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Garfield County v. WHI, Inc.: Omen of Change for Public Land Access Policy

Laramie D. Merritt

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I. INTRODUCTION

In *Garfield County v. WHI, Inc.*,[1] the Tenth Circuit ruled—much to the delight of interest groups and land management agencies seeking to preserve traditional access to public lands[2]—that the United States had standing to sue in the public's behalf for access by prescription or by a grant implied under R.S. 2477. The United State's involvement in *Garfield County* suggests that land management agencies have begun adopting a policy favoring litigation of access issues in behalf of the public. This policy promises action where inaction has long prevailed and is a welcome addition to the access advocate's arsenal.

But interest groups and land management agencies should be wary. Litigation can complicate matters which previously were settled quietly. Courts are likely to demand more meticulous study and more public input than traditionally has been required. Moreover, as the judicial process is seldom predictable, a policy of leaving land access issues to the courts could create unnecessary difficulties. For instance, while litigation can bring finality to long-standing land access disputes, it may also make it harder to change decisions which later prove undesirable. In a land access context, the results of litigation may be too final.[3] For these

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1. 992 F.2d 1061 (10th Cir. 1993).

2. In this Note, the term "public lands" generally refers to lands managed by the Bureau of Land Management (BLM), the United States Forest Service (Forest Service), and similar federal agencies to which the public has traditionally had access. For other definitions of "public lands," see Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 832 (1993).

3. The effects of precedent and public policy marble the American justice

reasons, interest groups and land management agencies would be wise to consider the effect *Garfield County* will have on land access policy and dispute settlement.

This Note considers the effects and desirability of *Garfield County* in a historical, political context. Part II examines the laissez faire approach which agencies,[4] courts, and Congress have traditionally taken to land access problems. Part III discusses the manner in which *Garfield County* strengthens the position of access proponents and land management agencies. Part IV demonstrates how public demand

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system. The influence one decision exerts on future litigation is often apparent only after time, and the workings of policy in a particular case are often identified only in retrospect. Public land access decisions show that a lack of clearly defined policy can "result in inconsistent court rulings" and "conflicts that in some cases could have been prevented." U.S. DEP'T OF AGRICULTURE FOREST SERVICE, TRAVEL MANAGEMENT: BRINGING PEOPLE AND PLACES TOGETHER, REPORT OF THE NATIONAL ACCESS AND TRAVEL MANAGEMENT STRATEGY TEAM 14, 19 (Jan. 1992) [hereinafter TRAVEL MANAGEMENT].

4. The Forest Service and BLM often approach public land management differently and report to different departments (the Forest Service reports to the Secretary of Agriculture, while BLM reports to the Secretary of the Interior). However, some similarities in how these agencies approach access issues can be partially explained by their "multiple-use" agendas. *See* WILLIAM E. SHANDS, FEDERAL RESOURCE LANDS AND THEIR NEIGHBORS 28 (1979). "Multiple use," as defined in the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1988), means "management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people." Section 528 of that Act specifically mentions "outdoor recreation" in an alphabetical list of permissible uses. Another federal statute defines multiple use, as it relates to both Forest Service and BLM lands, similarly. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988). For these reasons, this Note treats the policies of these agencies as being comparable except where clearly distinguishable.

Because BLM, the Forest Service, and other land management agencies use independent programs to manage different public lands, some authors address challenges facing one agency without acknowledging that other agencies have similar access problems. *See, e.g.*, Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373 (1987) (generalizing land management agencies under a "BLM" label without mentioning that the Forest Service faces the same problems).

The danger remains that my Note presumes too much similarity. The faultiness of such a presumption is illustrated by the fact that BLM has proposed more restrictions on claiming R.S. 2477 roads than has the Forest Service. Moreover, the Forest Service has often been more receptive to public input than BLM in management decisions. Indeed, these agencies have often clashed directly. "Access to the federal land is a significant and persistent source of friction between the Forest Service and [BLM] and their neighbors. Present policy, programs, and funding appear inadequate to resolve these problems in a timely fashion." SHANDS, *supra*, at 48. However, though differences exist, the scope of this paper must be limited to access problems facing both agencies similarly.

for land access encourages agencies and local governments to provide better access. Part V further explores the reasons agencies and interest groups benefit from *Garfield County*—as well as from other related, proposed actions affecting land access policy and dispute settlement—and also considers the limitations of the *Garfield County* litigation solution.

II. LITIGATION AND LEGISLATION INDICATE TRENDS IN ACCESS POLICY

A. Informal Agency Policy of Inaction

From the time they were first created, agencies such as the Bureau of Land Management (BLM) and the Forest Service have faced the problem of access to and rights of way on federal lands. Although an effort has been made to maintain title to traditional rights of way for administrative purposes, public access, absent a significant management need, has not been considered "a suitable justification" to condemn or to litigate access.[5]

Land planners recognized as early as the 1960s that increased use of federal lands would intensify access needs.[6] Accordingly, "several steps [were] taken toward solving this long-standing problem."[7] There has not been, however, a consistent policy of clarifying when and under what circumstances public access exists.[8] Until recently, land management agencies have appeared reluctant to pursue litigation in an effort to quiet title to access routes.[9] This has been

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5. BUREAU OF LAND MANAGEMENT, WYOMING PUBLIC LAND ACCESS 16 (1989) [hereinafter WYOMING PUBLIC LAND ACCESS]; *see generally* Elk Mountain Safari, Inc. v. United States, 645 F. Supp. 151 (D. Wyo. 1986) (easements given to the Government for administrative purposes do not necessarily provide public access).

6. In the Federal Roads and Trails Act of 1964, Congress acknowledged that "construction and maintenance of an adequate system of roads and trails within and near the national forests and other lands administered by the Forest Service is essential if increasing demands for timber, recreation, and other uses of such lands are to be met." 16 U.S.C.A. § 532 (West 1986).

7. *Interior Announces Public Land Access Program*, 12 OUR PUBLIC LANDS, Apr. 1963, at 22 [hereinafter *Access Program*].

8. TRAVEL MANAGEMENT, *supra* note 3, at 1, 3.

9. One pragmatic reason not to sue for access is that it often engenders negative public opinion of the litigating agency. Employees of "grass-roots" land management agencies live among and associate with local landowners and are understandably concerned with avoiding the scorn and resentment that results when neighbors feel the management agency has infringed on their property rights. However, it is likewise true that neighborly relationships are strained, when recreationists perceive that employees of management agencies in their communi-

due, in part, to then Justice Rehnquist's opinion in *Leo Sheep Co. v. United States*, which required the government to obtain access to federal lands by "negotiation, reciprocity agreements, and the power of eminent domain" rather than by implication or prescription.[10] Another plausible explanation for this reluctance to pursue litigated outcomes was that some doubted whether the United States had standing to sue in the public's behalf for prescriptive access.[11] This Note takes the position that, on the whole, the standing issue has been an excuse to avoid litigation and an attempt to preserve resources by leaving access issues undetermined.[12] Considering the increased management problems created by public use,[13] it is conceivable that agencies have, in some situations, intentionally allowed access rights to remain uncertain in order to discourage land use and to minimize policing burdens. The Forest Service, for example, has referred to limited access as an effective means of preservation.[14] This management strategy is still visible in Re-

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ties are doing nothing to protect their rights to use public lands. A fair and consistent access policy is therefore in the interest of land management employees. Two recent sources have suggested that such local concerns do, and should, affect environmental policy. *See* Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81 (Spring 1993); Scott McCallum, *Local Action in a New World Order*, 23 ENVTL. L. 621 (1993).

10. 440 U.S. 668, 681-82 (1979). It is at least plausible that after this decision land management agencies would have been hesitant to claim access by prescriptive as well as implied easement, since either method would seemingly take land without compensating the private landowner.

11. Doubt as to standing can be seen in *Garfield County* as well as in earlier decisions. For example, in *Garfield County*, co-defendant Payne Land and Cattle Company argued that "the United States has no standing to assert its cross-claim." 992 F.2d at 1063. Furthermore, Payne Land and Cattle asserted that the district court had no jurisdiction over the United States' claim that the road in question was a public highway. *Id.* Although the jurisdictional defense failed in *Garfield County*, lack of jurisdiction was argued successfully in another case. *See* Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 249 (9th Cir. 1974) (finding that a claim of title under 43 U.S.C. § 932 (1988), commonly referred to as R.S. § 2477—an act declaring roads across public domain lands to be public highways—"is not alone enough" to create a federal question). For a discussion of R.S. 2477, see *infra* part II.C and note 28. This finding has indirectly helped create a question of government standing to sue in § 932 cases. To understand the standing question as it relates to environmental litigation in general, see Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, C855 A.L.I.-A.B.A. 1 (June 21, 1993).

12. For a discussion of the reasons for and effects of ambiguous access, see *generally* TRAVEL MANAGEMENT, *supra* note 3.

13. *See* discussion and accompanying notes *infra* part V.A.

14. U.S. DEP'T OF AGRICULTURE FOREST SERVICE, NATIONAL FOREST ROADS

search Natural Areas, where the Forest Service "lets trails fall into disuse and signs topple" as a means of "returning the spots to nature."[15]

It is now becoming apparent that an ambiguous and inactive approach is only exacerbating the access problem.[16] According to a 1992 assessment by the General Accounting Office, "legal public access to somewhat more than fifty million acres of [BLM and Forest Service] lands (or 14% of the total managed by these agencies) was considered inadequate."[17] Access proponents, however, estimate that "40% to 60% of all public land in the West has serious access problems and one-third has no legal overland access at all."[18]

B. The Courts: Letting the Problem Solve Itself

The Executive Branch and its agencies are not the only entities that have endorsed a laissez faire attitude toward access to public lands. Then Justice Rehnquist pointed out in *Leo Sheep Co. v. United States* that in 1962, "Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads."[19] His statement that the rarity of "litigation over access questions" in the years preceding *Leo Sheep* is a "testament to common sense" suggests that the Court considers the problem one which should sensibly settle itself.[20] Rather than pointing to policies and other

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FOR ALL USES 15 (1986); U.S. DEP'T OF AGRICULTURE FOREST SERVICE, ROADS IN THE NATIONAL FORESTS 15 (1988).

15. Carrie Casey, *RNAs: Lands Left Alone*, AM. FORESTS, Nov./Dec. 1992, at 44, 45.

16. *See generally* TRAVEL MANAGEMENT, *supra* note 3.

17. GENERAL ACCOUNTING OFFICE, FEDERAL LANDS: REASONS FOR AND EFFECTS OF INADEQUATE PUBLIC ACCESS (Apr. 1992), *cited in* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 159 (1993); TRAVEL MANAGEMENT, *supra* note 3, at 24 (20 million acres of National Forest do not have access).

18. Ken Slocum, *Battle in the West: Public Lacks Access To Much Public Land As Ranchers Bar Way*, WALL ST. J., Jan. 2, 1980, at A1; *see also* Chavez, *supra* note 4, at 1373 (inadequacy of access to BLM lands); Roger Tippy, *Roads and Recreation*, 55 KY. L.J. 799, 804-05 (1967) (considering problems between preservationists and recreationists).

19. 440 U.S. 668, 686 (1979).

20. *Id.* at 686-87.

problem sources, Rehnquist blames the "litigious" times for making access a judicial issue.[21] However, the problem is not as easily settled by "common sense" as Rehnquist believed. The judicial policy of leaving access questions to be settled in the private sector seems to have worked surprisingly well for a time, but the startling explosion of access litigation in the last fifteen years proclaims that traditional policies fail to meet modern access needs.[22]

C. Attempts to Legislate Access

Although Justice Rehnquist claims that "the 37th Congress did not anticipate our plight,"[23] there have been legislative attempts to provide access. In the Unlawful Enclosures Act of 1885 (UEA), Congress prohibited anyone from preventing "by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means . . . free passage or transit over or through the public lands."[24] Although Rehnquist found that the UEA was not "of any significance" in *Leo Sheep*,[25] subsequent cases have held that the UEA forbids landowners from denying access to public land.[26] Nevertheless, because the Court has not issued a clear ruling on the application of the Unlawful Enclosures Act, it

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21. *Id.* at 687.

22. "It may seem surprising that for a long time litigation over access questions involving federal lands was rare, but no longer—it seems that there has been more such litigation in the past fifteen years than in the prior two hundred. Many of the issues raised . . . result from the collision of ancient and modern law and policy." COGGINS ET AL., *supra* note 17, at 145-46.

23. Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979).

24. 43 U.S.C.A. § 1061 (West 1986).

25. 440 U.S. at 683. Ironically, just after finding the Unlawful Enclosures Act of no significance in *Leo Sheep*, Justice Rehnquist blames Congress for not anticipating the problem of access to federal lands being blocked by private landowners.

26. Stoddard v. United States, 214 F. 566 (8th Cir. 1914) (fencing not lawful when it denies access to public lands "for lawful purposes"); United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502 (10th Cir. 1988) (fence on private land which prevented antelope from accessing public land illegal). Although *Leo Sheep* appears to definitively hold that UEA does not provide general access to the public lands, previous cases suggest that UEA prohibits obstruction of access to public lands for legal purposes. *See, e.g.*, Camfield v. United States, 167 U.S. 518 (1897). One knowledgeable source asserts "*Leo Sheep* may not be definitive. . . . There is a lot of open space between *Leo Sheep* and *Camfield*." Interview with Constance Lundberg, Professor at Brigham Young University, J. Reuben Clark Law School, in Provo, Utah (Sept. 8, 1993). *See also* Ann M. Rochelle, *Problems in Acquiring Access to Public Lands Across Intervening Private Lands*, 15 LAND & WATER L. REV. 119, 133-34 (1980).

has not yet become a significant tool to open access to public lands.

The need for legislatively defined access arose soon after public domain lands began passing into private ownership or being reserved for public purposes.[27] Congress responded with a single sentence in the Mining Law of 1866, sometimes referred to as R.S. 2477, providing that a "right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[28] Although R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976,[29] state and county governments can continue to claim rights of way where title had vested before the statute was repealed.[30]

In the second half of the twentieth century, Congress has taken a more active position on access issues, passing, for example, the Federal Roads and Trails Act of 1964[31] and the National Trails System Act of 1968.[32] In the latter Act, Congress expressed intent "to provide for the ever-increasing outdoor recreation needs of an expanding population" by providing for "public access to" and "travel within" the "outdoor areas and historic resources of the Nation."[33] Some contest, however, that by attempting both to protect private property interests and to provide public access, the Courts and Congress together have created an impossible situation in which, "it is *illegal* for anybody but the government to ban people from federal land and it is *legal* to stop people from crossing private land to reach public land, even

27. For a brief summary of some early access problems, see Leo Sheep Co. v. United States, 440 U.S. 668, 668-77 (1979) (resulting problems from checkerboard and other early land grant schemes).

28. 43 U.S.C. § 932 (1988) (repealed by FLPMA in 1976) (the Historical Notes of which include a savings provision indicating that "[r]epeal . . . [is] not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976.").

29. Ch. 7, Pub. L. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976) (codified as amended at 43 U.S.C. § 1701-84 (1988)).

30. Sierra Club v. Hodel, 848 F.2d 1068, 1070, 1083 (10th Cir. 1988) (holding that in order for title to vest in the public, road must have been created before the land passed into private ownership or was withdrawn from entry under land laws).

31. 16 U.S.C.A. § 532 (West 1986).

32. 16 U.S.C. §§ 1241-1249 (1988).

33. *Id.* § 1241.

if there is no other access."[34] Public reaction to this situation lead to the case of *Garfield County*.

III. *GARFIELD COUNTY* AS A REFLECTION OF POLICY CHANGE

A. Garfield County: *The Epitome of the Access Problem*

In *Garfield County*, a road considered public by the local populace was blocked by a private landowner in 1960.[35] The public continued to use the road to reach the National Forest "for hiking, to collect mistletoe, hunt grouse, and fish."[36] Since the road crossed private property, BLM land and Forest Service land,[37] *Garfield County* can conveniently be applied to either agency. It also illustrates that access determinations frequently affect both access *to* federal lands and access *on* federal lands. Although this Note mostly addresses the problem of access *to* federal lands, an understanding that access *on* federal lands may also be affected helps one understand why increased access can be considered a "two-edged sword."[38]

B. *Determination of Standing: Incidental But Helpful*

It is interesting that the standing ruling was only an incidental determination in *Garfield County*. Had the United States not been named as a defendant in the suit,[39] the question of government standing in prescription and related cases may have remained unanswered.

Although the United States was originally named as a defendant to the County's complaint,[40] "because its ultimate interest paralleled that of the County, the United States removed this case to federal district court where it was realigned as a party-plaintiff."[41] After the district court de-

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34. Slocum, *supra* note 18, at A1. "The difficulty, [Salt Lake County planners] say, is ensuring public access without infringing on the rights of private-property owners or making development too expensive or difficult." Tom Wharton & Craig Hansell, *Canyon Access Along Wasatch Front Becoming an Uphill Battle*, SALT LAKE TRIB., June 6, 1993, at A1.

35. 992 F.2d at 1065.

36. *Id.*

37. *Id.* at 1062-63.

38. *See infra* text accompanying note 73.

39. 992 F.2d at 1062.

40. *Id.* at 1062.

41. *Id.* at 1063.

livered an adverse decision, both the county and the federal government appealed. Significantly, the County withdrew its appeal, but the United States chose to contest the defendants' allegations that the federal government lacked standing.[42] The Tenth Circuit reversed the district court and, in spite of remanding the case on other grounds, ruled that the United States had standing and was a proper plaintiff.[43]

The original complaint alleged that the United States had an interest in the case for two reasons: (1) the road in question crossed federal land, and (2) the road provided essential access to public lands.[44] Taking these points into consideration, the Tenth Circuit ruled that based on the road's closure the government satisfied the case-in-controversy requirement—a constitutional requirement which dictates that plaintiffs and appellants show "some actual or threatened injury" in order to obtain standing in federal courts.[45] This ruling indicates that injury to the public, caused by closure of a road that "provides the citizens of the United States and others with an essential, necessary, and unique access to lands owned by [the] United States,"[46] is sufficient to create government standing.

It is important to remember in this context, however, that the government's argument asserted public rather than administrative concerns as the basis for adverse possession. This suggests that the government has overcome its reluctance to sue for primarily "public use."[47] The Tenth Circuit found injury to "public users" and "citizens" satisfactory for the purposes of meeting the statutory adverse use requirement as well as for creating government standing.[48] Referring to *Marshall v. Intermountain Elec. Co.*,[49] the Tenth Circuit further characterized *Garfield County* as "an action brought by the federal government to vindicate public rights

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42. *Id.*

43. *Id.* at 1064.

44. *Id.* at 1062. By specifically mentioning both that the road *crosses* federal land and that it *accesses* federal land, the court of appeals suggests that the need for access alone would satisfy the injury in fact determination.

45. *Id.* at 1064 (referring to U.S. CONST. art. III, § 2 and citing Franchise Tax Board v. Alcan Aluminum Ltd., 493 U.S. 331 (1990)).

46. *Id.*

47. *See* WYOMING PUBLIC LAND ACCESS, *supra* note 5, at 16.

48. *Garfield County*, 992 F.2d at 1064.

49. 614 F.2d 260, 262 (10th Cir. 1980).

or public interests" to which "a state's statute of limitations does not apply."[50] Thus *Garfield County* removes both standing and statute of limitations concerns as barriers to litigating rights of way in behalf of the public for recreational purposes.

IV. IN THE WAKE OF *GARFIELD COUNTY*

A. *Loss of Traditional Access and Increased Use*

While timber harvest, grazing, and other traditional uses have been curtailed on many public lands, recreational uses have increased.[51] Despite efforts to improve access,[52] some areas of traditional access have been lost, due to abandonment[53] or closure by development.[54] Time has obscured the construction and use of many R.S. 2477 roads, making it difficult to maintain them as public rights of way.[55] This problem is likely to intensify as more time passes. It is not likely, however, that recreational demands on the public lands will decrease.[56]

B. *Interested Groups Seek Fulfillment of Access Needs*

When national policy favored consumption and privatization of resources, concerned citizens realized that many

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50. *Id.* The court points out that the interest to be vindicated can be either a fee simple title or an easement. *Id.*

51. *See, e.g.*, *Recreationists Strike It Rich*, OUR PUB. LANDS, Fall 1964, at 7 (BLM celebrates improved access for recreation in California).

52. *See supra* text accompanying notes 7, 23, 28.

53. David Proctor, *Forest Service "Proud" Owners of Atlanta Road*, IDAHO STATESMAN, Oct. 23, 1993, at 1C.

54. Wharton & Hansell, *supra* note 34, at A1; Craig Hansell, *Luxury Home Development Choking Access to Salt Lake County Canyons*, SALT LAKE TRIB., June 6, 1993, at A6. Western states have seen increasing interference with public access as landowners adjacent to the forest attempt to preserve use of public lands to their own enjoyment at the exclusion of the public.

55. Several cases have struggled with R.S. 2477 road claims where a long time has passed since the qualifying use or construction. *See, e.g.*, Shultz v. Department of Army, 10 F.3d 649 (9th Cir. 1993); Adams v. United States, 687 F. Supp. 1479 (D. Nev. 1988), *aff'd in part, vacated in part*, 3 F.3d 1254 (9th Cir. 1993) (road not a public highway under R.S. 2477 since it was moved from historic position); Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (question of fact arose whether there was an easement and what was its scope); United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984) (scope of easement unclear after passing of 83 years).

56. *See supra* note 6 and accompanying text; Chavez, *supra* note 4, at 1394-95.

united voices could influence government more than individual voices. Those favoring preservation formed groups like the Sierra Club and Trout Unlimited.[57] These groups have swayed agencies toward policies of environmental protection and limited use. In order to offset these "group dynamics," recreationists spoke out through the National Rifle Association (NRA), the National Wildlife Federation, and other similar organizations.[58] However, the same problems which warranted expansion of access litigation have fostered a startling number of new local groups specifically seeking better access to the public lands.

Local citizen groups like the Wasatch Front Access Team (WFAT),[59] Save Our Access Rights (SOAR),[60] and the Public Land Access Association, Inc. (PLAAI)[61] have been organized to resolve specific access problems in Utah, Idaho, and Montana, respectively. Outdoor recreationists, "angry about being locked out of public lands," are joining with neighbors to protect "public access to the lands and canyons in their backyard."[62] In response to local pressures, "Forest Service officials have admonished property owners for denying the public access to the forest."[63] However, since *Garfield County*, concerned citizens can motivate federal agencies and local counties to do more than merely "admonish."

C. *Public Trust Implications*

Some have suggested that the federal government has a public trust obligation analogous to state governments' obligation of preserving access to waterfronts.[64] Case authority

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57. SHANDS, *supra* note 4, at 53-55.

58. *Id.*

59. Hansell, *supra* note 54, at A7.

60. For more information, contact Mr. Craig Shuler, Soda Springs, Idaho (telephone: 208-547-3047).

61. Public Land Access Association, Inc., P.O. Box 3902, Bozeman, MT 59772-3902. If one pronounces the acronym PLAAI like "play," it becomes an appropriate and witty name for a group of recreational access proponents.

62. Jon Ure, *There's Anger Brewing in Them Thar Hills*, SALT LAKE TRIB., June 6, 1993, at A7.

63. Hansell, *supra* note 54, at A7.

64. Wharton & Hansell, *supra* note 34, at A7; *see also* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521 (1992). *But cf.* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

suggests a natural law right to enter public lands.[65] While the public trust doctrine has been considered a principle of state law, not federal law,[66] it is becoming apparent that the doctrine can be used to compel an action by both state and federal governments.[67] An agency's duty to provide access was difficult to assert as long as government standing to litigate claims of prescriptive and R.S. 2477 roads was in doubt. When *Garfield County* cleared up the question of standing, it raised the question of whether land management agencies have a public trust duty to protect vested prescriptive and R.S. 2477 rights of way by means of litigation.

D. Improved Statutory Compliance

It is beyond the scope of this Note to say whether the public trust doctrine alone would require the United States to sue for access. However, the budgetary constraints on use of eminent domain,[68] coupled with legislation like the 1974 Resources Planning Act (RPA), which requires the Forest Service to provide for recreational and access needs in long-term land plans,[69] may force the government to seek less costly means of preserving access. It is becoming apparent that public interest in recreational uses of federal lands will pressure agencies to plan for access needs.[70] Access to public lands is no longer an issue that can be left to itself. In order for federal agencies to fulfill their stewardship in protecting and providing access to the public lands, they

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65. Twining v. New Jersey, 211 U.S. 78, 97 (1908) (citing United States v. Waddell, 112 U.S. 76 (1884)).

66. Johnson, *supra* note 64, at 521; Chavez, *supra* note 4, at 1385 ("the public trust doctrine has been used to articulate public rights in other government-regulated natural resources. . . . [T]he applicability of this doctrine to access easements onto public lands is, however, unclear"). For a general history of the public trust doctrine, see Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

67. Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, *in* HARRISON C. DUNNING, ED., THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS 169, 177 (1981); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 MICH. L. REV. 471 (1970). An economic argument for the public trust doctrine is given by Lloyd R. Cohen in *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239 (1992).

68. Chavez, *supra* note 4, at 1386.

69. Jay Heinrichs, *The Future of Fun*, AM. FORESTS, Mar./Apr. 1991, at 21.

70. *Id.* at 24.

must step in and referee, or at least have a say in, the disputes among public land users. To meet the recreational and traditional demands for access, federal agencies may find it expedient to use their new-found standing to preserve traditional rights of way through litigation.

V. A TWO-EDGED SWORD OR A CAT-O'-NINE-TAILS?

A. Escalated Abuse and Management Requirements

Unfortunately, opening land to public use has also come to mean opening it to abuse. In recent years, vandalism on public lands has become a costly problem.[71] Adjacent landowners are often unwilling to allow access "out of a concern about vandalism and potential liability."[72] Since increased access may both benefit and challenge public land administrators, public standing to sue for access has been considered a two-edged sword.[73] However, its potential for creating a myriad of land management problems and increasing public access litigation may prove it to be more like a cat-o'-nine-tails, a medieval multiple-strand flail used in battle to inflict widespread and random injury. As zealous access proponents sue for, and are granted, more access than is necessary or manageable, management agencies lose control and the public lands become subject to countless abuses.

Considering its duties to oversee and to protect public lands, the government is the logical plaintiff in an action for public access. This arrangement provides several benefits. (1) Costs of settling access conflicts are more equitably apportioned to the public, the ultimate beneficiaries. (2) Litigation presumptions favorable to the government are already built into existing legislation: e.g., "[a]ny doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government."[74] (3) State statutes of limitations would not prevent suit for access.[75] (4) Federal land man-

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71. Glenn D. Harris, *"Destructive Recreation" On Our Public Forests*, AM. FORESTS, Sept./Oct. 1991, at 37.

72. COGGINS ET AL., *supra* note 17, at 159 (quoting GAO Report). Taking a self-help approach, some private landowners "have blocked the historic routes" into public lands. Hansell, *supra* note 54, at A7.

73. Slocum, *supra* note 18, at 6.

74. United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984).

75. *See supra* note 50 and accompanying text.

agement agencies would be able to increase access while maintaining control. Recreationists would be able to use public lands, yet land management agencies would be able to avoid many of the problems that would occur if access were given too liberally.

B. Public Involvement and Community Awareness Indispensable

To make the government the proper plaintiff, however, is not to suggest that public interest groups would no longer have a say in the access issue. Acknowledging the role public interest groups play in monitoring and identifying trends in national sentiment, the Forest Service has requested increased public input in its revision of access policies.[76] If the public is the intended beneficiary of federal lands, then federal and county land managers need to know what the public wants. Cal Schneller, senior planner for Salt Lake County, points out that planners need to know where people want trails and access.[77] "What has happened in the past is that we get development proposals and nobody knows there is a trail head there or if one is needed. Decisions are then made accordingly without that information."[78] The public needs to know its options and make informed recommendations.

Interest groups focus government attention on areas needing access and provide impetus in the search for a solution. Now that *Garfield County* has established government standing to litigate access, interest groups must see to it that the government *will* do what it *can* do, namely, resolve access conflicts in court, if not by other means. Federal standing can be a two-edged sword or a cat-o'-nine-tails, but if it fulfills its promise to combat the inertia besieging the issue of access to public lands, it will be a formidable weapon in the arsenals of both interest groups and the government.

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76. TRAVEL MANAGEMENT, *supra* note 3, at 16.
77. Wharton & Hansell, *supra* note 34, at A6.
78. *Id.*

C. A Glance at Related Problems and Possible Solutions

Under a broad reading, *Leo Sheep* stands for the proposition that the government should acquire access by eminent domain, rather than by implication or prescription.[79] Until recently, "[w]hen the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased."[80] Exclusive recourse to this method of acquiring access would be ideal and avoid takings issues.[81] But the costs of this method, when used exclusively, are prohibitive to federal land management agencies operating on already tight budgets.[82]

In his article on inverse condemnation, Michael M. Berger of Berger & Norton, a law firm in Santa Monica, California, addresses the general belief that, "if it's for the public's good, the public should pay for it."[83] He recognizes that "the ever-widening gap between governmental goals and the economic means to achieve them has resulted in government seeking ever more innovative (read "cost free") ways to do so."[84] In many instances, agencies can provide access to public lands without creating new rights of way for which the public should pay. For example, they can preserve or restore access where there is an existing right of way.

While compensation is generally required when the government appropriates private lands to public uses, it is hardly equitable to require compensation when claiming rights of way along roads for which title has already vested in the public under prescription statutes or under R.S. 2477. *Garfield County* will have the most potential sway in this latter circumstance. Since BLM is in the process of design-

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79. *See supra* note 10 and accompanying text.

80. Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979).

81. For a leading case on environmental takings, see Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

82. Chavez, *supra* note 4, at 1375, 1383, 1386 (noting that condemnation unavailable due to "fiscal constraints" and that agencies do not have funds to solve access problem by paying for access easements).

83. Michael M. Berger, *The Latest About Inverse Condemnation*, C791 A.L.I.-A.B.A. 99 (1993).

84. *Id.*

ing new policy on R.S. 2477 rights of way,[85] this is one area where timely public input is particularly important.

1. R.S. 2477 Sunset Provision Darkens Access Outlook

Already, the trend favoring access is being tempered by efforts to limit the ways it can be established. Currently, BLM is proposing a sunset provision which would require counties and public organizations to file on all R.S. 2477 rights of way by a given date or lose the ability to claim those routes under this statute.[86] Although it is unclear whether BLM intends this provision to affect rights of way across private lands, it apparently intends to definitively settle disputes of R.S. 2477 roads on BLM property. While access proponents, frustrated by the low priority local governments give to establishing access,[87] seek action to clear up rights of way, they do not want action which would foreclose the option of accepting R.S. 2477 rights of way. Ambiguities in the BLM proposal make it hard to tell whether it will affect access *to* public lands, but it will certainly affect transportation *on* public lands.[88] While it is doubtful that BLM has jurisdiction to affect R.S. 2477 roads across private lands, that agency should consider what coincidental effect the provision will have on these roads.[89] Any action taken without sufficient public involvement would violate the Federal Land Policy and Management Act's statutory mandate that BLM give "local governments and the public adequate notice and opportunity to comment upon and participate in the formation of plans and programs relating to the management of the public lands."[90]

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85. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS (June 1993) [hereinafter REPORT TO CONGRESS].

86. *Id.* at 14.

87. Wharton & Hansell, *supra* note 34, at A1.

88. Since restricted travel would facilitate designation of more wilderness lands, wilderness proponents are likely to support a sunset provision. Recreationists, on the other hand, oppose provisions which make it harder to reach areas of recreational and scenic interest.

89. For a discussion on how the public can be bound by agency regulations, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

90. 43 U.S.C. § 1712(f) (1988).

Because identification of roads created under R.S. 2477 takes a long time and candidacy of such roads for public acceptance is realized only after use is challenged, a sunset provision threatens to eliminate public access routes which presently get little use, but which nonetheless may be badly needed in the future.[91] Obliteration of dormant access routes would complicate the access problem and may be contested as a taking. In order to preserve for future disputes a claim that a right of way was created under R.S. 2477, access proponents must be aware of sunset proposals and protect themselves by researching and claiming roads which qualify for public acceptance under that statute.

2. New County Ordinances

Although the federal government, as administrator of federal lands, has a duty to provide access, it is not solely responsible. In order to solve the access problem, both state and local governments need to include access in land planning and zoning ordinances. This would be consistent with congressional intent as Justice Rehnquist perceived it in *Leo Sheep*.[92] Don Davis, a Salt Lake County Recreation official, believes that "an ordinance requiring developers to set aside land for public access 'would make all the difference in the world.'"[93]

Others in the Salt Lake area feel that, unless land plans with "more legal clout to preserve access" are developed, "only those who can afford upscale homes in the canyons will have access to public lands behind their properties."[94] The Wasatch Front Access Team[95] suggests that counties provide access by (1) "working out easement agreements with landowners,"[96] (2) "using the zoning and development

91. Eliminating future R.S. 2477 claims would be similar in effect to an Idaho statute, now repealed, which stated that R.S. 2477 claims could be abandoned. That statute caused conflict over liability for a road along the Middle Fork of the Boise River in Idaho. For the present solution to that issue, see Proctor, *supra* note 53, at C1. It is unclear, however, what would be required (i.e., a de minimis filing or claim requirement or more involved proof of right of way) under BLM's proposal to keep the sun from setting on dormant historical routes.

92. *See supra* text accompanying note 19.

93. Wharton & Hansell, *supra* note 34, at A6.

94. *Id.*

95. *See supra* part IV.B.

96. Hansell, *supra* note 54, at A6.

permit process to mandate access,"[97] (3) "using land exchanges with private-property owners to acquire property rights for trail-head developments,"[98] and (4) "convincing landowners that allowing responsible use of rights of way through their property to canyons can help solve the problem of unwanted use."[99] WFAT contends that counties and landowners will cooperate more freely as they see that "property values are actually improved when a trail or trail head is located near a subdivision."[100] But while increased county attention to access needs can help solve the problem, increasing litigation indicates the problem is not being resolved merely by relying on local governments.

3. Better Management by Increased User Fees and Mapping

The *Garfield County* solution—having the government sue in the public's behalf—is not and will not become the sole means of preserving and clarifying access. To be most effective, agencies should combine legal action with other remedies, such as user fees and consistent signing practices.

Many feel that users of public lands should provide for expanding recreational needs by paying higher user fees.[101] Recreational uses have traditionally been subsidized to cost visitors little or nothing, but the Omnibus Budget Reconciliation Act of 1987 "amended the Land and Water Conservation Fund Act, raising recreation fees for a number of agencies, including the National Park Service and Forest Service."[102] Since people tend to value what they pay for, some feel that heightened appreciation and care for recre-

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97. *Id.*

98. *Id.* This has also proven a successful option for the Forest Service, which recently negotiated a trail to Mount Olympus in Salt Lake County and has reached similar agreements in other areas.

99. Wharton & Hansell, *supra* note 34, at A6.

100. *Id.*

101. "Where public access is possible and we have costs associated with it, we think it's reasonable that visitors bear the expense." Randy Johnson, *Pay to Play: A Rationale For User Fees*, AM. FORESTS, Mar./Apr. 1991, at 52, 72-73 (quoting Audubon Society policy and identifying others who favor user fees); *see also* Tami Gibbons, *State Officials Consider Toll Booths in Canyon Areas*, DAILY UNIVERSE, Jan. 13, 1994, at 10 (noting toll collected to fund canyon management and to discourage gang-related abuse).

102. Johnson, *supra* note 101, at 72.

ation sites would be a positive side effect of higher user fees.[103]

By giving limited access to some uses, demand for open public access can be controlled. Where no legal access is provided, trespass and abuse often increase, and land managers have a harder time doing their job. Many landowners have improved public relations by providing access.[104] At times, the best way for private landowners and management agencies to reduce the impact on private lands and avoid litigation is to provide carefully planned and identified means of getting to the public lands on a consistent basis.[105]

Both BLM and the Forest Service have recognized the need for better mapping and signing of routes to document and inform the public of existing access.[106] Unfortunately, at least in Wyoming, this need has not been adequately met, for "confusion and contradiction" regarding legal access abounds.[107] Better posting practices could alleviate many disputes, but—as is the case with government quiet title actions, eminent domain, and increased user fees—clearer posting will not be effective in all circumstances. Without the cooperation and input of all interested parties, there will not be a lasting resolution of the access conflict.

VI. CONCLUSION

For many years litigation of public access was rare, and a casual approach to the problem by each branch of government was thought sufficient to handle the problem. Increased conflicts in recent years, however, have highlighted a need for land managers to directly address the access issue. Steady increase in recreational use and loss of traditional rights of way are fueling the conflict.

In order to preserve traditional access, access proponents and government agencies must consider alternative means of

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103. *Id.*

104. *Access Program*, *supra* note 7, at 23.

105. TRAVEL MANAGEMENT, *supra* note 3, at 13-14.

106. TRAVEL MANAGEMENT, *supra* note 3, at 15; *Access Program*, *supra* note 7, at 23; Jack Bryant, *The Public Lands—Where Are They?*, OUR PUB. LANDS, Winter 1965, at 13 (mapping and signing of access roads make land usable, not just "open to public use").

107. *See* letter from Bob Williams, Roseville, CA, *in Feedback: Questions, Comments and Responses from Our Readers*, WYO. WILDLIFE, Feb. 1994, at 5.

securing and maintaining access. *Garfield County*, by establishing the government's standing prescriptively to quiet title by litigation, suggests a judicial remedy to the access problem. The lack-of-standing excuse is not likely to delay either prescriptive claims or assertions of an R.S. 2477 right of way. Increased user fees and improved county planning promise to alleviate many access problems. Caution is required, however, for while greater access to federal lands will expand opportunities, it will also magnify the potential for abuse. Nevertheless, *Garfield County* sets a useful precedent for concerned citizens to see that land management agencies develop a policy favoring informed use of the judicial power to preserve traditional public access. Awareness and cooperation can keep the two-edged sword of public access from becoming a cat-o'-nine-tails.

Laramie D. Merritt