

ROAD AND ACCESS LAW: SUCCESSFULLY HANDLING DISPUTES

James R. Arnold, Esq.
The Arnold Law Practice¹
San Francisco & Lafayette, California

COMMON ROAD AND ACCESS PROBLEMS AND SOLUTIONS

Scaling the Fence: How to Resolve Conflicts in the Shared Use of Private Roads

I. Introduction

Invariably, owners of private roads and access routes will face some conflict with unauthorized or excessive use over time. These problems are most commonly worked out informally. This is most likely due to the fact that the courts are inefficient arenas to resolve even the most basic confrontations among owners and between owners and the public. The judicial system can be ineffective when multiple competing views about “rights” and “duties” are expressed by third parties, government agencies, and legislative bodies.

Of course, owners of private roads can establish and protect their rights by threatening or pursuing legal action against intruders. But, when they do they inevitably confront an enormous doctrinal conflict that exists in our society between “property rights” and “public use.” The debate over public vs. private rights and use has historic, cultural, religious and ethnic foundations. The position that land, whether wide swaths or the margin of public roads, should be possessed to the total exclusion of the public or public agents is bound to encounter skepticism, regardless of the precise letter of the law.

The lesson for anyone seeking to resolve such conflicts, therefore, is to closely evaluate the alternatives that are available in light of the perspectives of the involved parties. The appropriate solution is that which will most realistically achieve the landowner’s objectives.

The four basic methods of resolution for resolving road and access disputes are “do-it-yourself,” alternatives to litigation such as mediation, using the assistance of the authorities, or filing a lawsuit. The following reviews the potential advantages or disadvantages of each method.

II. “The Do-It-Yourself – Negotiate With Your Neighbors Approach”

“Do-it-yourself” is by far the most common method of resolving disputes over road and access. By “do-it-yourself,” we are referring to anything from discussing a

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problem informally with a neighbor to sending a letter articulating specific demands. The process involves everything short of taking action with the help of a third party such as a private neutral person, the police, or the courts. By “do-it-yourself,” we are not referring to “self-help.” “Self-help,” as a legal concept, is only permissible where it is allowed by law and can be accomplished without committing a breach of the peace. (A breach of the peace refers to violence or threats of violence.)

“Do-it-yourself” solutions to road and access conflicts can be most effective in basic disputes with neighbors over a shared private road. In this situation, involving the authorities might be detrimental to the parties’ long-term relationship. Once a third party is brought into the equation, one side to the dispute may feel threatened. Do-it-yourself informal discussions with a neighbor may be more likely to establish rapport with a neighbor.

A hypothetical can illustrate the use of a “do-it-yourself” approach. Two persons, Smith and Jones, share the use of a short and narrow road in which they each own title to the center line. This “property line” road is their only access to their respective properties. One day, Smith, without Jones’ consent, parks his two valuable but unregistered antique cars at the end of the shared road. That evening, when Jones has a social event her guests find it difficult to park or turn around because Smith’s cars are in the way. There is no previous agreement between the two and both own title to the road in equal shares.

One can imagine the dilemma. Jones is frustrated with Smith and intends to call the police to remove the unregistered vehicles if nothing is done. Jones may have a legal claim against Smith for nuisance or trespass which protects his rights to enjoy and defend his property and his common use of the jointly owned road. Smith believes she is using what she owns, namely, part of the road that does not prevent access to Jones’ property.

Of course, a lawsuit will jeopardize what may have been a peaceable sharing of use of the road for many years. No one likes a neighbor who talks to them through an attorney. If Jones understands the negative implications of a lawsuit, Jones may prefer to approach her neighbor to see if they can work it out themselves.²

One must take extra caution, however, when making informal or unwritten agreements with one’s neighbors. If a dispute develops in the future, a lack of legal formalities can make the contract void or voidable. If the issue is serious and likely to come up again, an attorney should be consulted.

² California law is that each neighbor using an easement can use it for any use that does not interfere with the other easement holders. *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 706 (using easement area for grape vines and water tanks).

A. Advantages of the “Do-It-Yourself” Approach

- Can reduce ill-will between parties.
- Communication can be adapted to conform to the nature of the relationship between the parties.
- A creative agreement may be reached.
- Little to no out of pocket costs for resolving a dispute.

B. Disadvantages of the “Do-It-Yourself” Approach

- Binding contracts require certain formalities unfamiliar to most laypersons.
- Risk of losing exclusive possession through prescriptive easement or adverse possession.
- Risk of relying on an unenforceable agreement.
- Impact of frustration/anger on negotiations.³

III. Mediation

Alternative dispute resolution (“ADR”) is a system of strategies used to resolve conflicts outside court. Mediation is one type of ADR that can yield consensus without lengthy litigation.⁴ In mediation the parties agree to a neutral decision maker who facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. (Evid. Code §1115, Cal. Rules of Court Rule 3.800).

The mediator may first confer individually with each party to the dispute to see if they are evaluating their positions realistically. The mediator may act as a go-between, working down the conflicts, until a resolution is reached. Or, the mediator may meet with the parties together and facilitate a discussion to find a joint decision.

A. Advantages of Mediation

- Voluntary and nonbinding – educates the parties.
- Available at any time.
- Parties, not just lawyers, participate and negotiate.
- Speed.
- Cost.
- Confidential – prevents adverse publicity.
- Flexible – parties choose mediator and procedure.
- Creative Solutions possible.

³ As an example of a situation where neighbors were unable to reach an amicable agreement as to a shared roadway, see *Bunton v. Barber*, No. A106932 (1st DCA 2006), unpublished, 2006 WL 337730.

⁴ Other forms of ADR include arbitration (which can be binding or non-binding, and can involve less cost than traditional litigation), and other forms of non-court resolution of disputes.

B. Disadvantages of Mediation

- Courts cannot require a party to attend mediation, or pay mediation fees.⁵
- Non-binding.
- Success based on mediator's skill.

IV. Involving Law Enforcement Authorities

Another alternative for discouraged landowners to deter trespassers on private roads is to call the police or the sheriff. Landowners have attempted to use this approach when neighbors use a joint roadway. But all tenants in common have a common right to share equally in the possession of the entire property. So, a tenant in common of a parcel (including a roadway) cannot trespass on the commonly owned property. All tenants in common have the right to share equally in the possession of the entire property.⁶ California law requires that there be a (i) violation of a person's right of exclusive possession of land, and (ii) an unreasonable and substantial interference with the use and enjoyment of the land.⁷

In addition to disputes between common owners of roadways, there appear to be more disputes between owners of private roads and members of the public. One contributing factor is the growing interest in activities that seek out old roads and trails such as mountain biking, off road vehicle use, and public access to the ocean, rivers, and lakes. Outdoor sports enthusiasts may see little harm in riding on seemingly well-established trails, even though they may be privately owned.

In 2000, a group of landowners, mostly ranchers, in San Luis Obispo County become frustrated with ongoing public recreation on their property.⁸ They chose to contact the County Sheriff. The landowners recorded license plate numbers of cars they found parked near old trails and roads and sent lists to the authorities. The Sheriff then would make contact with the vehicle owners and would check for outstanding warrants.

The landowners also established a group program called Ranch Watch. The group provided notice to the sheriff and other law enforcement personnel that they did not want trespassers on their properties. The sheriff's officers would then stop interlopers who often were unaware that they were trespassing or that they were causing any harm.

The Ranch Watch program had mixed results. The landowners may have achieved some temporary success in reducing public use of their private roads and

⁵ *Jeld-Wen Inc. v. Marlborough Development Corp.*, (2007) 146 Cal.App.4th 536.

⁶ *Kapner v. Meadowlark Ranch Ass'n* 2004) 116 Cal.App.4th 1182, 1189.

⁷ *Rancho Viejo LLC v. Tres Amigos Viejos LLC* (2002) 100 Cal.App.4th 550, 561.

⁸ Steven T. Jones, *New Times*, *The Battle Over Access*, May 25, 2000, available at http://www.newtimes-slo.com/archive/2003-09-11/archives/cov_stories_2000/cov_05252000.html.

property. The involvement of law enforcement contributed to community divisiveness. Many recreational users see no harm in enjoying private and public land as long as they are respectful, but without regard to who owns the property. This fundamental difference in viewpoint between private landowners and public recreational users suggests that law enforcement authorities may not provide a complete remedy.

A. Advantages of Involving Law Enforcement Authorities.

- Protect privacy of landowners.
- Protect exclusive use of land.
- Save costs of filing lawsuits by using authorities as enforcers.

B. Disadvantages of Involving Law Enforcement Authorities.

- Drain law enforcement budgets.
- Create community divisions.
- Actions perceived as hostile may invoke retaliation.

IV. Involving the Judicial System.

Whether a roadway is actually owned by a private party is a threshold issue for filing a lawsuit with claims of trespass, quiet title and possibly a declaratory judgment. If the roadway is public, no one has a right to exclusive access.

In many rural areas with well documented histories this can be a challenge. Many rural landowners in California may be surprised to learn that, despite their deeds, many of their roads may have been and still are public roadways.

One California court upheld public ownership of a road by invoking more than 150 years of history.⁹ At issue was whether a group of labor protesters were trespassing at a sand and gravel mining area in Yuba County. The company which was being challenged by the protestors owned the sand and gravel mining area. The company had to prove that the roadway on which the protestors carried on their protest was a private, not a public, road. The company persuaded the local sheriff to arrest the protestors for trespassing.

The protestors challenged the company's claim that the road was private. The company argued that the roadway was never owned by Yuba County, or that the county had abandoned the road by acquiescing in private control and use for over a century.

The County was part of the lawsuit. It changed its position as to the arrest of the protestors. The County proved through written accounts and maps dating back to 1850 that the area had a long history of public use.

⁹ *Western Aggregates, Inc. v. County of Yuba* (2002 3rd Dist) 101 Cal.App.4th 278

And, even though the County had not used the roadway or exerted any possession or maintenance over the roadway for many years, the court required the company to prove public abandonment of the roadway. The court analyzed the complicated history in California of public ownership of roads. The court noted that prospectors who established mining camps in the 1850s were de facto trespassers on public lands.¹⁰ The court found that federal mining legislation, dating from at least 1866 caused the confusion. The 1866 mining law is the source of the doctrine that public roads can be established without being recorded or patented out of government ownership. And, such roads would be recognized even though they conflicted with the exclusive possession granted to owners of property for which the government had issued patents.

Another, more recent dispute in Montana involving private parties demonstrates the need for a plaintiff to have a clear title to a road before starting a lawsuit for trespass. Two landowners in a rural part of the state bought their properties along an old rural road; they installed a locked gate in an attempt to establish exclusive rights to the road and the property accessible by the road.¹¹ Two hunters who had used the road for 20 years decided in 2003 to engage in “self-help.” They broke the locks on the gate and proceeded to use the old rural road.

The two landowners then sued the two hunters, other landowners served by the road, and others, in an attempt to establish in the courts that the roadway is private. The two hunters face up to \$50,000 in penalties, plus legal fees. After the lawsuit was filed it became clear that the public had been using the road since at least the early 20th Century. The hunters argue that public ownership had therefore never ended – the road was never legally abandoned because the state legislature had never acted to do so. It remains to be seen whether this will convince the court that, even though the owners paid for the road, they never actually owned it. As of January 2008, the lawsuit had been postponed.

One reason the owners may be attempting to exclude the defendants is to protect their exclusive ownership. The value of their properties is enhanced if they can prove that no third party, including the general public, has a legitimate right of access from the road to the public lands adjacent to their property. The landowners appear to be seeking to establish their private and exclusive rights to the road through the doctrine of prescription, namely, by excluding the public for five years they gain exclusive title to the road.

¹⁰ *Western Aggregates*, 101 Cal.App.4th at 293; “The common law and the civil law (from Rome through Spain and Mexico) held that a gold mine presumptively belonged to the sovereign,” *citing* (1 Lindley on Mines (2d ed.1903) § § 2-4, pp. 6-9, § § 11-12, pp. 16-19 (Lindley).

¹¹ [The Missoulian](http://www.missoulian.com/articles/2007/04/05/news/mtregional/news09.txt), *Locked out - Deer Lodge Road Latest in Battle Over Access*, available at <http://www.missoulian.com/articles/2007/04/05/news/mtregional/news09.txt>; [The Montana Standard](http://www.montanastandard.com/articles/2008/01/30/opinion/hjbjgjjjjjd.txt), *Carten Creek Road Future Uncertain*, 1/3-/2008, available at <http://www.montanastandard.com/articles/2008/01/30/opinion/hjbjgjjjjjd.txt>

California law, for example, recognizes prescriptive rights. For example, trespassers on property (or those seeking to end long established uses by third parties) can establish an easement by prescription. To do so, they must have (1) actual possession, (2) that is open and notorious to the true owners – or any other claim of right, (3) continuous for five years, (4) hostile to the title of any other owner, and (5) under a claim of right.¹²

The Montana dispute is not resolved, but it illustrates one of the continuing conflicts over use of private and public roadways. Using the court system requires patience, significant costs, and includes a risk of alienating other property owners. On the other hand, those with legitimate claims of ownership have only the courts from which to obtain a binding decree as to title and rights to use. A court-imposed solution may be the only way to achieve certain objectives.

A. Advantages of Filing a Lawsuit.

- Establish exclusive possession to a road by court decree.
- Enhances land value.
- Ensures marketability of title.
- Protect privacy of owner.
- Send a clear message to the public that trespassers will be violated.

B. Disadvantages of Filing a Lawsuit.

- Bad public relations.
- Establishes community divisions.
- Less likelihood to work out future conflicts informally.
- Costly.
- Questionable whether enhancement of land value will exceed cost of suit.
- Final costs are unknown at the outset of litigation.
- Uncertainties may remain about public ownership

V. Conclusion

Disputes over private roads and access rights are increasingly common in California as the population continues to grow, particularly into formerly rural areas. Owners and prospective owners of these roads need to understand how to manage the balance between private rights and public assumptions as to access.

Accommodating all interests may not be possible. However, continuing problems will arise because of the conflict between assumptions of rights to public access and assumptions of total exclusivity of private use of roadways and access routes.

¹² *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal. App.4th 1798, 1803; *Silacci v. Abramson* (1996) 45 Cal. App.4th 558, 562.