turning a de facto ability into an explicit right – converting power and access into property. If, as Ribot and Peluso argue, property is a bundle of rights to control the benefit flow from a resource, access is a bundle of powers.52 Both rights and powers rest within and rely on webs and networks of power in social relations. We thus borrow from Ribot and Peluso (2003: 154) but take the converse question: we study ways (i.e. power relations) by which people restrict access and formalize that restriction, whether or not they have an explicit right to restrict. Access is a good lens through which to examine implied property because, in matters of land and natural resources, access is power no matter what the law says or to whom the law ascribes rights.

Indeed access and explicit property do not always coincide. One can hold a right to benefit from a resource, but lack the ability to do so. Though commonly documented as a right-holder who lacks the requisite labor to capture a resource’s benefits,53 it could also refer to

49 William Eskridge describes this tendency: “The legislative market is one that works badly. The public goods that government ought to be providing ... are seldom passed by the legislature, because demand for them is usually not strong and legislators gain too little from sponsoring them ... Conversely, rent-seeking statutes – primarily, concentrated benefit, distributed cost measures – seem inevitable.” W. Eskridge, Politics without Romance: Implications of public choice theory for statutory interpretation, 74 VIRGINIA LAW REVIEW 275 (1988)
50 Olson, supra note 46.
51 Ribot & Peluso, supra note 7, at 172.
53 E.g. ACCESS TO LAND, RURAL POVERTY, AND PUBLIC ACTION 1, 5 (Jen-Phillipe Patteah et al., eds., 2001)
anglers whose walking access to publicly owned waters is blocked or impeded by surrounding private land posted with No Trespassing signs.\(^5^4\)

In contrast to explicit property rights, access rights by custom and convention do not rely on formal enforcement by the state,\(^5^5\) and there are many forms of coercion entirely outside the law.\(^5^6\) To Ribot and Peluso, the power of access takes two forms: 1) the capacity of A to affect the behavior and ideas of B;\(^5^7\) or 2) the capacity of disciplinary practices to induce behavior without coercion.\(^5^8\) Implied property or access rights, by definition, cannot rely on formal enforcement because such an attempt would be a Schroedinger’s cat\(^5^9\) moment at which an implied right either gets formalized or dissolves.

IVc. The Politics of Property: Norms, Custom, and Power

Joseph Singer describes property norms as “standards that help allocate and define the legitimate (emphasis added) interests of persons with respect to control of valued resources.” Fundamentally they “shape our understanding of the meaning of property rights and the legitimate contours of social relationships.”\(^6^0\) Functioning properly, they orient lawmakers through a moral universe “to determine who has a legitimate claim as presumptive owner of a resource, and who is a non-owner.”\(^6^1\) Property norms also determine whether the exercise of the presumed right affects the legitimate interests of others (Singer calls this “externalities”), thus differentiating “between legally relevant and legally irrelevant interests.”\(^6^2\) However while they reveal externalities, property norms also have a capacity to obscure them. Singer observes that norms obscure externalities in at least two ways.

Outside the realm of “crystals and mud” implied property exacerbates this tendency to obscure externalities. The mutual interaction of norms and implied property fogs the “moral universe” lawmakers must navigate, and hides the fact that an exercise of private power by the few does have real effects on the many. As the case study later exemplifies,


\(^{5^6}\) For theories of indirect coercion, see STEVEN LUKES, POWER: A RADICAL VIEW (2nd ed., 2005).

\(^{5^7}\) And for empirical observation of extralegal and normative coercion, see ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991)

\(^{5^8}\) Ribot & Peluso, supra note 7, at 156, citing Lukes 1986; Weber 1978: 53

\(^{5^9}\) Id., after Foucault 1978, 1979.

\(^{6^0}\) Erwin Schroedinger, *The Present Situation in Quantum Mechanics*, NATURWISSENSCHAFTEN (1935)

\(^{6^1}\) PROPERTY AND COMMUNITY, 65 (Gregory S. Alexander & Eduardo M Penlaver eds., 2010).

\(^{6^2}\) Id. at 70.

\(^{6^3}\) Id. at 75.
Singer’s second effect of is also actualized, the de-legitimization of the public many’s interest at the expense of the private few’s implied property claim.

Robert Ellickson draws links between implied property and the few in his 1990 study of rural Shasta County, California. Ellickson observes that in small, tightly knit, and less transient communities, extra-legal norms or custom serve a critical function, albeit at the micro-level. His study revealed that relations between ranchers are more likely to be regulated by an all-pervasive set of norms than the explicit law. Ellickson describes the former as custom, the “legal label for informal rules” that generate rights, including property rights, “through decentralized social processes, rather than from the law.” Likewise Ellickson notes that such rules are inherently implied, there is no single entity that prescribes content or enforces sanctions, nor is there a library to refer to its doctrines. Others concur that implied social norms (including those capable of creating property rights) prove efficacious in smaller homogenous groups where members expect “workaday affairs with one another.” In the context of small social groupings, the vacuum of implied property is filled (for most parts constructively) by norms of collective compliance and coercion inter se. But beyond the few, in disputes with outsiders (such as motorists passing through the county) the enforceability of the implied norm dissipates. Ellickson’s work confirms a key dynamic between implied property rules and the few, but his observations are largely internalized, focussed on how order (including property order) is maintained within small groups without recourse to the explicit law. But he did not examine how the few could extrapolate their implied norms to reach beyond the group and manipulate the content of explicit law.

Leigh Raymond notes the counter-intuitive power and influence of implied custom over explicit property law when describing the nature of private grazing rights in publicly owned rangelands. Raymond observes a “common phenomenon” where property rights are

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64 Ellickson, supra note, at 56.
65 In a like study of a conservative rural community in Illinois undergoing change, the ‘traditional social order’ of Sander County was described as ‘an enclosed system of customary law… where the intrusion of the “stranger”…can serve to crystallize the awareness of norms that formerly existed in a preconscious or inarticulate state.’ David M. Engel, ‘The Oven Bird’s Song’, in Law and Community in Three American Towns (Carol J. Greenhouse et al eds.) (1994) 51-2.
66 Ellickson, supra note 56, at 254
67 Id. at 139.
68 Id. at 130.
70 Ellickson, supra note 56, at 167.
71 Similar studies include property –like rules in queues, Alexander & Penalver, supra note 61, at 165-195, and norms surrounding the location of food carts at a university campus, Gregory M. Duhl, Property and Custom: Allocating Space in Public Spaces, 79 Temple L. Rev. 199 (2006). Duhl states that “the ordering of lunch trucks and carts at Temple University illustrates how, in the absence of private property ownership, communities adopt and follow customs and norms to create and order property rights.” Id. at 200.
72 Contrast Daniel Nazer’s study of the informal norms of surfers, which escape the strictures of a small, tightly knit community. Rather, Nazer concludes that the global surfing community is a “large and heterogeneous” one that had developed a core set of norms with only minor geographical variations, Daniel Nazer, The Tragicomedy of the Surfers’ Commons, 9 Deakin Law Rev. 655, 677 (2004).
“asserted in the face of clear judicial and statutory evidence to the contrary.” He ascribes the persuasive force of implied property to the value of custom and historical practice and “the marginal value of law and the legal system to most of society.” In this latter respect, Raymond affirms one of Ellickson’s observations. Indeed Raymond writes that “what is most striking about this incongruity between law and custom is how often custom wins.”

Raymond writes from the perspective of analysing the property of the Taylor Grazing Act permittee, the renewable grazing privilege in publicly owned forage in the western United States. The Taylor grazing permit has remained a resilient “thing of value,” stability and alienability (so called “licensed property”) since the 1930s, despite numerous court rulings that it is not strictly compensable property in terms of black letter law. This is pointedly exemplified where grazing permits attached to base ranches enhance the latter’s sale value. While compensability has profound implications for defining property in jurisdictions where a right to property enjoys constitutional protection, elsewhere this distinction is less significant if the constitutional protection is murky.

When a grazing privilege becomes valuable, identifiable and transferable, it evidences the crossing of an ill-defined implied property threshold. This occurs despite the original statute’s insistence that:

[While] grazing privileges shall be adequately safeguarded,... the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act, shall not create any right, title, interest, or estate in or to the lands.

Such odd resilience affirms theories proposed by interest group politics and political ecology. Firstly, implied property thrives in the shadows inside the box of Schroedinger’s cat, preferring obfuscation to the harsher scrutiny of explicit law. Secondly, echoing Mancur Olson, its success depends on the quality of who hears the claim to implied property, not necessarily the how many in the wider populace.

Joseph Sax recognizes the importance of implication to property law, that a community’s developed expectations can be as significant as formalities such as title ownership in resolving “claims of custom versus title.” While not determinative, the “significance of established uses to the sustenance of the community as a stable entity was, in one way or another, factored into the ultimate result.” Sax viewed the public trust doctrine operating in a similar vein, “the central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.” However Sax’s re-invigoration of the public trust doctrine in 1970, and its later

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74 Raymond, supra note 23.
75 Osborne v U.S. 145 F.2d 892 (1944); U.S. v Fuller 409 U.S. 488 (1972)
76 In the United States this has proved the stumbling block for Taylor grazing permits being recognised as fully-fledged property rights.
77 For example in New Zealand or the states of Australia
78 Grazing Act 1934 §3 (US)
application to natural resources beyond navigable waterways\textsuperscript{81} represents a re-affirmation of an explicit but overlooked precedent.

Similarly, Carol Rose examines a case that seems to offer a counter-example to our theory, that of public property rights (principally recreation) in the dry sands of American beaches.\textsuperscript{82} Despite the public trust and prescription being strong legal doctrines, (as opposed to custom’s weakness), Rose concludes that much of the theoretical foundation behind revived public property rights in inherently public property can be attributed to populist sentiment.

Rose argues where once the public good of “commerce” enhanced public property in navigable waterways, newer public goods such as “sociability,” “a social glue” or the “contemplation of nature”\textsuperscript{84} underscore public property rights in spaces such as beaches.\textsuperscript{85} On the surface public access to beaches does appear a counter-example to our proposition, but our proposition rests on the common situation where the many are apathetic and the few are motivated. Access to the beach is a rare example of the motivated many.\textsuperscript{86}

In sum what conclusions can be drawn about implied property? Implied private property is especially powerful for smaller groups with homogenous or similar interests, the few. It is resilient; its advocates are able to continue to yell loudly despite statutory or judicial pronouncements to the contrary. It is capable of influencing outcomes successfully in the contest of custom versus the law when it articulates a community’s expectations. Because it is outside the rules of statute and common law, the self-adjusting balance of crystals and mud, it has the propensity to make up its own \textit{ad hoc} rules without check. This tendency presents especial dangers to lawmakers, who must guard against elevating unworthy claim into property right, especially where property norms tend to obscure rather than reveal the effect of externalities. And the lawmaker’s adherence to settled principle should not be obfuscated by implied property’s apparent façade of “propertiness.”

In the second-half of this paper, we observe how a few claimants to implied private property in state-owned land in the high country of New Zealand’s South Island asserted the narratives of modern private property as their own, and transformed an implied claim into an explicit right in a legal environment devoid of mud and crystal.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{81} See for e.g. surfing waves in Nazer, \textit{supra} note 72.
\item \textsuperscript{82} Carol M. Rose, \textit{The Comedy of the Commons: Custom, Commerce and Inherently Public Property}, 53 \textsc{University of Chicago Law Rev.} 711 (1986)
\item \textsuperscript{83} \textit{Id.} at 774
\item \textsuperscript{84} \textsc{Joseph L. Sax, Mountains Without Handrails Reflections on the National Parks} (1980)
\item \textsuperscript{85} Rose, \textit{supra} note 82, at 777–781.
\item \textsuperscript{86} David J. Bederman, \textit{The Curious Resurrection of Custom: Beach Access and Judicial Takings}, 96(6) \textsc{Columbia Law Review} 1375 (1996).
\item \textsuperscript{87} The setting of our case study shared geographical, political and legal similarities with the rangelands
\end{itemize}
V. Trespass rights and the Crown pastoral estate in New Zealand’s South Island

The high country of New Zealand’s South Island was a spectacular but empty landscape at the end of the Second World War.88 A relatively few run-holders89 were vastly out-numbered by herds of merino sheep and plague proportions of rabbits. This was pastoral country, where the dominant economic use was sheep grazing and fine wool. Yet the sheep industry came at an unsustainable cost, the on-going degradation of the high country environment, its soils and waterways, and, eventually, the viability of the sheep industry itself.90 The harsh desolation of the high country made it difficult to predict that who owns what in the high country could come into heated dispute half a century later.91 But the property rights dispute that did eventuate informs and illustrates our ideas about implied property.

Va. The evolution - property rights in pastoral leases

Land use of the high country had been regulated since the times of provincial government in New Zealand. National Land Acts from 1877 had consistently used the formula of “exclusive rights of pasturage, and no right to the soil” to describe the ambit of pastoral tenure.92 This tenure was a pragmatic response to the dual high country imperatives of sustaining the sheep industry and its fragile environment. Exigency, rather than doctrinal purity, delivered a tenure that guaranteed fixity of tenure, nominal rental for the use of public forage, and security for run-holder improvements. In this almost vacant human landscape, the exclusivity or otherwise of (a few pastoral run-holders) possession was of neither pressing nor practical import. If it were, logically it would have been enacted. But in the black letter of the various Land Acts from 1877 to 1948, a statutory prescription of exclusive occupation or exclusive possession was never explicit.

This however did not mean that it was never canvassed. In 1909 the Court of Appeal in Commissioner of Crown Lands v Bennie93 was required to consider the extent of the grant of a lease in perpetuity (999 years).94 In so doing it used exclusive pasturage rights in both small grazing runs and pasturage leases as points of comparison. In an unanimous judgment of the court (Williams ACJ, Denniston and Edwards JJ at 960) observed

managed by the BLM; empty landscapes; a nation-building imperative to settle the frontier; and land settlement statutes that rewarded improvement with title. In 1948, another analogy materialized, the shift from disposal to retention of high country lands by the national government. See John Page, Grazing Rights and Public Lands in New Zealand and the Western United States: A Comparative Perspective 49 NAT. RESOURCES J. 403 (2009).

88 This post-war period is selected because of the imminent enactment of the Land Act 1948 (NZ).
89 ‘Run-holder’ is the Australasian term used to describe the holder of grazing rights under a pastoral lease.
92 For example section 66 Land Act 1948 (NZ). Additional limitations on the tenure included “no rights to timber or minerals” and “roads and right of ways to be taken without compensation.”
93 (1909) 28 NZLR 955
94 This form of tenure (999 years) was a statutory variant on freehold. In NSW a ‘perpetual lease’ in the Western Division of that state was held by the High Court to be the equivalent of a form of freehold, albeit a historical variant not seen since 1848, Wilson v Anderson (2002) 190 ALR 313.
Section 176 (lease of small grazing runs) provides that such a lease entitles the lessee to the exclusive right of pasturage over all the lands included in the lease, section 198 (relating to pasturage leases) provides that such a lease entitles the holder to the exclusive right of pasturage over the lands specified therein but shall give no right to the soil, timber or minerals. In each of these cases the lease of the surface of the land gives strictly limited rights to the surface, and in the case of a pasturage lease gives a right to the vesture only. In the case however of a lease under Part III (Lease in Perpetuity) there is no limitation of the right of the lessee to use the land as he pleases.

The common law thus seemed to suggest that a pasturage lease gave a right to the vesture only, a mere use right. The significance of secure or fixed tenure (as compared to exclusive possession) was underscored in a journal article published around the same time as Bennie To the settler there are many advantages. Instead of sinking his capital in the purchase of the freehold, he is free to employ it in improving the land, with the assurance that, whether he remains or leaves, the values of his improvements becomes his property. Although he is not a freeholder [with rights of exclusive possession], so long as he performs the covenants of his lease he cannot be turned out. He enjoys absolute fixity of tenure.

In 1920 the Sadd Royal Commission was set up to inquire into the deteriorating condition of the “southern pastoral lands,” and the most appropriate tenure from the perspective of the State and the run-holder. The Commission’s recommendations were premised on two guiding principles, overlooked for another 28 years:

1. That the tenure must in every detail be such that all rights of the tenant be respected compatible with the best interests of the State; and 2. that the tenure shall not only deal with the occupation of the Crown lands...but shall also be so constructed that the tenant will be encouraged in every way possible to improve his holding, and to bring it into as high a state of efficiency and productivity as is possible according to the present state of knowledge. In short our aim is to suggest what appears to us the very best both for the tenant and the State.

In using the word “occupation” the report noted that the term in this context referred to the “acquisition, transferring, and other cognate matters” concerning pastoral Crown lands, not “possession” as a common law term of art. The term “pasturage” referred to the pasture cover of the Crown lands.

In an authoritative text on Crown land tenures written in 1925, Solicitor General W R Jourdain described the diversity of tenures under the various Land Acts as “perplexing to a student or visitor from abroad. Each tenure was designed to meet the special needs of the case (emphasis added)...all helped to settle the country in a satisfactory manner.” “Designed to suit the special needs of the case” suggests the crafting of a sui generis tenure.

In 1946 a royal commission into the national sheep industry took evidence from run-holders, concerned by the continuing legislative neglect of high country issues raised in 1920. Although its final report was not handed down until after the 1948 Land Act took

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96 1920 REPORT OF THE COMMISSION APPOINTED TO INQUIRE INTO AND REPORT UPON SOUTHERN PASTORAL LANDS, (the Sadd Royal Commission) at 10.
97 1920 REPORT OF THE COMMISSION APPOINTED TO INQUIRE INTO AND REPORT UPON SOUTHERN PASTORAL LANDS at 12.
98 Solicitor & Chief Clerk of the Department of Lands & Survey, W R JOURDAIN, LAND LEGISLATION & SETTLEMENT IN NEW ZEALAND (1925)
effect, the 1946 Sheep Industry Royal Commission and the *Soil Conservation and Rivers Act 1941* heavily influenced thinking about high country runs. The Report listed run-holder concerns as: the regrouping of non-viable units created by faulty subdivisions; the safeguarding to the tenant of the value of his improvements; a working plan to encourage good husbandry; and the establishment of a tribunal to protect the rights of the farmer. Exclusivity of possession was prominent by its absence.

The *Land Act* of 1948 created “new” and “distinctive” tenures applicable to high country pastoral lands. Section 66 read:

1. A pastoral lease or pastoral occupation licence shall entitle the holder thereof to the exclusive right of pasturage over the land comprised in his lease or licence, but shall give him no right to the soil.

2. Every pastoral lease or pastoral occupation licence may be subject to such restrictions as to the numbers of stock which may be carried on the land comprised therein as the Board in each case determines.

3. A pastoral lease under this Act shall be a lease for a term of 33 years with a perpetual right of renewal for the same term, but with no right of acquiring the fee simple.

Section 2 defined a “Lease” as *a lease granted under this Act*, (emphasis added) or any former Land Act. A “Licence” had an equivalent definition, suggesting that the terms had an exclusively statutory basis. The 33-year perpetually renewable pastoral lease represented the high-water mark of a secure and fixed tenure. But because of the land’s susceptibility to soil erosion, and the risk of downstream damage to riparian systems, the Crown retained its national interest in the lands through a prohibition on the right to freehold. This removal of the right to freehold went against the general tenor of the 1948 Act, and was explained by Lands Minister Hon F C Skinner in the following terms:

If there is any doubt as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right of purchase in these hill country leases called pastoral licences.

Much was made of the denial of the right to freehold. Seen through an ideological prism, opponents and proponents of the Act focused on this divisive issue.

Members of the Opposition have got on their high horse about the absence of the freehold tenure in our policy…. The freeholding of land… to a great extent alienated the community-created assets from the community… I see no reason why the people as a whole should provide an asset to a particular individual and allow him from time to time to capitalize on a matter towards which he has made no contribution except as a member of the community. I believe that the unimproved value of that land

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99 Other influences included the writings of Kenneth Cumberland, K B Cumberland, *High Country “Run” the Geography of Extensive Pastoralism in New Zealand*, 20(3) ECONOMIC GEOGRAPHY 204 (1944); and HORACE BELSHAW, *LAND TENURE AND THE PROBLEM OF TENURIAL REFORM IN NEW ZEALAND* (1948).

100 *The earlier Soil Conservation and Rivers Control Act 1941* [was] a recognition that the hill country is also of concern to the riparian landholders dependent on river flow*, Evidence of Dr. P R Woodhouse to the ROYAL COMMISSION ON THE SHEEP INDUSTRY, Lake Tekapo 12 March 1948. Also NZPD Vol. 284 p. 4071 (Mr. Parry)

is that community-created asset. The rights of the individual are confined to the improvements that he places on that land. 102

The significance of this freehold debate, and its explicit withdrawal in the case of high country tenures should not be overlooked. Freehold (as traversed in Part IV) is the largest estate known to the common law, and central within its bundle is the right to exclude. 103 While parliamentary debates stressed the interest of the Crown in these lands, and the creation of a secure tenure, 104 exclusive possession was prominent in its absence. At law, the explicit “no right to freehold” negated it.

Initially “[t]he changes in tenure introduced in 1948, particularly the perpetual right of renewal, created a climate of confidence which encouraged run-holders to undertake development programs.” 105 But as post-war wool prices fluctuated and generally declined, the economic straitjacket of pastoral tenure became increasingly problematic. Thus run-holders and their advocates began to criticize its arbitrary classification of “pastoral lands,” and the onerous restrictions it placed on alternative uses of high country land. Fixity in land use was the intended concomitant of fixity of tenure, but in the two decades after 1948, it had unintended and unwelcome consequences.

Vb. Nascent assertions of an implied power to exclude

In 1948, and while use rights were of equal value to the power to exclude, runholders neither asserted nor sought the power to exclude. Before 1948, no one bothered to assert exclusive possession because a pastoral run that excluded trampers and hunters was no more valuable than a run with trampers and hunters. The value was in the fodder the sheep enjoyed, not in the amenities the recreationists enjoyed. Indeed when in 19??, the Crown offered runholders the option to convert to freehold, very few accepted. 106

As values and commodity prices changed, the values of explicit rights and implicit powers also changed. The prohibition of other uses (such as viticulture and or subdivision) that had become more lucrative led lessees to look at their statutory tenure in a less favorable light. The valued and valuable asset was no longer the sheep that ran on the sheep run, but the run itself. Though the Lockean narrative lauds building something of value out of nothing to create property, as wool prices fell and amenity values rose, the Lockean Crown-owned nothing of unimproved land became more valuable than the run-holder-owned something of improvements. 107 To capitalize on this re-configured asset, lessees had to assert the invisible, deeply implicit, right of exclusive possession.

Evidence of this momentum is scant but present. In 1966 a commentator counselled against the imminent privatization of public land when writing

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102 Mr. Baxter [1948] NZPD 4009
103 Kaiser Aetna v United States 444 U.S. 164, 177.
104 That encouraged investment in farm improvements, facilitated financial security, and avoided consequential scenarios of overstocking and land degradation.
105 Pastoral High Country proposed Tenure Changes and the Public Interest: A Case Study, LINCOLN PAPERS IN RESOURCE MANAGEMENT: No 11, 1983 University of Canterbury & Lincoln College, at 48
106 Encyclopaedia Brittanica.
107 Brower, supra note 91, at 69-71.
I must deplore the way in which the benefits of the 1948 Land Act have been and are being converted into capital gain to the individual. Higher rents with rebates for improvements would have probably been a better method than charging the often excessively low rents fixed on reassessment.  

Nearly twenty years later, this initial "conversion of capital gain" had become a fully-fledged "view on land ownership"

It is important that we do not mistake narrow group interests or ideological views on land ownership as representing the public interest in the high country. The question of appropriate tenure can only be addressed usefully once we have a real understanding of the nature of the public interest in the high country.

The dynamic surrounding the practical privatization of the public interest in the high country, "the high country community talk[ing] up the extent of their rights," is particularly evident around the claim of "trespass rights." Trespass is a remedy at common law, not a right. The conjunction of two diametrically opposed terms in the expression "trespass rights" suggests that this property claim has little to do with common law precedent. Rather trespass rights have proved an effective sword for privatization creep, playing out as a zero sum property rights game at the expense of public property rights in Crown land, particularly traditional access rights. From 1968 "trespass rights" have assumed a uniquely statutory form. In invoking the state’s aid in enforcing (in this case a heightened statutory) trespass right, Joseph Singer may have concluded that the interests of the private run-holder had become imbricated with that of the Crown. But such subtlety was not then on the legislative agenda.

In 1968 a conservative National Party Government (traditionally sympathetic to the concerns of high country run-holders) introduced a Trespass Bill designed to "give a greater degree of protection to farmers and other landowners against irresponsible trespass, but without taking away freedom of access to the open country so valued by the citizens of New Zealand.” The Labour Opposition, on the basis that the common law was sufficient protection, opposed the Bill. Following the passage of the 1968 Trespass Act, there were seven reported cases involving prosecutions for statutory trespass, of which six related to urban settings, suggesting that the statute’s rationale was over-stated.

In May 1977 an article appeared in the Tussock and Grassland Review written by Ruth Richardson, legal adviser to Federated Farmers, and later National Party finance minister, proposing certain amendments to the 1968 Act to make it more applicable to farmers and rural trespass. According to Labour MPs at the time of the introduction of the 1980 Trespass Bill, the justifications for the 1980 Bill were obscure, given the existence of the 1968 legislation, and could only be attributed with any certainty to this article. Debate surrounding the passage of the 1980 Trespass Bill revolved around the protection of private property rights (from the Government’s perspective) and the Bill’s unnecessary and oppressive nature (from the Opposition).

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109 Pastoral High Country proposed Tenure Changes and the Public Interest: A Case Study, LINCOLN PAPERS IN RESOURCE MANAGEMENT. No 11, 1983 University of Canterbury & Lincoln College, at 54.
111 Mr Palmer (Christchurch Central) 26 June 1980.
If those station owners can prevent New Zealanders from getting access to Crown land, in effect they will be the owners of the land. They will be able to say to wealthy Americans, “Sure you can come and shoot on my property, and I will give you the right of access to go and shoot on a whole mountain owned by New Zealanders”; and they will be able to charge thousands of dollars for that privilege....By this legislation New Zealanders will be wrongly prevented from going on to Crown property, which in effect they own. 112

This (farmers selling hunting or access rights) is the true explanation for the Bill now before this House. It has been introduced so that the manner in which people have been pursuing their recreational interests...will be changed, and so that people’s rights to access the back country can be cut off, and those rights can be flogged off to the highest bidder. 113

But it is the argument of the trespass rights' proponents that are arguably more insightful

Land has been purchased, and in return the Crown has issued estates in fee simple, or...in other instances, when leasehold land has been bought, leasehold titles have been granted. The essence -- although it is something the many legal luminaries on the other side of the House would not bother to declare -- is that title gives exclusive possession to the owner or occupier.... Those people are entitled to exclusive possession - and that has its origins in a grant from the Crown.114

While the statement is legally luminous for the fee simple estate holder, the Crown grant applicable to the pastoral leaseholder was section 66 of the 1948 Act. And that section contained no grant of exclusive possession. Its explicit absence left only scope for an implied property assertion, which by 1980 had reached the status of entitlement, at least in the minds of its proponents. In the years between 1948 and 1980, I want had became I am entitled.

Into the late 1980s and early 1990s, the view that pastoral tenure was achieving neither sustainable management nor economic viability, led to a working party on Sustainable Land Management (the Martin Report) conducting a South Island High Country Review.115 Its final report, handed down in April 1994, recommended the freeholding of those Crown lands not required for the public interest. While noting that the run-holder has “the right to exclusive occupation and rights to pasturage, but no right to the soil,”116 it observed that there were divergent views

There appears to be some uncertainty over the rights, interests, and obligations of lessees and the lessor. A recent paper sets out the views of the Federated Farmers High Country Committee...., and this perspective has been largely reiterated by the Office of Crown Lands.117

112 Mr Prebble (Auckland Central) 5 June 1980
113 Mr Palmer (Christchurch Central) 1 July 1980
114 Mr Kidd (Marlborough) 5 June 1980. This speech contains the only reference to exclusive possession in debates surrounding the Trespass Bill.
115 There was an earlier report in May 1982, a Report into Crown Pastoral Leases and Leases in Perpetuity (the Clayton report). It recommended the abolition of a separate pastoral tenure because it saw the distinction between rights to pasturage and soils as illusory, and that pastoral tenure had outlived its usefulness. Its recommendations were not acted upon. While the implied right of exclusive possession was more entrenched by 1982, the Clayton Report did not specifically note the right in its analysis of the post 1948 history of pastoral tenure.
116 The Martin Report, at 84.
117 Id.
The *Crown Pastoral Land Bill* of 1998 represented the unwinding of the Crown/run-holder partnership instituted in 1948, and a deliberate re-allocation of high country property rights that the Land Act had enacted, or not enacted. The 1998 high country solution was to reward the productive use of lower altitude and lakeside land by converting pastoral lease land capable of economic use\(^{118}\) into fee simple, and to swap higher altitude, less productive land into Crown conservation estate. Existing pastoral leases would endure, but no new pastoral leases would issue. The implied right to exclusive possession, strangely absent alongside the explicit right of exclusive pasturage, and no right to the soil, was interpreted in 1998 as if it were there. There was no need to specifically enact the right because its implicitness seemed explicit. In bureaucrats’ minds, pastoral leases conferred rights of exclusive occupation. However in attributing the source of this authority, departmental advices were vague, referring either to the rights inherent in the lease contract, or section 66 of the *Land Act*. Run-holders themselves were said to consider the Bill a freeholding exercise.

They argue essentially that their pastoral leases are the next best thing to freehold...and that essentially they were freeholded in 1948 under the existing Act, and really they already have virtually the whole bundle of rights that freeholding would represent.\(^{119}\)

During the select committee stage, several submissions and reports were relevant to the entrenched assumption that run-holders enjoyed a right to exclude. For example the Legislation Advisory Committee submitted in relation to the proposed wording of Clause 3 Tenure

A pastoral lease gives the holder-

a) The exclusive right to pasturage over the land  
b) A perpetual right of renewal for terms of 33 years  
c) No right to the soil  
d) No right to acquire the fee simple of any of the land

that sub-clause a was technically unnecessary. Since the lessee already had exclusive possession of the pastoral land, a grant of exclusive right of pasturage was superfluous. Ultimately the Committee’s recommendation was not acted upon. The recommendation of no change was substantiated by the advice that “Clause 3a brings forward section 66 of the Land Act which qualifies the basis of the lease.” This reasoning demonstrates an unshakeable belief in the implicit presence of the right in section 66, despite the physical evidence to the contrary.

The Commissioner of Crown Lands gave unequivocal advice on at least two occasions to the select committee that “[p]astoral lessees have the right of exclusive occupation and quiet enjoyment of their leases.” The commissioner attributed the source of this authority to section 66. The final Report of the Primary Production Select Committee repeated the Commissioner’s advice that “lessees have the right of exclusive occupation.”\(^{120}\) It cited no authority for its assertion. In the final Explanatory Note to the Crown Pastoral Land Bill, it

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\(^{119}\) Mr Blincoe, (Nelson) 6 April 1995.  
\(^{120}\) Commentary No. 86-2 at ii
explained Part I as enacting, with some modifications, provisions equivalent to those in the Land Act 1948 relating to pastoral land. In respect of clause 3 it said “Clause 3 specifies the rights conferred by a pastoral lease, and is to the same effect as section 66(2) of the former Act.”

Once out of the select committee stage, debates in Parliament as to the wording of Clause 3 of the Bill were scant. A run-holder MP belled the cat when he justified the Bill as protecting the farmer’s right to exclude from “widespread abuse” by recreationalists.

Whilst we have had access to the pasturage in days gone past, we the farmer lessees were the only ones who had the major interest in the past, present and future outcomes for this country. However all that is changing. ...more and more of the general population...sees the potential for this land for their own personal recreational and conservation purposes. They believe that the Crown is the ultimate owner, they should have a right to have some uninterrupted passage on to this country.

In 1948 the right to exclude was irrelevant to an empty expansive landscape. Secure tenure and low rent for forage were headline high country imperatives. “Secure tenure” translated into 33-year renewable terms, security for farmer improvements, and security for mortgage collateral. Arguably it might also have meant security from unreasonable interferences in pasturage use, in the sense of Eric Freyfogle’s settled agrarianism. A right to exclude was never enacted. Indeed there are two reasons to believe it was deliberately omitted: the right to freehold was denied against the general tenor of the 1948 Land Act; and section 66 expressly stipulated that run-holders had “no right to the soil.” But over the ensuing decades as economic fortunes changed, the implied power to exclude gathered momentum and came to look more and more like a property right, in the sense of Raymond’s “things of value.” By 1998 the implied power to exclude had become a de jure right in respect of those runs that were capable of freeholding. The enforceability of the implied right in the remaining statutory pastoral leases was the “last frontier.”

Vc. 1998 – 2008 Tenure Review

Passage of the Crown Pastoral Land Act 1998 authorized what the Minister of Lands of the day, Hon Denis Marshal called “a decent divvy-up.” To achieve the stated aim of sustaining both ecological systems and the economic viability of farming, the CPLA land reform process, called “tenure review,” “divvies” Crown pastoral land into two types of

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121 There were three speeches, one from Mr. Herlihy, run-holder MP for Otago, another from the Minister for Conservation, Mr. Carter, and one from Green MP Ms. Fitzsimmons.
122 G Herlihy (Otago) 7 May 1998 [8340-8341]
123 Stuart Banner construes this expression to mean having no proprietary interest in the land, see STUART BANNER, POSSESSING THE PACIFIC 36 (2007).
124 Raymond describes forms of ownership that are in “a limbo of sorts, legally short of being a ‘vested right’ of property, but a ‘thing of value’ nonetheless.” Page 431
126 In introducing the Bill to Parliament, the Minister stated, ‘[t]he pastoral lease estate has had a long history of grazier settlement that is as long as the European presence in New Zealand. This estate is now the last frontier (emphasis added) of Crown land settlement. I believe that the time has finally come for the Crown to withdraw from an interest in the productive area in this estate.’
tenure. Land deemed “capable of economic use ... [may now be] freed from the management constraints” of pastoral tenure. On the ground, “freed from management constraints” translated to “freehold disposal.” Pastoral land with “significant inherent values” for conservation, recreation or heritage was to be protected by “creation of protective mechanisms, or (preferably) by the restoration of the land concerned to full Crown ownership and control.”

Conservation and recreation interest groups suggested the tenure review idea during the fervor of the 1980s state sector reforms in New Zealand. While farmers had been advocating for the right to convert to freehold in an affordable manner for some decades, the NZ Deerstalkers Association suggested reform was necessary after the advent of lucrative helicopter hunting in the 1970s meant that many runholders started denying recreational hunting access. This “made life hectic for the poor deerstalkers.” The Deerstalkers and their angling and conservationist colleagues in Fish and Game Councils of NZ and the Royal Forest and Bird Protection Society advocated for Mr Marshall’s divvy-up, in which recreationists would gain guaranteed access to land above 1000m and the same fragile land would be protected from sheep grazing. Scant attention was spent on potential conservation or recreation values in land below 1000m in elevation.

Though all the active interests – farming, conservation, and recreation – supported the idea of tenure review at the time, it was the desire for recreation access that provided the impetus for the land reform. As tenure review unfolded, the recreationists’ desire for access and the farmers’ assertions claims of exclusive possession loomed large politically and economically.

Indeed, the rights and powers conveyed and implied in the pastoral lease had certainly grown into Raymond’s things of value by the time the Crown started dismantling leases at the turn of the 21st century. By the end of 2008, the Crown had disposed of 269,510 ha as freehold, with title vested in the former lessee; 213,848 ha had been shifted from Crown ownership under pastoral lease to public conservation land, managed by the Department of Conservation. Some of the privatized land was on the shores of the majestic Lakes Wanaka, Wakatipu, Pukaki, Ohau, and Tekapo, most was below 1000m in elevation, and all was deemed “capable of economic use.” Still, the Crown paid $27.5 million more to the lessees to purchase pastoral rights in land deemed to have little commercial capacity, than the lessees paid the Crown for freehold rights. Since privatization, 28 of the new freehold owners have subdivided and or sold some or all of their land. These 28 paid $6.9 million in

127 Crown Pastoral Land Act, 1998, §24a(2)
129 Crown Pastoral Land Act, 1998, §24a(3)
130 Brower, supra note 91, at chapter 2
131 NZ Deerstalkers Association advocate quoted in Brower, supra note 91, at 33
132 Brower, supra note 91, 26-37
133 Brower, supra note 91.
aggregate for freehold rights, and have sold about 46% of that land for a total of $135.7 million.\(^{134}\)

If there were no implied or explicit right of exclusive possession in pastoral leases, deerstalkers likely would not have suggested tenure review in the first place. But even if it had happened absent exclusive possession, the financial side of the land divvy-up would have been different. To purchase the runholders’ exclusive pastoral (but not possession) rights, the Crown likely would have not paid the runholders $27.5 million more\(^{135}\) than the runholders paid the Crown to attain freehold title. In short, access is paramount in tenure review.

**Vd. Fish and Game Litigation**

In 2007, access to the high country came under legal challenge when a Waikato Law Review article argued that pastoral leases are statutory, not common law, leases, that the statute does not explicitly grant exclusivity, therefore pastoral leases do not grant exclusive possession as had long been implied, assumed, and obeyed.\(^{136}\) The Minister of Land Information sought legal advice in the form of a Crown Law Opinion, which concluded that the very purpose of a pastoral lease – pastoralism – implies a grant of exclusive possession because “it would be impossible for the holder to undertake…farming operations without exclusive possession of the land.”\(^{137}\) The Minister further deemed it unlikely that anyone would bring such a question to the attention of the court “because both the Crown and the lessees agree that they’ve got exclusive possession.”\(^{138}\)

But the Fish and Game Councils of New Zealand\(^{139}\) defied the Minister’s prediction and sought a declaratory judgement of the High Court. The Crown quickly accepted Fish and Game’s invitation to join the case, but the farmers held out. Federated Farmers, the premier farming lobby group, quickly issued a media release comparing Fish and Game to terrorists. The Federated Farmers’ high country chairman called Crown pastoral land “privately held land,” and compared a pastoral lease to a residential tenancy.\(^{140}\) Several months later, the farmers joined the case and hired a Queen’s Counsel.

Throughout debates over tenure review and during the run-up to the declaratory judgement, farmers invoked Lockean visions of property and nation-building in order to

\(^{134}\) A Brower, P Meguire & A DeParte. (in press) *Does tenure review in New Zealand’s South Island give rise to rents?*, NZ ECONOMIC PAPERS.


\(^{135}\) Id.


\(^{138}\) Chris Laidlaw, Interview with Hon David Parker, Donald Aubrey, Ann Brower and Kevin Hackwell, Radio New Zealand. ‘Sunday Morning with Chris Laidlaw.’ 7 July 2008, 10-11 am.

\(^{139}\) Fish and Game represents recreational anglers and game bird hunters. It also has statutory authority to issue hunting and fishing licenses. But it is not an agency of the Crown.

\(^{140}\) Federated Farmers, ‘High Country No Wild West’ (Press release, 27 August 2008).
support their exclusive possession claim. They argued that security of tenure is required for investment in improvements, which are beneficial to the land and to the economy of the nation. However, they consistently conflated secure tenure with exclusive possession and seem to ignore that the former can exist without the latter. For example, in 2006 when conservationists lobbied for a moratorium on tenure review, farmers argued that high country relations would be much smoother if “everyone recognized that … the land [the runholders] farm is theirs.” And in response to the Waikato Law Review argument that pastoral leases make no explicit grant of exclusive possession, the Federated Farmers high country chair again conflated security with exclusivity: “These pastoral leases have been provided on an exclusive basis. Without that security of tenure, I don’t believe that we would have achieved the sorts of outcomes that we have for the South Island tussock grasslands. … security of tenure does deliver good results.”

Ve. The Judgment - *The New Zealand Fish and Game Council v Attorney General and Others (“Fish and Game”)*

The *Fish and Game* litigation centred on an application brought by the New Zealand Fish and Game Council (as plaintiff) seeking a declaratory judgment143 “that pastoral leases granted under the *Land Act 1948* do not confer exclusive possession or exclusive occupation of the land contained in the leases.” The hearing was heard before a single judge of the New Zealand High Court, Justice Simon France.144

The case is one of a handful of judicial decisions on pastoral leases in New Zealand, and the first to squarely address the issue of whether grantees of pastoral leases enjoy exclusive possession of their runs. In Australia145 there is a large body of case law relating to pastoral leases. The legal and spatial intersection of native title rights146 and pastoral lease rights was the subject of intense judicial scrutiny by the High Court of Australia in a series of three landmark decisions, beginning with *The Wik Peoples v State of Queensland* (*Wik*).147

*Wik* distinguished pastoral leases from common law leases on the basis that pastoral leases were creatures of statute divorced from common law antecedence.

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142 Donald Aubrey in Chris Laidlaw, Interview with Hon David Parker, Donald Aubrey, Ann Brower and Kevin Hackwell, Radio New Zealand. ‘Sunday Morning with Chris Laidlaw.’ 7 July 2008, 10-11 am.
143 Declaratory Judgments Act 1908 § 3 (NZ).
144 In the New Zealand court hierarchy the High Court is not the highest court. The Court of Appeal is that jurisdiction’s superior court. But in Australia the High Court is the highest court.
As creatures of statute they were to be seen as conferring an interest consistent with the construction of the lease and the statute under which it was granted. That statutory “bundle of rights” comprising a pastoral lease did not confer exclusive possession.\textsuperscript{148} Whether a pastoral lease conferred exclusive possession or not was a matter for individual interpretation of the lease and statute in question, but significantly there was no automatic implication of certain rights as was the case with common law leases. \textit{Wik} and the line of High Court authority that followed represented a preference for the explicit law of statute, and the rejection of the common law of leases on the ground that the latter was legally, contextually and historically inconsistent with the nature of the pastoral lease. The \textit{Wik} majority was informed by the research of historian Henry Reynolds who wrote of the origins of the unique pastoral lease. Reynolds cited the views of Secretary of State Earl Grey in the formative mid 19\textsuperscript{th} century, who advocated “that pastoral leases give only the exclusive right of pasturage in the runs, not the exclusive occupation of the land, as against the Natives using it for the ordinary purposes.”\textsuperscript{149} Justice Gaudron reflected this historical background when she observed in \textit{Wik}

It is clear that pastoral leases are not the creations of the common law. Rather they derive from the specific provisions in the Order in Council of 9 March 1847 [issued pursuant to Imperial Sale of Wastelands legislation of 1846]...and so far as is presently relevant, later became the subject of legislation in NSW and Queensland. That they have now and have been for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under the legislation of the Australian states and earlier the Australian colonies authorising the alienation of Crown land.

In \textit{Fish and Game} Justice Simon France similarly averred to history, noting that “[a]lthough the 1948 Act is the key piece of legislation \textit{because it is the Act under which the pastoral lease were created} (emphasis added), it was by no means the first legislation of its type...starting with the Waste Lands Ordinance of 1849.”\textsuperscript{150} Moreover the simplicity of the Australian approach to the interpretation of pastoral lease rights impressed Justice Simon France, who said, “[i]n some ways the Wik idea of the pastoral lease being a creature of statute has attractions in that it frees one from a constant attempt pigeon-hole terms or conditions into a common law equivalent.”\textsuperscript{151}

The court’s eventual decision affirmed the widely-held expectation that pastoral leases do confer the right of exclusive possession on run-holders. The once presumed right to exclude had migrated from deep implication to explicit case law precedent. The plaintiff has not appealed.

While the final outcome is clear, the court’s reasoning is not as clear-cut. Indeed much of the judicial journey to the final determination is one of inference, the searching for

“contextual clues”, and an instinctive judicial preference. To the extent that the court considered pastoral leases under the *Land Act 1948* as “common law leases” or “true leases,” the minority opinion in the High Court of Australia’s decision in *Wik* was preferred to that of the majority. As Justice Simon France noted, “eminent jurists can reasonably disagree...I make no attempt to add to the debate, but note that, with respect, I prefer the minority reasoning.” Justice Simon France attributed his choice by referring to a judgment from another Australian High Court case where (minority) Justice McHugh argued that “the reservation of a right of entry to the grantor... is not only consistent with, but indicative of the grantee having the legal right to exclusive possession” and that “there is nothing about the grant of a lease for pastoral purposes that is inconsistent with the lessee having the legal right to exclusive possession....”

In keeping with this common law analysis, to the extent that the determinative issue was the *substance* of the grant, and not its label,\(^{152}\) the court described the language of the *Land Act 1948* as “a mixed bag.” Moreover the provisions of the “(pastoral) lease document itself adds little to these (statutory) provisions.” The court observed that the *Land Act* used “common law terms, such as lease and licence, in ways that were not always consistent with the common law concepts underlying them.” Thus there was little substantive difference between a “pastoral lease” and a “pastoral occupation licence” except that the former had a right to renew. In this regard, Justice Simon France was at one with the *Wik* majority. In *Wik*, Justice Gummow said “land law is but one area in which statute may appear to have adopted general law principles and institutions in a new regime, in truth the legislature has done so only on particular terms.”\(^{153}\)

Despite the “mixed bag” on offer, the High Court in *Fish and Game* was inclined to prefer those “contextual clues” that evidenced the grant of exclusive possession dating back to 1948.\(^ {154}\) This approach, a discernment of legislative intent on the balance of the available evidence, is defensible. But it was also deeply reliant on inference and a selective preference for one set of evidence over the contrary. There were few silver bullets that run-holder advocates had so confidently predicted would explicitly vindicate the right in the lead-up to the hearing.\(^ {155}\) The High Court was no more successful than others\(^ {156}\) in locating the absent express grant of exclusive possession in section 66 of the *Land Act 1948*.

There are specific criticisms of the judgment. There is a logical difficulty in citing contextual clues that are derived from later amendments to the principal Act, in effect passed into law decades after the rationales of 1948.\(^ {157}\) In other words, contextual clues from the future

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\(^{154}\) The court analysed the terms of the pastoral lease for ‘Glenmore Station’ described as ‘PO1’, possibly the first pastoral lease issued under the new Act in 1948.

\(^{155}\) Donald Aubrey in Chris Laidlaw, Interview with Hon David Parker, Donald Aubrey, Ann Brower and Kevin Hackwell, Radio New Zealand. ‘Sunday Morning with Chris Laidlaw.’ 7 July 2008, 10-11 am.

\(^{156}\) For example the Commissioner of Crown Lands assumed that the right was in section 66 in its advice to the select committee charged with responsibility for the *Crown Pastoral Land Bill* in 1995.

\(^{157}\) For example section 67A was added to the principal act in 1968 around the same time as the first rural trespass legislation. Also sections 66A and 68A were relied upon. Indeed 75% of the “clues” relied upon came from later amendments cited in *The N.Z. Fish and Game Council v. Her Majesty’s Attorney-General in respect of Comm’r of Crown Lands*, [2009] CIV 2008-485-2020 (H.C) at [54] to [79].
provide little context of the original thinking of the Act’s drafters, whether on the crucial issue of exclusive possession, or otherwise. More holistically, the exercise of discerning statutory intent is one where routinely the finding of alternative interpretations is a matter on which “eminent jurists [also] do reasonably disagree.”

There was also a difficulty in Fish and Game maintaining a consistent distinction between common law and statutory leases. While the judgment appears to affirm that New Zealand pastoral leases (unlike their Australian counterparts) are common law leases, it struggled to be definitive. In various places the judgment talked of leases “established under the Act” or being part of a statutory “scheme.” This confusion was most amply illustrated by the court’s misconstrual of key aspects of Wilson v Anderson, one-third of the Australian trilogy of pastoral lease jurisprudence. Wilson v Anderson conformed to the Wik precedent that pastoral leases are creatures of statute, the majority in its conclusions stating that “the interest conferred under section 23(1)(a) of the Western Lands Act and identified as a “lease in perpetuity; was a creature of statute forming part of the special regime governing Crown land.” The majority regarded the Western Division “lease in perpetuity” as the equivalent of a determinable fee simple estate, and not a leasehold interest at all. Another (particularly pertinent New Zealand analogy) the Australian High Court drew in Wilson was with the 999-year “lease in perpetuity” briefly issued under the Land Act of 1892.

The comparison that the Fish and Game decision sought to make between the 33-year lease with perpetual (but not guaranteed) renewals under section 66, and the conceptually different Western Land Act “lease in perpetuity” was inaccurate in fact and in law. The distinction between a “lease in perpetuity” and a “term lease with perpetual (but not automatic) renewals” is more than one of mere semantics. In Wilson the legal consequence was to equate the former to a limited fee simple estate. The conflation of the term “perpetual” to capture, and thereby purport to compare, a common law leasehold with a statutory freehold is flawed. The inherent problem in seeking to draw comfort from Wilson v Anderson was that Justice Simon France preferred neither the majority nor the minority reasoning in Wilson. The dissenting reasoning of Justice Kirby behind his finding that the pastoral lease did not confer exclusive possession, was inter alia that the word “perpetual” was a trope used to facilitate secured finance.

Fish and Game represents the final denouement in the run-holder journey of I want to I am entitled, begun in the years after 1948 when the economic straitjacket of pastoral tenure first stared to impact. For these few, the spatial and legal jigsaw of the high country geography is now complete, freehold land converted under tenure review is secure territory

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158 Wilson v Anderson [2002] HCA 29 at [109]
159 A determinable fee simple estate incorporating concepts of quit rent granted by the Crown in NSW prior to 1849.
160 Wilson v Anderson [2002] HCA 29 at [104]
161 Wilson v Anderson [2002] HCA 29 at [158].
for the right to exclude, and post 2009 the right is confirmed in remaining pastoral leases, despite it never being in the statute and despite the common law precedent of the Australian High Court. *Fish and Game* closed the last frontier and transformed an implied property claim into a vindicated and explicit property right.

**VI. Conclusions**

*Fish and Game* is interesting as a study in the competition between explicit and implied property. Farmers had long asserted an entrenched exclusionary power that required staring hard at the space between the lines of statute to find. In the decision, the judicial starting point was the space between, not the text of, the lines. In an unusual reversal of the onus of proof, the onus was on the statute, not the implication.

This is but one example of our proposition – that power, narratives, assertion, strategy, and property itself work together to allow implied to prevail over explicit, and private over public. The story of access to the South Island high country also illustrates a broader pattern in implied property, that an assertion of exclusion establishes power that often becomes a private right recognized at law. In the *Fish and Game* decision, the judgment relied first on the assertion and expectation of exclusivity instead of the statute. This was the Shroedinger’s cat moment where the judgment makes implied law explicit. While we like to think of explicit law as prescient, when explicit grows out of implied law it cannot avoid being both *post hoc* and *ad hoc*.

Ambiguity let Piglet think that Trespassers William was his grandfather. Piglet’s assumptions were innocent and jejune, nonetheless he used devices seen in our case study; assertion (“he said it was his grandfather’s name”), narrative (“it had been in the family for a long time”), and a lawmaker’s transformation of implied claim into explicit fact, (“’I’ve got two names,’ said Christopher Robin carelessly. ‘Well, there you are, that proves it’, said Piglet.”) In the adult world of implied property, ambiguity likewise favors the vocal claimant. But unlike childhood fantasy, the legal and political consequences are lasting and profound, for the private few, the public many, and the integrity of property itself.