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IDAHO PUBLIC LAND ACCESS: AMENDING ROAD LAWS TO ENSURE PUBLIC LAND REMAINS ACCESSIBLE

Jillian Greene

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IDAHO PUBLIC LAND ACCESS: AMENDING ROAD LAWS TO ENSURE PUBLIC LAND REMAINS ACCESSIBLE

JILLIAN GREENE*

ABSTRACT

Public land access issues regularly arise across the West because of the unique landscape of federally owned public land, state owned public land, and private property. In Idaho, and other western states, there is a trend of private parties purchasing large landholdings and subsequently closing off roads that have historically been used to access public land. If the roads are public, then blocking access across them is illegal. However, it is not always clear whether a road is public. This comment frames public land access issues around Idaho road law; it also uses a Montana Supreme Court case to explore how the issue pervades the West. Is there a way to ensure that roads remain open and useable by the public despite them crossing private land?

There are some avenues that the Idaho Legislature should pursue to ensure that public land remains accessible to the broader community. They should incentivize local governmental agencies to fulfill their legal duties to remove obstructions and encroachments. Private citizens should be given a cause of action to sue those who obstruct public roads. And penalties for illegally closing public roads ought to be increased to discourage private citizens from opting for an “obstruct now—ask questions later” mindset. With proper legislative changes, the public can continue to access their public lands as they have for generations.

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* J.D. Candidate, University of Idaho College of Law, 2023.

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I. PUBLIC LAND ACCESS ISSUES IN IDAHO AND ACROSS THE WEST¹

Public land access issues have come to the forefront of many Idahoans' minds in the last decade due to large private landowners buying up property and blocking access to public land by closing roads that cross their private land.² Two Texas billionaires, the Wilks brothers, recently purchased significant portions of land in Idaho through their landholding company, DF Development and closed off roads that people have used for generations to recreate on public land.³ Dan and Farris Wilks created their wealth by developing a hydraulic fracturing company.⁴ After they sold their company, they began buying up land in the West, first in Montana and now in Idaho.⁵ They recently purchased 172,000 acres of forest land in central Idaho that touches Valley, Boise, and Adams Counties.⁶ This is in addition to the 42,000 acres they had already purchased in Idaho County.⁷ The brothers are listed as the thirteenth largest landowners in the United States on the Land Report.⁸

The previous owners of the 172,000 acres purchased in central Idaho were timber and wood products companies; these owners had left the land open to the public for recreational use and access to the neighboring Boise National Forest and Payette National Forest.⁹ Often in forest land such as this, there are gravel or dirt roads that run through the private land onto public land. It is not always clear whether some land is private or public, and this results in people recreating on

1. The eleven western states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—collectively called “the West” for the purposes of this Comment.

2. See generally Julie Turkewitz, *Who Gets to Own the West?*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/wilks-brothers-fracking-business.html>; Nicole Blanchard, *Texas Billionaire Brothers Block Another Idaho Road, Prompting Criticism Over Public Access*, IDAHO STATESMEN (June 12, 2019, 2:24 PM), <https://www.idahostatesman.com/outdoors/article231467743.html>.

3. Turkewitz, *supra* note 2.

4. Rocky Barker, *To Understand Why Billionaire Brothers Closed Off Land, Know That Texas Is Not Idaho*, IDAHO STATESMAN (Aug. 3, 2017, 8:21 PM), <https://www.idahostatesman.com/news/local/news-columns-blogs/letters-from-the-west/article165142092.html>.

5. *Id.* (“In Montana, the Wilkses have shut out many hunters from popular spots . . .”).

6. *Id.*

7. Andrew Ottoson, *Wilks Ranch Now Largest Single Landowner in Idaho County at More Than 42,000 Acres*, IDAHO CNTY. FREE PRESS (Apr. 5, 2017), https://www.idahocountyfreepress.com/news/wilks-ranch-now-largest-single-landowner-in-idaho-county-at-more-than-42-000-acres/article_eb1147dc-1b40-56b9-a5e0-ce262a2af5bb.html.

8. Cary Estes et al., *The Land Report 100*, LAND REPORT, Winter 2021, at 110, 134, <https://editions.mydigitalpublication.com/publication/?m=61105&i=733821&p=136&ver=html5>. According to the Land Report, just one hundred American families own 42 million acres across the country. Turkewitz, *supra* note 2.

9. Barker, *supra* note 4 (“Boise Cascade, Potlatch and the other companies that previously owned the tracts chose to open them to the public.”).

private land while under the impression that they are in a National Forest or on some other public land.¹⁰ Understandably, as new owners take possession of their property, they may be stricter about public recreation occurring on their land than the previous owners were.¹¹ However, that does not justify closing public roads that lead to public lands.

Almost immediately after the brothers filed the deed to their new property, they wrote to Valley County and terminated the leases to roads the County has historically groomed for people to access West Mountain snowmobiling trails.¹² The leases that the County had were strictly for snow grooming; the roads that they groomed were often used by the public to access national forests.¹³ The brothers later reversed course in regard to the snowmobiling trails and entered into an agreement with the Idaho State Snowmobiling Association to allow trail grooming on a portion of their property so snowmobilers could reach public land; though notably, the County was not a party to the agreement.¹⁴

In another instance, the brothers' company, DF Development, LLC, installed gates, posted no trespassing signs, and dug anti-vehicular trenches on Forest Service Road 374, popularly known as Boise Ridge Road.¹⁵ This road is maintained as a part of the Forest Service road system; but, according to the district ranger, the Forest Service does not have an easement across the property, despite evidence of a past agreement with the prior owner.¹⁶ Additionally, the road was built and has been maintained with public money, which may mean it is a public road pursuant to Idaho Code section 40-109(5).¹⁷

There have been some notable confrontations between public land users and employees of DF Development. The employees patrol roads and the private property heavily armed, and stop people driving through their property on

10. *Id.* (“Campers, hunters, snowmobilers and other users couldn’t tell the difference between these private forest lands and public land for most of this period.”).

11. Turkewitz, *supra* note 2 (“‘We want to be good neighbors,’ Mr. Wilks said. ‘I know some people think we haven’t been, just because we haven’t let them freely roam across our property as they saw fit. But I also offer: Do you want me camping in your front yard?’”). The Wilks brothers have never resided in Idaho and mostly live in Texas. *Id.*

12. Rocky Barker, *Texas Billionaires Limit Snowmobile Access on Idaho Land, Reverse Course on Logging*, IDAHO STATESMAN (Sept. 8, 2016, 10:26 AM), <https://www.idahostatesman.com/news/local/news-columns-blogs/letters-from-the-west/article99576022.html>.

13. *Id.*

14. Rocky Barker, *Texas Billionaires Open Up Some Land Access, Let Idaho Snowmobilers Groom Trails*, IDAHO STATESMAN (Dec. 21, 2017, 1:47 PM), <https://www.idahostatesman.com/outdoors/recreation/article190549684.html>.

15. Chadd Cripe, *Texas Billionaires Put Gates to Popular Forest Service Road Near Boise*, IDAHO STATESMAN: OUTDOORS BLOG (Sept. 28, 2018, 11:24 AM), <https://www.idahostatesman.com/outdoors/playing-outdoors/article218846715.html>.

16. *Id.*

17. *Id.*; IDAHO CODE § 40-109(5) (2021) (stating that all roads used by the public for a period of five years, and worked and kept up at the expense of the public are public highways).

presumably public roads.¹⁸ In one video posted to YouTube, a person was stopped by a DF Development employee that was outfitted like a police officer, he requested ID (which the driver refused to give) and recorded the person's license plate.¹⁹ In the video, the employee was unsure whether the road was public or private but stated that his job was to record the information of everyone travelling on it in case the road was determined to be private; the information could then be used for trespass prosecution.²⁰ This shows that private landowners merely need enough money to hire armed guards across their vast properties in order to restrict the public from accessing public land.

These kinds of issues will continue coming to a head as the West grows and incoming residents have differing views of the relationship between private and public land use interests. Past owners from the region recognized that their land was an access way to public land and allowed the local government to maintain the roads for public use. However, new owners such as the Wilkes, who come from a state with almost no public land,²¹ have different ideals and views about their role as stewards of the land.²²

A. A large portion of land area in the West is public, making access issues important.

The Federal Government, which owns 640 million acres across the United States, is the largest owner of land in the West.²³ The majority of that land is concentrated in eleven western states, not including Alaska.²⁴ The five main federal land management agencies (Bureau of Land Management, Forest Service, Fish and Wildlife Service, National Park Service, Department of Defense) manage 53% of the acreage in the West.²⁵ The Federal Government, through the five main agencies, manages 32,789,648 acres in Idaho, encompassing 61.9% of the state.²⁶ With such large federal holdings there is consistent debate about how the land is managed and used, but there is a general agreement among Idahoans that public land should be accessible for all that want to enjoy it.²⁷

18. James S., *Run in with DF Development on National Forest Service Rd 409*, YOUTUBE, (July 25, 2017), <https://www.youtube.com/watch?v=Tt2ndalulYA>.

19. *Id.*

20. *Id.*

21. CAROL VINCENT, CONG. RSCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2020), <https://sgp.fas.org/crs/misc/R42346.pdf> [hereinafter *Federal Land Ownership*] (The Federal Government owns 3 million acres in Texas, or about 1.9% of the acreage in the state.).

22. Barker, *supra* note 4 (“The brothers come from Texas, where there is no public land to speak of and certainly no cultural tradition of public land recreation.”).

23. *Federal Land Ownership*, *supra* note 21, at 2.

24. *Federal Land Ownership*, *supra* note 21, at 2.

25. *Federal Land Ownership*, *supra* note 21, at 9.

26. *Federal Land Ownership*, *supra* note 21, at 9.

27. Barker, *supra* note 4, at 2–3.

The Western United States is a patchwork of private land, federally managed public land, and state managed public land.²⁸ The West is known as a place for avid outdoor use on public lands and is managed as such—whether that be for-profit uses such as farming, ranching, and extractive industries, or in the form of recreation such as hunting, fishing, hiking, and biking.²⁹ With a significant portion of the land being public, the opportunities for recreational use across the Western United States seems endless.³⁰ However, as land moves into private hands, or private land changes hands, some access to public land is being cut off.³¹ This is more than just an issue felt by recreationalists seeking to enjoy the vast public lands that the West has to offer. In 2020, outdoor recreation generated \$689 billion in consumer spending, and supported 4.3 million jobs across the country.³² Idaho saw \$2.2 billion added to the state GDP, and 29,867 jobs in 2020.³³

The key to ensuring that public land remains accessible lies in whether roads that have historically been used to access that land remain open to the public. Private landowners cannot be allowed to close public roads under the guise of private property rights, as the Wilkes brothers did with the Boise Ridge Road.³⁴

B. Public land in Idaho enjoys a rich history; the majority of the state is still publicly owned.

When Idaho entered the Union, the Federal Government granted 3.6 million acres to the State for the purpose of funding specific beneficiaries.³⁵ The primary beneficiary is the public school system; the University of Idaho is a land grant

28. *Inaccessible Public Lands: The West*, THEODORE ROOSEVELT CONSERVATION P'SHIP, <https://www.trcp.org/unlocking-public-lands/> (last visited Jan. 28, 2022).

29. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(7)(8) (“[P]ublic land use planning, and that management be on the basis of multiple use and sustained yield.”).

30. *Federal Land Ownership*, *supra* note 21, at 7–10 (For example, 52.3% of Oregon is federally owned; 61.9% of Idaho is federally owned; 80.1% of Nevada is federally owned.).

31. See generally Turkewitz, *supra* note 2; see also Christine Peterson, *Why Wyoming's Public Lands are Locked up*, HIGH COUNTRY NEWS (Jan. 30, 2019), <https://www.hcn.org/issues/51.2/public-lands-why-wyomings-public-lands-are-locked-up> (discussing a proposed land exchange that would have closed off access to 4,000 acres of public land).

32. *Advocacy*, OUTDOOR INDUSTRY ASSOCIATION, <https://outdoorindustry.org/advocacy/> (last visited Apr. 11, 2022).

33. IDAHO OUTDOOR RECREATION SATELLITE ACCOUNT, BUREAU OF ECON. ANALYSIS 1 (2020), <https://outdoorindustry.org/wp-content/uploads/2015/03/ORSA-Idaho.pdf>.

34. Cripe, *supra* note 15 (“[T]he gate on the northern end of the property was open, but ‘no trespassing’ signs were in place. The sign on the gate also said ‘private road’ and large trenches were dug on each side of the gate to prevent vehicles from driving around it.”).

35. 2020 ANNUAL REPORT, IDAHO DEP'T LANDS 5 (2020), <https://www.idl.idaho.gov/wp-content/uploads/sites/2/2021/01/IDL-AnnualReport-WEB-Pages-01142021.pdf>. [hereinafter IDL ANNUAL REPORT].

university with funding coming directly from this endowment.³⁶ Article IX of the Idaho Constitution memorialized the purpose of the endowment lands to “secure the maximum long term financial return to the institution to which granted.”³⁷ This means that State endowment lands are managed for the primary purpose of financial advantage to the beneficiary rather than broader public use.³⁸ The State endowment lands cover 2,477,587 surface acres, or 4.6% of the acreage of Idaho—other state agencies, such as Idaho Fish and Game, manage about 265,000 surface acres, or .5% of the acreage of Idaho.³⁹ Though the purpose of the endowment lands is to provide financial support to its beneficiaries, the public still has an interest in the land because “about 96% of [endowment land is accessible [to the public] via foot, watercraft, or vehicle.”⁴⁰

Since statehood, Idaho has recognized the value in public lands, as evidenced by Article IX § 8 in its Constitution, specifically calling for the responsible management of state public land.⁴¹ Additionally, Title 58 of the Idaho Code is dedicated to the management of State public land.⁴² Under the fish and game statutes, the Idaho Legislature has recognized the importance of public lands by stating that “[n]o person shall post, sign, or indicate that any public lands within this state . . . are privately owned.”⁴³ This should necessarily include public roads used to access public lands because public roads are property of the people in the same way that the land is.

Roads and access to public land in Idaho is a convoluted and confusing area of the law.⁴⁴ In most cases there are likely legal paths to ensure that roads stay available for use by the public. However, public access is a difficult problem to manage for small rural counties and communities, which are tasked with keeping

36. *Id.* at 7. The land granted to the University of Idaho endowment is the historical territory of the Nimiipuu people—more commonly known as the Nez Perce tribe. The Federal Government took this land pursuant to an 1863 treaty, which was rejected by the Nimiipuu then, and still is now. Though the past wrongs against the Nimiipuu and other Native American tribes cannot be easily corrected—the benefits that have been reaped due to these injustices should be accompanied by an acknowledgement of the people that were here first, and a recognition that the land that makes up the endowment system was not the Federal Government’s to give. See Robert Lee & Tristan Ahtone, *Land-Grab Universities*, HIGH COUNTRY NEWS (Mar. 30, 2020), <https://www.hcn.org/issues/52.4/indigenous-affairs-education-land-grab-universities>.

37. IDAHO CONST. art. IX, § 8.

38. *A Brief History of Idaho’s Endowment Trust Lands*, IDAHO DEP’T OF LANDS, <https://www.idl.idaho.gov/wp-content/uploads/sites/2/land-board/lb/documents-long-term/history-endowment-lands.pdf> (last visited, Apr. 11, 2022) [hereinafter *A Brief History*].

39. IDL ANNUAL REPORT, *supra* note 35, at 4.

40. IDL ANNUAL REPORT, *supra* note 35, at 1.

41. IDAHO CONST. art. IX, § 8.

42. See IDAHO CODE § 58 (2021).

43. IDAHO CODE § 36-1603(b) (2021).

44. See *generally* CHRISTOPHER H. MEYER, ROAD LAW HANDBOOK: ROAD CREATION AND ABANDONMENT LAW IN IDAHO (Givens Pursley LLP, 2021), <https://www.givenspursley.com/publications>.

public roads open.⁴⁵ Additionally, public access—and the public nature of a road—only becomes an issue for public land users once a road has been blocked. Thus, the public generally must lose access before they are able to legally solidify their right to use the road. There must be a better way to affirm the right to use roads to access public lands—new legislation should be enacted to clear up the issue and ensure the public can access their land.

C. Idaho is not the only western state where public land access is an issue—landowners in Montana have continuously created controversy by keeping a public road closed.⁴⁶

Public land access issues have arisen in multiple states across the West.⁴⁷ A particular case of interest is *Bugli v. Ravalli County* because, despite the Supreme Court of Montana declaring Hughes Creek Road to be a public road, landowners along the road have continually kept it blocked to the public.⁴⁸ Hughes Creek Road was built in 1900 to access mining claims and is about twelve miles long.⁴⁹ The road was historically maintained conjunctively by Ravalli County and the United States Forest Service (USFS).⁵⁰ It provides access to a USFS trailhead that leads into the Bitterroot National Forest and is used to access both public lands and waters.⁵¹

The dispute surrounding Hughes Creek Road began in 1982 when the current landowners and their predecessors in interest petitioned the Ravalli County Board of Commissioners (Board) to abandon the county road that extended beyond a gate that they had erected.⁵² The controversy arose due to a misunderstanding about where the county road ended and private property started.⁵³ The gate had been erected nine miles into the county road, and was based off of a map created in 1965.⁵⁴ The landowners were under the impression that the county road ended only four tenths of a mile beyond their gate.⁵⁵ However, after an investigation into

45. Shelbie Harris, *Bannock County Mulling Solutions for Confusing Access Road Situation*, IDAHO STATE J., (Jan. 27, 2020), https://www.idahostatejournal.com/news/local/bannock-county-mulling-solutions-to-confusing-access-road-situation/article_d9e2d858-fcdd-5d21-b6c9-efc7dd3ce80d.html.

46. See *Bugli v. Ravalli Cnty.*, 444 P.3d 399 (Mont. 2019).

47. See e.g., Angus M. Thuermer Jr., *Corner Crossing: Hunters Challenge Public-Land Access Issue in Court*, WYOFILE, (Dec. 27, 2021), <https://wyofile.com/corner-crossing-hunters-challenge-public-land-access-issue-in-court/?msclkid=2cc1b36ab9e811eca1658207a9f1a283>; *Park County Court Cases Testing Boundaries of Public Access, Private Property Rights*, YELLOWSTONE PUB. RADIO, (Feb. 28, 2020), <https://www.ypradio.org/environment-science/2020-02-28/park-county-court-cases-testing-boundaries-of-public-access-private-property-rights>.

48. *Bugli*, 444 P.3d 399; *Hughes Creek Road Summary*, PUB. LAND WATER ACCESS ASS'N INC., <https://www.plwa.org/hughes-creek-road> (Feb. 2022).

49. *Bugli*, 444 P.3d at 401.

50. *Id.*

51. *Id.*; see also *Hughes Creek Road Summary*, *supra* note 48.

52. *Bugli*, 444 P.3d at 401.

53. *Id.*

54. *Id.*

55. *Id.*

the record of the road, the Board determined that the county road was 11.8 miles long and thus denied the landowners' petition for abandonment.⁵⁶ The County then sought a temporary restraining order, which was denied.⁵⁷ The case was later dismissed by stipulation of the parties.⁵⁸

The newest controversy surrounding Hughes Creek Road began in 2016 when the landowners again petitioned the County to abandon the four tenths of a mile of road past their gate.⁵⁹ Again, their petition was denied due to the County asserting that the road was actually public and that it extended several miles beyond their gate.⁶⁰ Under Montana law, a board may not abandon a county road or right of way if it provides access to public lands or waters.⁶¹ After reviewing the record, the Montana Supreme Court found that the Board properly denied the landowners' request to abandon the road because it was a public road used to access public land.⁶² The Court found that the "Board's findings did not create a new county road, but rather confirmed that Landowner's gate illegally blocked access to an existing county road."⁶³

Despite the Montana Supreme Court determining that the road is a public road used to access public lands, the obstructions have remained.⁶⁴ In a letter from the Ravalli County Attorney's office to attorneys working for a public access advocacy group—the Public Land Water Access Association (PLWA)—the County stated that they had removed a gate from the road twice in 2021, and each time it was re-erected.⁶⁵ The County then stated that they would not seek further legal action to remove the obstruction until new issues were examined; they cited increased tensions and risks to the public from the continued controversy as their reasons for not providing details or a timeline for removal.⁶⁶ By October 2021, the County had still not fulfilled their duty to remove the obstructions—resulting in legal action from PLWA against Ravalli County for declaratory relief and a writ of

56. *Id.* at 133.

57. *Id.* at 132–33.

58. *Bugli v. Ravalli Cnty.*, 422 P.3d 131, 133 (Mont. 2018).

59. *Id.* at 401.

60. *Id.* at 401–02.

61. *Id.* at 404.

62. *Id.* at 404–05.

63. *Id.* at 405.

64. *Hughes Creek Road Summary*, *supra* note 48 ("[T]he illegal gate blocking public access on the Hughes Creek county road in Ravalli County was removed in January of 2021 . . . [a]nd yet, as of May 2021 PLWA received word that the gate was up again.").

65. Letter from Royce A. McCarty, Jr., Deputy Ravalli County Attorney, to Kyle Nelson, Goetz, Baldwin & Geddes, P.C. (Oct. 1, 2021), <https://static1.squarespace.com/static/6002236795a3752c3a5420f6/t/6160c91a6078af60c0609621/1633732891191/2021-10-01+McCarty+-+Nelson.pdf>.

66. *Id.*

mandamus ordering the County to comply with the law and remove the obstructions.⁶⁷

The Montana Supreme Court found that the road was a public road based on records from the local and federal government going back to 1900 when the road was first built, which is very similar to how someone in Idaho would determine that a road is public.⁶⁸ Additionally, the County is responsible for the removal of obstructions in Montana,⁶⁹ which mirrors Idaho law.⁷⁰ The County must comply with the law and remove the obstruction immediately;⁷¹ PLWA argues that “immediate” does not mean the County can delay removing the obstruction for months at a time.⁷² Arguably, Montana would also benefit from legislative changes to encourage governmental agencies to uphold their statutory requirements. Additionally, legislation that would discourage private parties from blocking access, such as allowing private citizens to sue the property owners that block public roads, and increased penalties for those that flout the law would be beneficial in Montana—much the same way they would be in Idaho.

II. PUBLIC ROADS IN IDAHO ARE CREATED BY FOLLOWING STATUTORY PROVISIONS, COMMON LAW DEDICATION, AND PRESCRIPTIVE USE

In order to begin exploring public land access issues in Idaho, it is imperative to understand how public roads are created. If a road is deemed to be public, then private landowners cannot obstruct it, even if it crosses their private land.⁷³ “Highways” as defined by Idaho Code Title 40 Chapter 1 are:

[R]oads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public...Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used

67. Complaint for Declaratory Judgment and Petition for Alternative Writ of Mandamus at 1, Pub. Land/Water Access Ass’n v. Ravalli County, No. DV-41-2021-0000433-WM (Mont. Dist. Ct. Oct. 22, 2021), <https://static1.squarespace.com/static/6002236795a3752c3a5420f6/t/6172f26851c0ba590c522112/1634923144274/Complaint.pdf>. As of January 2022, the landowner had removed the obstructions, presumably in response to pressure from the legal action by PLWA, though they had not faced any legal penalties. *Hughes Creek Road Summary*, *supra* note 48.

68. Bugli v. Ravalli Cnty., 422 P.3d 131, 401 (Mont. 2018).

69. *Id.*; MONT. CODE § 7-14-2133 (2021) (“When a road becomes obstructed, the board of county commissioners . . . shall remove the obstruction upon being notified of the obstruction.”); MONT. CODE § 7-14-2134 (2021).

70. IDAHO CODE § 40-2319(2) (2021).

71. MONT. CODE § 7-14-2134(2) (2021) (“If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor shall immediately remove the encroachment.”).

72. Brief in Opposition to Defendant’s Motion to Dismiss at 1, Pub. Land/Water Access Ass’n v. Ravalli County, No. DV-41-2021-0000433-WM (Mont. Dist. Ct. Jan. 13, 2022), <https://static1.squarespace.com/static/6002236795a3752c3a5420f6/t/61e6f62453676a5e747b41b7/1642526245066/2022-01-13+Brief+in+Opposition+to+Def.+Mot.+to+Dismiss.pdf>.

73. IDAHO CODE § 40-2319 (2021).

as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners.⁷⁴

Therefore, under Idaho law, public roads can be either dedicated to the public, abandoned to the public, formally created, or established through prescription from five years of use and maintenance.⁷⁵ Because formally created roads are rarely disputed, this section will focus instead on public roads created through common law dedication and prescription.

A. Common law dedication occurs when there is a clear, unequivocal offer for a dedication of land to the public, and the public accepts the offer of dedication; a dedicated road must be formally abandoned.

Idaho's platting statutes in Title 50 Chapter 13 lay out the requisite elements to dedicate public roads through the platting process.⁷⁶ However, the Idaho Supreme Court has also recognized common law dedication.⁷⁷

In *Worley Highway District v. Yacht Club of Coeur D'Alene, Ltd.*, the Idaho Supreme Court found that a private company, the Yacht Club of Coeur D'Alene, could not close access to a sixty-foot strip of road and boat ramp because they constituted a public road and right of way due to common law dedication.⁷⁸ The elements of common law dedication of land are (1) a clear and unequivocal offer by the owner to dedicate the land to public use, and (2) acceptance of the offer by the public.⁷⁹

i. Recording a plat or map with reference to the road is a clear and unequivocal offer to dedicate the land to public use.

The Court in *Worley Highway District* found that the act of recording a plat or a map referencing the public road is sufficient to satisfy the first element of

74. IDAHO CODE § 40-109(5) (2021).

75. *Id.*

76. *See, e.g.*, IDAHO CODE § 50-1309 (2021) (Owners can "make a dedication of all public streets and rights-of-way shown on said plat . . ."); IDAHO CODE § 50-1312 (2021) ("[A]cknowledgement and recording of such plat is equivalent to a deed in fee simple . . . set apart for public streets or other public use . . ."); IDAHO CODE § 50-1315(1) (2021) ("When plats have been accepted and recorded for a period of five (5) years and said plats include public streets that were never laid out and constructed to the standards of the appropriate public highway agency, said public street may be classified as public right of way . . .").

77. MEYER, *supra* note 44, at 30.

78. *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 775 P.2d 111, 116, 116 Idaho 219, 224 (1989).

79. *Id.* at 116, 116 Idaho at 224.

common law dedication.⁸⁰ In the late nineteenth century, the Federal Government operated a military reserve in the area, but by 1904 the government abandoned the reserve and sought to sell off the land.⁸¹ The Government had the reserve surveyed and platted; the plats were then recorded in the General Land Office in Boise and subsequently the government sold the parcels.⁸² The Court found that when the plat shows a road as public then a clear unequivocal offer by the owner is satisfied.⁸³ By recording the plats referencing the public road with the Land Office in Boise, the Government had satisfied the first element of common law dedication by making a clear and unequivocal offer to dedicate the road to the public.

ii. Purchasing a lot with reference to the filed plat is a valid acceptance of the offer by the public.

An offer to dedicate the road as public can be accepted by purchasing lots with reference to the filed plat.⁸⁴ The Court in *Worley Highway District* found that, because the lots had been “sold or otherwise conveyed by instruments which specifically refer to such plat, there is a legally efficacious dedication of such property.”⁸⁵ So long as there has been a valid offer through a recorded plat, and lots were sold with reference to such plat, the public has accepted the offer to dedicate the road to public use.⁸⁶ This case confirmed that through common law dedication, no statutory requirements need to be met; so long as there is a valid offer and acceptance the property becomes dedicated to public use.⁸⁷

iii. A road dedicated to the public must be formally abandoned.

The Yacht Club’s insistence that if a public road had been dedicated, then it had long been abandoned, was also addressed.⁸⁸ The Court found that even though common law dedication need not fulfill statutory requirements, formal abandonment must.⁸⁹ The dedication is irrevocable absent affirmative abandonment, regardless of whether the property is not immediately used by the public in the manner that it was dedicated for.⁹⁰ The Court found that “[t]he public exigency requiring the use of the property may not arise for years,” thus absent formal abandonment, the public nature of the dedicated property remains.⁹¹

80. *Id.*

81. *Id.* at 113, 116 Idaho at 221.

82. *Id.*

83. *Id.* at 117, 116 Idaho at 225; *see also* MEYER, *supra* note 44, at 30–31.

84. *Worley Highway Dist.*, 775 P.2d at 116–17, 116 Idaho at 224–25.

85. *Id.* at 117, 116 Idaho at 225.

86. *Id.* at 118, 116 Idaho at 226.

87. *Id.* at 119, 116 Idaho at 227.

88. *Id.* at 118, 116 Idaho at 226.

89. *Id.*

90. *Worley Highway Dist.*, 775 P.2d at 118, 116 Idaho at 226; *see also* MEYER, *supra* note 44, at 32.

91. *Id.* at 119, 116 Idaho at 227 (citing *Pullin v. Victor*, 655 P.2d 86, 103 Idaho 879 (Idaho Ct. App. 1982)).

In 2002, the Court reaffirmed common law dedication in *Farrell v. Board of Commissioners of Lemhi County*.⁹² There, the Court held that the federal government adequately offered Indian Creek Road for public use by filing a plat of the land with reference to the road, and the dedication was accepted when homesteaders were granted patents by reference to the plat.⁹³ The recognition of this dedication was a victory for public land users that secured the right to use the road to access 32,000 acres of National Forest land.⁹⁴

The Idaho Supreme Court has confirmed that roads can be dedicated to public use through common law dedication, which in both of the above cited cases has resulted in victories for public land users.⁹⁵ However, the difficulty in determining the dedication is evidenced by the fact that both of these dedications occurred in the early 1900's.⁹⁶ So far, finding that a common law dedication occurred has been predicated on an ability to find platting and sale documents from over a century ago. Though sometimes it is possible to do so—evidenced by the two cases at hand—it may not always turn out to be feasible to find documents that are over one hundred years old.

B. Public highways can be created through five years of public use, and maintenance at the expense of the public.

Idaho law has recognized road creation by public use since 1887; the current system of road creation based on five years of public use and maintenance has been in place since 1893.⁹⁷ In accordance with Idaho Code section 40-109(5), a highway can mean a road “used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public.”⁹⁸ It is further codified in Idaho Code section 40-202(3), that “all highways used for a period of five (5) years, provided they have been worked and kept up at the expense of the public . . . are [public] highways.”⁹⁹ Notably, the statute does not require the prescriptive use of the road to be hostile in any way.¹⁰⁰ It merely requires (1) public use for five years, and (2) maintenance at the expense of the public.

92. *Farrell v. Board of Comm'rs, Lemhi Cnty.*, 64 P.3d 304, 311, 138 Idaho 378, 385 (2002), *overruled on other grounds by* *City of Osburn v. Randel*, 277 P.3d 353, 152 Idaho 906 (2012).

93. *Farrell*, 64 P.3d at 311, 138 Idaho at 385.

94. *Id.* at 307–08, 138 Idaho at 381–82.

95. *Worley Highway Dist.* 775 P.2d at 111, 116 Idaho at 219; *Farrel*, 64 P.3d at 304, 138 Idaho at 378.

96. *Worley Highway Dist.* 775 P.2d at 113, 116 Idaho at 221 (“The plat . . . was approved by . . . Commissioners of the Land Office, on October 28, 1904”); *Farrell* 64 P.3d at 307, 138 Idaho at 381 (“[T]he original road was constructed circa 1901”).

97. MEYER, *supra* note 44, at 13.

98. IDAHO CODE § 40-109(5) (2021).

99. IDAHO CODE § 40-202(3) (2021).

100. *East Side Highway Dist. v. Delavan*, 470 P.3d 1134, 1150, 167 Idaho 325, 343 (2019) (holding “[t]he statute does not contain a requirement for hostile or adverse use by the public.”)

- i. Public use must be more than casual and sporadic but use for recreation can be sufficient if it is regular.

The first statutory element that must be met is public use for five years.¹⁰¹ The Idaho Supreme Court found in *Floyd v. Board of Commissioners of Bonneville County* that public use for the purposes of recreating on public land was sufficient to satisfy the first statutory element of prescriptive road creation.¹⁰² There, private landowners sought to declare Antelope Creek Road a private road.¹⁰³ The Board of Commissioners of Bonneville County found it to be a public road, and the private landowners brought suit to overturn the Commissioners' decision, which was later affirmed by the Idaho Supreme Court.¹⁰⁴

Antelope Creek Road was used to access public land and water in the Caribou National Forest and Tex Creek Wildlife Management Area.¹⁰⁵ Notably, the Court found that the road had been adequately used by the public because it "was regularly and continuously used . . . for fishing, hunting, camping, and other recreational activities."¹⁰⁶

The Idaho Supreme Court has determined that a road only "casually and desultorily" used by the public is insufficient to establish a public road through prescription.¹⁰⁷ In *Lattin v. Adams County*, the County asserted that Burch Lane, which is a road used to connect a public highway to a forest service road in the Payette National Forest, is a public road pursuant to Idaho Code section 40-202(3).¹⁰⁸ Nonetheless, the Court found that affidavits in support of the County's position which attested to three County residents accessing the Payette National Forest via Burch Lane for at least twenty years "for recreational or personal purposes such as hunting, berry picking, and wood gathering" to be insufficient to satisfy the public use element.¹⁰⁹ However, that case was later abrogated by *East Side Highway District v. Delevan*, on the grounds that the Court misinterpreted the elements of prescriptive road creation to require hostile use from the public.¹¹⁰

Thus, the Court has determined that a road must be "regularly and continuously used" for the first statutory element to be met.¹¹¹ Recreational uses can satisfy this requirement, but they must be more than "casual or sporadic use."¹¹² It is unclear whether additional affidavits from the public in *Lattin* would

101. IDAHO CODE §§ 40-109(5), 40-202(3) (2021).

102. *Floyd v. Board of Comm'rs of Bonneville Cnty.*, 52 P.3d 863, 869, 137 Idaho 718, 724 (2002).

103. *Id.* at 865, 137 Idaho at 720.

104. *Id.*

105. *Id.* at 869, 137 Idaho at 724.

106. *Id.*

107. *Kirk v. Schultz*, 119 P.2d 266, 268, 63 Idaho 278, 280 (1941).

108. *Lattin v. Adams Cnty.*, 236 P.3d 1257, 1262, 149 Idaho 497, 502 (2010) *abrogated by* *East Side Highway Dist. v. Delavan*, 470 P.3d 1134, 167 Idaho 325 (2019).

109. *Id.* at 1262, 149 Idaho at 502.

110. *Id.* at 1263, 149 Idaho at 503 ("Furthermore, the record does not suggest that any public access was hostile to Respondents' ownership.").

111. *Floyd*, 52 P.3d at 869, 137 Idaho at 724.

112. *Lattin*, 236 P.3d at 1262, 149 Idaho at 502.

have pushed the Court to find that the use had been sufficiently regular. Additionally, hostility is not a requirement for public prescriptive road creation.

- ii. Maintenance at the public's expense need not occur every year and does not need to be any more than necessary.

The second statutory element of Idaho Code sections 40–202(3) and 40–109(5) requires that the road be maintained at the public expense.¹¹³ Prior to 1893 there was no road maintenance requirement; therefore, if five years of public use prior to 1893 can be demonstrated, then there is no need for the maintenance element to be met.¹¹⁴

There is some disagreement about whether the maintenance requirement must be for five years or if that requirement only attaches to the element of public use.¹¹⁵ However, the Idaho Supreme Court has found that “[t]here is no requirement that the County *exclusively* maintain the road and no mandated level of maintenance other than ‘as necessary’” is required.¹¹⁶ The court determined in *Floyd* that road maintenance by the county from 1949 to 1974 was sufficient to satisfy the element of maintenance at the public expense.¹¹⁷ The public use and maintenance of Antelope Creek Road was enough to overcome the fact that the county had expressly abandoned the road in 1939.¹¹⁸ Additionally, Idaho law allows for road maintenance at the public expense to come from any government agency, including the federal government.¹¹⁹

Therefore, the road must be maintained pursuant to some public funding, though it need not be exclusively maintained by public funding. Maintenance needs to only be for repairs that are reasonably necessary; it need not be for five consecutive years, and it can be done by a federal agency in order to satisfy the second statutory element of public road creation through prescription.

113. IDAHO CODE §§ 40–202(3), 109(5) (2021).

114. Meyer, *supra* note 44, at 23.

115. Roberts v. Swim, 784 P.2d 339, 346, 117 Idaho 9, 16 (Ct. App. 1989) (“The maintenance of the road by a public agency and the use by the public must be for a period of five years.”); *Floyd*, 53 P.3d at 870, 137 Idaho at 725 (“When a right of way has been used by the general public for a period of five years and has also been maintained at public expense, the right of way becomes a public highway.”); see also Meyer, *supra* note 44, at 24.

116. *Floyd*, 53 P.3d at 870, 137 Idaho at 725 (emphasis in original).

117. *Id.* at 869, 137 Idaho at 724.

118. *Id.* at 865, 137 Idaho at 720.

119. In a 1988 case the Idaho Supreme Court determined that funds expended by the United States Forest Service did not satisfy the element of “public expense” as required to create a public road through prescription. French v. Sorenson, 751 P.2d 98, 113 Idaho 950 (1988) *overruled by* Cardenas v. Kurpuweit 779 P.2d 414, 116 Idaho 739 (1989). However, the legislature quickly disposed of this precedent by passing IDAHO CODE § 40-106(3), which states that public expense means “the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the Federal Government.” IDAHO CODE § 40-106(3) (2021).

If the two statutory requirements for prescriptive public road creation have been satisfied, then the property owner across whose property the road traverses cannot legally block public use of the road. However, it is difficult to determine prescriptive public roads because of the sporadic, and often times poorly documented public maintenance.¹²⁰ The public use requirement is often easier to establish because the county or other proponent of public road creation can rely on personal recollections and affidavits of people that use the road to establish five years of continual use.¹²¹ But in small rural counties where road maintenance records are less reliable, there may be more difficulty in establishing the second element. This is especially true considering there is some judicial uncertainty as to the amount and duration of maintenance required.

C. Enforcement of public road access falls to the county or highway district.

If a road is determined to be a public highway as defined by Idaho Code section 40–109, then it is the responsibility of the relevant county or highway district to remove any encroachments.

If the county or highway district has actual notice of an encroachment that is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles or is unsafe for pedestrian or motorist use of an open highway, the county or highway district shall immediately cause the encroachment to be removed without notice.¹²²

Under Idaho Code section 40–2319(2), there are no legal repercussions for a party that illegally obstructs a road; the section instead requires the county or highway district to remove the obstruction.¹²³ However, under Idaho Code section 40–2319(1)(3), if the county requests the removal of the encroachment rather than removing it themselves, the party may be subject to a \$150 per day fine until the encroachment has been removed.¹²⁴ There is very little indication of successful litigation under this statute for either removal of obstructions or payments of fines due to obstructions.¹²⁵

Furthermore, in *Stricker v. Hillis*, the Idaho Supreme Court held that an individual may only bring suit to enjoin obstruction of a highway if the “individual has suffered a loss not common to the public, and in which the public do[es] not share.”¹²⁶ This indicates that a private party could not sue an individual to remove road obstructions if that private party does not have a unique, individualized injury.

120. MEYER, *supra* note 44, at 23 (“[P]ublic maintenance is difficult to prove where records of maintenance are sketchy at best and sometimes entirely unavailable.”).

121. *Id.*

122. IDAHO CODE § 40-2319(2) (2021).

123. *Id.*

124. IDAHO CODE § 40-2319(3) (2021).

125. There are almost no cases that have been litigated under this statute; the record is unclear as to whether there have been many, if any, fines issued under this statute.

126. *Stricker v. Hillis*, 106 P. 1128, 1128, 17 Idaho 646, 646 (1910).

In the case of public land access, it is difficult to think of a plaintiff that would have standing to bring suit, as the nature of public land access is that the public shares in the right of use.

Because of the standing issue, it is the responsibility of the counties or highway districts to enjoin a party from maintaining an illegal obstruction. To justify going through this timely and expensive process, the county would first need to be certain that the road is in fact a public road. And, as discussed above, it is not always easy to determine whether a road is public if the documents relating to dedication are a century old, or if there are inadequate public maintenance records. Even so, it is not impossible. The county or highway district should uphold their legal duties and go through the required steps to affirm that the road is in fact public and the obstruction is illegal, then they should remove the obstruction as required by law. The legislature should pursue some mechanism of either incentivizing them to fulfill their duties, or disincentivizing them from shirking their duties. Furthermore, if the law were changed to allow a private party to bring suit, there is a high likelihood that public interest groups would get behind the movement to ensure public access to public lands is available.¹²⁷

III. LEGISLATIVE CHANGES CAN ENABLE THE PUBLIC TO HAVE A LARGER VOICE IN ACCESS ISSUES

There are a number of ways that the legislature can address the current issues surrounding private parties closing public roads. The lowest hanging fruit would be to use the laws that are currently on the books to ensure public access across public roads. However, the counties and highway districts have been either unable or unwilling to remove obstructions. The legislature could address this by allowing a plaintiff that sues the district to enforce the immediate removal of an obstruction under Idaho Code section 40–2319, to be able to win damages if they are successful.

The Legislature should enact a law giving private parties injured by road closures a cause of action. With injury defined as the inability to travel on the public highway. This would encourage those most affected by closures to sue in order to enjoin the obstruction. If a party is able to successfully enjoin a road closure, they also ought to be able to get damages and attorneys' fees.

Additionally, the Legislature should increase penalties for those who block public roads. Currently, the fine is up to \$150 per day that the road is encroached upon; it is within the discretion of the county or highway district to decide whether to fine the party responsible for the encroachment.¹²⁸ If this fine was increased and made mandatory rather than discretionary, then the property owner may be further disincentivized to continue blocking the road. Additionally, Idaho Code section 36–1603 prohibits any person from posting signs or indicating in any way

127. *See generally* Access, IDAHO WILDLIFE FED'N, <https://idahowildlife.org/access> (last visited Dec. 20, 2021).

128. IDAHO CODE § 40-2319(3) (2021).

that public land is privately owned.¹²⁹ However, the only penalties referenced under this section relate to trespassing on another's property or taking an animal, fish, or bird without the proper license.¹³⁰ The Legislature should amend this chapter to include penalties for illegally indicating that any public property, including roads, is privately owned.

A. The Legislature should amend Idaho Code section 40–2319 to allow a prevailing party to receive monetary damages resulting from an action against a county or highway district forcing them to enjoin a road closure.

In Bannock County there are eight roads that provide access to public lands that have been improperly closed.¹³¹ The county or highway district is required to remove obstructions from public highways if they have actual notice of the obstruction.¹³² However, under Idaho Code section 40–2319(4), the county or highway district “shall not be liable for any injury or damage caused by or arising from the encroachment or the failure to remove or abate the encroachment.”¹³³ If this provision were amended to allow a prevailing party to hold the county or highway district liable for damages caused by the encroachment, then public access groups and recreationalists injured by illegal closures would have a better incentive to bring legal action directly against the county for failing to uphold their legal duties.

The situation in Bannock County could be resolved if the group pushing for the roads to be reopened, Gateway Coalition for Change,¹³⁴ knew that they would be able to recoup damages if they prevailed in litigation. Initially, there was confusion as to whether the County was responsible for ensuring the roads stay open or whether that fell to Idaho Fish and Game, despite Idaho Code section 40–2319, which explicitly requires counties or highway districts to remove encroachments on public roads.¹³⁵ The Bannock County Commissioner, Ernie Moser, was quoted as saying about public land access that “[h]onestly, this was never a priority to me.”¹³⁶ However, under section 40–2319(2), the county or

129. IDAHO CODE § 36-1603 (2021).

130. IDAHO CODE § 36-1402 (2021).

131. Harris, *supra* note 45 (“The public meeting mostly involved Larkin speaking to the county commissioners about eight of the nearly 50 roads listed on the county’s website as the ones that provide access to public lands that have been improperly closed – either with gates, no trespassing signs, or a combination of the two.”).

132. IDAHO CODE § 40-2319(2) (2021) (“If the county or highway district has actual notice of an encroachment...the county or highway district *shall immediately* cause the encroachment to be removed without notice.”) (emphasis added).

133. IDAHO CODE § 40-2319(4) (2021).

134. Harris, *supra* note 45 (The Coalition is headed by retired Idaho Fish and Game biologist Mike Larkin, and Pocatello City Councilwoman Christine Stevens.).

135. Harris, *supra* note 45.

136. *Id.* (Speaking about the road closure situation to the Idaho State Journal, the County Commissioner stated “Honestly, this was never a priority to me . . . [a]nd it’s still not. This is something that we are going to invest some time in, but it’s not the top thing on my priority list.”).

highway district is required to “immediately cause the encroachment to be removed” once they are on actual notice of the encroachment, regardless of whether it is a priority to the commissioner personally.¹³⁷ Bannock County is undeniably and unashamedly neglecting their duty—this absolute disregard for their statutory obligations should be addressed through litigation or the threat of litigation.

If the Gateway Coalition for Change were ensured that they could win damages if they prevailed, then they may be more inclined to bring a case against the County. If there was judicial precedent in Idaho for a public access group prevailing against a county that was not fulfilling their duty to keep public roads open, then more access groups may decide to hold counties and highway districts accountable. Additionally, the mere threat of litigation may be sufficient to encourage a county or highway district to fulfill their duties. Though, if the county removes encroachments on their own accord, without a favorable court decision, then the plaintiffs would be unable to get either damages or attorney’s fees.

In the Hughes Creek Road case, PLWA sued Ravalli County for neglecting their duty to ensure that the road remained open.¹³⁸ The County had removed the gate twice after the declaration from the Montana Supreme Court that the road was public.¹³⁹ However, both times were due to prompting from PLWA and other concerned citizens.¹⁴⁰ The gate was replaced in July 2021, in addition to felled trees and brush behind the gate to further obstruct the road.¹⁴¹ By October of 2021, the gate had still not been removed despite multiple requests from PLWA.¹⁴² In response to this, PLWA filed suit against the County to force them to uphold their statutory duty.¹⁴³ PLWA was particularly concerned about the language of the

137. IDAHO CODE § 40-2319(2) (2021).

138. Compl. for Decl. J. and Pet. for Alternative Writ of Mandamus at 1, Public Land/Water Access Ass’n v. Ravalli County, No. DV-41-2021-0000433-WM (Mont. Dist. Ct. Oct. 22, 2021), <https://static1.squarespace.com/static/6002236795a3752c3a5420f6/t/6172f26851c0ba590c522112/1634923144274/Complaint.pdf>.

139. Declaration of Drewry Hanes at 2–3, Public Land/Water Access Ass’n v. Ravalli County, No. DV-41-2021-0000433-WM (Mont. Dist. Ct. Jan. 12, 2022).

140. *Id.* at 8 (“Given the plain and unambiguous language of §§ 7-14-2133 and 7-14-2134, MCA, and the lack of any legitimate reason for further delay, the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association respectfully request that the Board (or the road supervisor or county surveyor, as appropriate) ‘immediately’ remove the unlawful gate obstructing and encroaching upon Hughes Creek Road.”); *id.* at 13 (“Because the County refuses to comply with Montana law mandating this gate be ‘immediately’ removed, §§ 7-14-2133 and 7-14-2134, MCA, we respectfully request the State step in, remove the unlawful gate, and ensure safe public access on Hughes Creek Road and the public lands and waters beyond it.”).

141. *Id.* at 2.

142. *Id.* at 3.

143. Compl. for Decl. J. and Pet. for Alt. Writ of Mandamus at 1, Public Land/Water Access Ass’n v. Ravalli County, No. DV-41-2021-0000433-WM (Mont. Dist. Ct. Oct. 22, 2021).

statute that required “immediate” removal of the obstruction.¹⁴⁴ Finally, with the threat of litigation realized, the County removed the gate in January 2022.¹⁴⁵ Following the removal of the gate, the County moved to dismiss the case as moot—which the district court granted against the wishes of PLWA.¹⁴⁶ PLWA argued that they should litigate the merits of the case because it is reasonably likely that the property owners will again block the road, and that the County will again “drag their feet” in upholding their statutory duties.¹⁴⁷ However, the court disagreed, dismissed the case as moot, and denied PLWA’s request for attorney’s fees because they did not technically prevail in the litigation.¹⁴⁸

Public officials should be upholding the law regardless of whether they are threatened with litigation or not. But, if the legislature ensured that a prevailing plaintiff suing the county or highway district to enforce their statutory duty was entitled to damages and attorney’s fees, there may be more incentive for an access group to litigate. Though, as seen in the Ravalli County case, if the County opts to fulfill their duties in response to litigation, the plaintiffs will not be entitled to either damages or attorney’s fees, although their ultimate goal of reopening the road will be realized.

B. The Legislature should give private citizens a cause of action to force the removal of obstructions.

One of the key hurdles in ensuring that roads remain open is that enforcement of public access on public highways remains with the county or highway district. As discussed above, this is especially an issue when relatively small rural counties may be unable or unwilling to prioritize public access issues.¹⁴⁹ The people that are most affected by road closures should have a say in their ability to access public land regardless of who owns the private property that the public road traverses. Private citizens and groups that encourage public access are uniquely situated to support access rights because they are the ones affected by closures.¹⁵⁰ If private actors are given the ability to enjoin road closures, then they may be incentivized to do the timely and costly research to determine whether a road is in fact public; if the road

144. *Id.* at 2.

145. Order Granting Defendants’ Motion to Dismiss at 5, *Public Land/Water Access Ass’n v. Ravalli County*, No. DV-41-2021-433 (Mont. Dist. Ct. Feb. 7, 2022).

146. *Id.* at 2.

147. *Id.* at 8.

148. *Id.* at 11–12.

149. *Bannock County, Idaho*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/bannockcountyidaho#> (last visited Apr. 13, 2022) (total population of 87,018; 74.5 people per square mile); *cf. Ada County, Idaho*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/adacountyidaho#> (last visited Apr. 13, 2022) (total population of 494,967; 372.8 people per square mile).

150. *Idaho Senate Takes Up Public Access Protection Act*, CONSERVATION VOTERS FOR IDAHO (Feb. 13, 2020, 2:18 PM) <https://cvidaho.org/senate-public-access-protection/> [hereinafter *Idaho Senate*] (“At Conservation Voters for Idaho, we work to understand threats to public access and what we can do to protect our right to get outdoors.”).

is determined to be public, then they can bring suit to remove any blockages. This would alleviate the burden on the county or highway district and allow for a new avenue in Idaho law for ensuring that the public can access the vast public lands that the state has to offer. In fact, there has been a bill proposed in the senate that would give a civil remedy to private citizens harmed by illegal road closures known as the Public Access Protection Act (PAPA).¹⁵¹

- i. The Public Access Protection Act would give the public a cause of action to enjoin road closures.

PAPA is an innovative solution to public access issues because it allows a private party to sue another private party that is violating Idaho law by illegally blocking public roads. In the second regular session of 2020, the Resources and Environment Committee of the Idaho Senate approved a print hearing on the Public Access Protection Act.¹⁵² The stated purpose of PAPA is to create “modest incentives for Idahoans to post or place gates only on grounds individuals have the authority to do so.”¹⁵³ The Statement of Purpose also recognizes that recreation is Idaho’s third largest industry; thus, ensuring access to Idaho’s public land is essential for the state’s economy.¹⁵⁴

The bill prohibits interference with public land open to the public; private land open to the public pursuant to easements, access agreements, or rights-of-ways; public highways; and navigable streams.¹⁵⁵ Interference by way of posting a sign or otherwise indicating that public land is privately owned or not open to the public is prohibited; additionally, it prohibits obstructing, blocking, and interfering with a person’s attempt to lawfully use public land.¹⁵⁶ Notably, the language of this bill seems to be an extension of Idaho Code section 36–1603(b), which states that “[n]o person shall post, sign, or indicate that any public land within this state . . . are privately owned lands.”¹⁵⁷ The major difference between the two, is that a violation of PAPA could result in both criminal and civil penalties.¹⁵⁸

The criminal penalties for violating PAPA would include a warning for the first offense, an infraction plus a \$200 fine for the second offense, and a misdemeanor plus a fine of \$1,000 for the third offense.¹⁵⁹ With no threat of jail time, these are relatively small penalties that serve to maintain access without “over-criminalizing

151. S. 1317, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

152. *Idaho Senate*, *supra* note 150.

153. Statement of Purpose, S. 1317.

154. *Id.*

155. S. 1317 § 18-7008A(1).

156. *Id.* § 18-7008A(2).

157. IDAHO CODE § 36-1603(b) (2021).

158. S. 1317, 65th Leg., 2nd Reg. Sess. § 18-7008A(4)(5) (Idaho 2020).

159. *Id.* § 18-7008A(4).

bad behavior.”¹⁶⁰ Presumably, the authors of the bill kept the penalties relatively insignificant so that the bill would be more politically palatable. But stricter penalties may be another avenue for discouraging private citizens from blocking public roads.

The real teeth of the proposed legislation is section 5, which details civil penalties for violators.¹⁶¹ After written notice of an alleged violation, any person damaged by the closure or blockage may bring suit for actual damages or \$500 in damages, whichever is higher plus attorney’s fees.¹⁶² Additionally, the state or any private party bringing suit under section 5 of the proposed legislation can seek relief by way of an injunction against the blockage.¹⁶³ The possibility of getting actual damages and attorney’s fees would encourage private citizens and public access groups to pursue litigation because if they prevail they would be compensated for the work required to determine the public nature of the road in question.

If this legislation were passed it would solve the standing issue of Idaho Code section 40-2319, which as discussed above, only allows for a county or highway district to force removal of a blockage.¹⁶⁴ If a private citizen or group were able to bring suit to remove an obstruction, then it could ensure that the incentivized parties were able to enforce their own rights to access public land. Furthermore, this may incentivize private landowners to actually determine whether the road is in fact private prior to placing an obstruction on it.

Currently, the Wilks brothers have closed or restricted access on roads that may or may not be public, presumably with the understanding that the counties or highway districts have little incentive to stop them.¹⁶⁵ However, if they knew that there were groups of private citizens that were organized in a manner intended to ensure that public roads stayed open, they may think twice before closing roads whose status is actually unknown. Furthermore, if they did continue to close roads, the affected citizens would have a legal cause of action to fight the closures.

ii. It appears that PAPA died in the Senate without a vote on the merits.

As of now, PAPA never got a hearing in the House of Representatives and though it received a print hearing in the Senate Resources and Environmental Committee, it has yet to make it out of the committee.¹⁶⁶ Senators Bair, Mortimer, and Johnson opposed even printing the bill in the committee.¹⁶⁷ However, it should

160. Brian Brooks, *IWF’s Public Access Protection Act is Resurrected*, IDAHO WILDLIFE FOUND. (Feb. 11, 2020), <https://idahowildlife.org/news/iwfs-public-access-protection-act-is-back>.

161. S. 1317 § 18-7008A(5).

162. *Id.*

163. *Id.*

164. IDAHO CODE § 40-2319 (2021).

165. See generally James S., *Run in with DF Development on National Forest Service Rd 409*, YOUTUBE (July 25, 2017), <https://www.youtube.com/watch?v=Tt2ndalulYA>.

166. *Idaho Senate, supra* note 150 (“Idaho House – despite hearing from hundreds of Idahoans in support of the measure – rejected the motion to even give the bill a print hearing.”).

167. Public Access Protection Act: Hearing Minutes on R.S. 27592 Before the S. Res. & Env’t Comm., 2020 Leg., 65th Sess. 1–2 (Idaho, 2020).

be noted that the two senators that voiced concern about the contents of the bill did vote for it to be printed.¹⁶⁸

Idahoans should resurrect interest in the bill by pushing their legislators to hold additional hearings and finally allow the entirety of the legislature to take a vote on the bill. In the very least, this would give voters a better understanding of where their representatives stand on public land access issues going forward.

C. The Legislature should increase penalties for private parties that illegally block public roads.

Currently, under Idaho Code section 40–2319, a party that obstructs a public road will be given ten days to remove the encroachment after notice from the county or highway district.¹⁶⁹ If the encroachment has not been removed after ten days, then the party who “owns or controls the encroachment shall forfeit up to one hundred fifty dollars for each day” that the encroachment is not removed.¹⁷⁰ If the party blocking the road refuses to remove the obstruction, then the county or highway district can seek a court action to compel its removal—upon doing so they may fine the party up to \$150 per day that the blockage remains in place after notice, in addition to abatement of the blockage.¹⁷¹ Though this penalty can add up to a hefty fine, there are opportunities to improve this legislation.

Under the Fish and Game statutes, no one is allowed to post or indicate that any public property is privately owned.¹⁷² However, there is no penalty for violating this provision. The Legislature should amend this statute to penalize private parties that post or indicate that public property, including roads, is privately owned.

i. Idaho Code section 40–2319 should be amended to increase the ceiling for fines against someone who violates the statute.

Idaho Code section 40–2319 does not require the county or highway district to actually fine the party obstructing the road the full \$150 per day.¹⁷³ Though the statute says the county “shall” fine the owner of the encroachment, it also states that the daily fine can go “up to” \$150.¹⁷⁴ The Legislature should change this to a floor rather than a ceiling. Setting a floor for the fine would ensure that the county or highway district does actually fine the violators rather than merely giving them a slap on the wrist. The legislature should increase the ceiling to \$500 per day and set

168. Senator Guthrie questioned the delineation used for public access and what criteria would be used to issue a citation; Senator Bracket voiced concern about fence lines not always following the correct property boundaries. *Id.*

169. IDAHO CODE § 40-2319(3) (2021).

170. IDAHO CODE § 40-2319(3)(a) (2021).

171. IDAHO CODE § 40-2319(3)(b) (2021).

172. IDAHO CODE § 36-1603(b) (2021).

173. *See* IDAHO CODE § 40-2319 (2021).

174. *Id.*

the floor at \$150 per day, which would further disincentivize parties from obstructing public roads.

There is already a ten-day grace period between the property owner getting notified to remove the encroachment and the fines beginning to accrue.¹⁷⁵ Therefore, increasing the fines would not result in an unsuspecting property owner getting hefty fines if they close a road that they mistakenly thought was private. Any reasonably diligent property owner would be able to remove the encroachment prior to the fining period beginning. This would also incentivize a property owner to do their due diligence in learning whether the road is actually private before deciding to block it. And, if the property owner decided to block a road without doing their due diligence, then the threat of a \$500 per day fine would incentivize them to re-open the road before the fining period begins.

- ii. Idaho Code section 36–1603(b) should be amended to include penalties for anyone that indicates public land, including roads, is private.

Idaho Code section 36–1603(b) prohibits people from posting or indicating that any public land within the state is private.¹⁷⁶ This should be amended to clarify that public land includes public roads within the meaning of section 40–109(5).¹⁷⁷ The statute should also be amended to include penalties for improperly indicating that any public land is privately owned.

The statute states that any violation of the provisions will subject the violator to penalties “including, but not limited to, section 36–1402(e).”¹⁷⁸ However, section 36–1402(e) deals with license revocation for taking an animal, bird, or fish without the proper license.¹⁷⁹ This suggests that the penalties included in section 36–1603 are more closely tied to the other sections of the statute that prohibit trespassing on private property for hunting, fishing, and trapping purposes.¹⁸⁰ The Legislature should utilize the “including, but not limited to” language to add a penalty for those that improperly indicate any public land is privately owned. Violating section 36–1603(b) should subject the violator to the proposed increased penalties of section 40–2319.¹⁸¹ This would ensure that the improper signs or indication that public land is privately owned would be removed, while subjecting the violator to fines if they refuse to comply with the statute.

175. IDAHO CODE § 40-2319(3)(a) (2021).

176. IDAHO CODE § 36-1603(b) (2021).

177. IDAHO CODE § 40-109(5) (2021).

178. IDAHO CODE § 36-1603(b) (2021).

179. IDAHO CODE § 36-1402(e) (2021).

180. *See e.g.*, IDAHO CODE § 36-1603(a) (2021) (“No person shall enter the real property of another and shoot any weapon or enter such property for the purposes of hunting, retrieving wildlife, fishing or trapping in violation of section 18-7008, Idaho Code.”).

181. IDAHO CODE § 40-2319 (2021).

IV. CONCLUSION

Public land access issues are prevalent across the West. In Idaho, the first step in determining whether the public can continue accessing public land is to determine if the roads that cross private land en route to public land are in fact public roads. In addition to formal creation, roads can be dedicated to the public through common law dedication, and they can be created through prescription pursuant to Idaho Code section 40-202(3). Once a road is determined to be public, then the county or highway district is required to remove any obstruction upon that highway after they receive actual notice pursuant to Idaho Code section 40-2319(2).

However, there is evidence of public highways being obstructed and the county refusing to remove the obstructions.¹⁸² This is an issue in Idaho as well as other states across the West, as evidenced by the situation in Bannock County and the Hughes Creek Road controversy in Montana.¹⁸³ Idahoans, and public land users across the West, would benefit from legislative changes to encourage counties and highway districts to uphold their statutory duties; give private citizens a cause of action to enjoin private landowners from restricting public land access by constructing illegal blockages on public roads; and increase penalties for violators to discourage private citizens from blocking public roads. The Legislature should amend the current laws to allow plaintiffs to recover damages if they prevail in an action against a county or highway district that is not performing their statutory duty. They should amend the current statutes to increase penalties for violators. And legislation such as PAPA should be pursued by the voters because it would allow the affected citizens to fight for their rights to access their public lands. This kind of legislation should also be supported by local governments because it would reduce the burden on them by allowing private citizen groups to do the leg work required to determine the public nature of a road, and to fight any blockages and closures that threaten public land access. PAPA is a novel piece of legislation that, if passed in Idaho, could transform the legal landscape of the West when it comes to public land access.

182. Harris, *supra* note 45.

183. Harris, *supra* note 45; Bugli v. Ravalli County, 444 P.3d 399 (Mont. 2019).