

Public Land and Resources Law Review

Volume 3

Public Access to Federal Lands: Dilemma

Charles S. Lucero

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>



Part of the [Law Commons](#)

Recommended Citation

3 Pub. Land L. Rev. 194 (1982)

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land and Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

PUBLIC ACCESS TO FEDERAL LANDS: DILEMMA

I. INTRODUCTION.....	194
II. THE ACCESS PROBLEM	195
III. THE RESPONSIBILITY OF GAINING ACCESS	196
IV. CASE LAW ADDRESSING PUBLIC ACCESS ACQUISITION.....	197
V. CURRENT EFFORTS TO ALLEVIATE THE ACCESS PROBLEM	199
VI. DISCUSSION: WHAT SHOULD BE DONE.....	200
VII. CONCLUSION.....	203

I. INTRODUCTION

At one time virtually all lands west of the Mississippi River were held by the United States Government.¹ To encourage settlement of this vast frontier, the government instituted public land policies to transfer these lands into private ownership. For example, cash sales, state grants, railroad grants, and the homestead acts were all dispositive devices employed by the government.² When these policies were terminated in the 1930s, the western United States featured public lands that were often nonagricultural, forested and isolated. This situation was aggravated by withdrawals of National Parks, National Forests, military reservations, and power sites.³

Although these lands were unattractive to the honyocker,⁴ they have become so to recreationists. Since World War II, outdoor recreation has grown at an unexpected rate.⁵ The hunter and fisherman must now compete with hikers, photographers, backpackers, cross country skiers, and others for recreational space.⁶ Alarmed by the increased demand on public lands, landowners have restricted access across private lands. The fear expressed by landowners is warranted; their property can be subjected to pilferage, vandalism, and other damage.

Contributing to the access problem is a lack of an inclusive public land management policy instituted by the federal government. As one author states: "there is not now, and has never been, what properly could be called a comprehensive or integrated public land policy."⁷ Although Congress has enacted public land legislation, little is directed to

1. *Montana Wilderness Ass'n v. United States*, 496 F. Supp. 880, 883 (D. Mont. 1980); *Leo Sheep Co. v. United States*, 440 U.S. 668, 670 (1979).

2. J. Munger, *Public Access to Public Domain Lands*, 2 *ECON. RES. SERV. MISC. PUB.* No. 1122, 1968 [hereinafter cited as Munger].

3. *Id.*

4. TOOLE, *MONTANA AN UNCOMMON LAND*, 228 (1959).

5. 8 *LAND & WATER L. REV.*, 149, (1973).

6. *Id.*

7. Munger, *supra* note 2, at 2.

an overall goal. These inconsistent policies led to the creation of the Public Law Review Commission (PLRC), which after three years of deliberations produced several volumes of information and recommendations.⁸ Since the PLRC's report to Congress and the President, few of its recommendations have been enacted by Congress, leaving federal agencies with no clear policy guidelines. In summary, fragmented ownership, increased outdoor recreation, and the lack of a federal policy addressing public lands have all "set the stage" for public access problems.

II. THE ACCESS PROBLEM

Although 754 million acres of federal lands are found in the western United States, they are often inaccessible to the public.⁹ This inaccessibility results from four problems: 1) a lack of public awareness concerning which lands are public; 2) the physical remoteness of public lands from established roads and trails; 3) government lessees and permittees who prohibit public use on federal lands; and, 4) private landowners who block access to public lands by controlling key tracts of land.

The access problem surfaced in the 1950s,¹⁰ and has grown steadily with the increase in the number of public land recreationists. In 1959 the Bureau of Land Management (BLM) estimated that 12.4 million acres of its land could not be reached by existing roads and trails and an additional 5.4 million acres were blocked by private lands.¹¹ Oregon¹² and Colorado¹³ field studies indicate that a considerable amount of public lands are closed to the public in those states. And in Montana, an interim study by the subcommittee on agricultural lands demonstrates specific instances of access denial to public lands.¹⁴

8. UNITED STATES PUBLIC LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND (1970): A Report to the President and Congress [hereinafter cited as PUB. L. REV. COMM.].

9. *Id.* at 214.

10. M. Frome, *The Big Lockout*, FIELD AND STREAM, Oct. 1971 at 58; W. Fairhurst & B. East, *Cloud in the Big Sky*, OUTDOOR LIFE, July 1971 at 31.

11. Munger, *supra* note 2, at 5.

12. *Id.* at 5 n.6.

13. *Id.* at 5 n.5.

14. In a questionnaire, the subcommittee asked for specific instances of public access denials. Those people responding listed the following situations:

a. The road leading from I-15 near Melrose to Brown's Lake in Beaverhead County had been open for over forty years and has recently been closed by a private landowner. The lake is owned by the Department of Fish, Wildlife and Parks and surrounding the lake is United States Forest Service land.

b. A road along Thompson Creek in Beaverhead County has recently been closed.

c. The west side of the Bitterroot Valley where the terrain is such that any practical

III. THE RESPONSIBILITY OF GAINING ACCESS

Of all federal lands, eighty-seven percent are managed by the BLM and Forest Service.¹⁵ The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of Agriculture and Interior to acquire access to public lands by "purchase, exchange, donation, or eminent domain" subject to specified conditions.¹⁶ FLPMA recognizes outdoor recreation as one of the multiple uses for which public lands are managed.¹⁷ When these provisions are viewed in connection with FLPMA's enforcement provisions,¹⁸ the Forest Service and BLM can acquire access to federal lands for outdoor recreational purposes. Government permits and leases can be "subject to such terms and conditions the Secretary concerned [Agriculture or Interior] deems appropriate and consistent with the governing law, including . . . the authority to cancel, suspend, or modify a grazing permit or lease in whole or in part, pursuant to the terms and conditions thereof"¹⁹

The Taylor Grazing Act states that none of its provisions concerning public lands shall be: "construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any state, or as vesting in any permittee any rights whatsoever to interfere with hunting or fishing within a grazing district."²⁰ Thus, the Taylor Grazing Act²¹ authorizes the government to require permittees or lessees of federal lands to allow public access to hunters and fishermen. Forest Service personnel are required to notify Regional Foresters when an attempt is made to deny use of roads where the public is believed to have prescriptive rights.²²

IV. CASE LAW ADDRESSING PUBLIC ACCESS ACQUISITION

In 1965, near Rawlins, Wyoming, a private company precluded the public from reaching Seminoe Reservoir, a popular recreation site,

access to the canyon is precluded unless right-of-way across private lands is obtained. Access to many of these areas has been banned since 1958.

d. The entrance to Sweetgrass Canyon in the Crazy Mountains. MONTANA LEGISLATIVE COUNCIL, *Public Access to Public Lands: Interim Study 1* (1976) [hereinafter cited as MONT. LEGIS. COUNCIL]. Further examples of access denial in Montana are enumerated by W. Fairhurst & B. East, *supra* note 10, at 31.

15. PUB. L. REV. COMM., *supra* note 8, at 22.

16. 43 U.S.C. § 1516 (1976).

17. 43 U.S.C. § 1701 (1976).

18. 43 U.S.C. § 1733 (1976).

19. 43 U.S.C. § 1752 (1976).

20. 43 U.S.C. § 315 (1976).

21. *Id.*

22. FOREST SERVICE MANUAL, *Landownership* § 5461.03(a)(4) (1976).

unless access fees were paid to the company.²³ A checkerboard ownership pattern surrounded the reservoir. The government owned the even numbered sections and the Elk Mountain Safari Company, a conglomerate of six ranches, held the odd numbered sections.²⁴ After unsuccessfully negotiating with the company to provide access, the BLM cleared a road to the reservoir.²⁵ The company sued, contending that the United States illegally entered their lands.²⁶ The United States alleged that it had access over the private land via an easement by necessity.²⁷ The United States Supreme Court held in favor of the company, holding that an implied easement could not be inferred from the Union Pacific Act of 1862, and that no easement by necessity existed because the government retained the power of eminent domain.²⁸ This decision, *Leo Sheep Co. v. United States*, stripped the government of its right to rely on easements by necessity where the government could otherwise assert its inherent power of eminent domain.

Although *Leo Sheep* precludes the United States government from relying on easements by necessity, it has no application to Montanans raising the same issue. Montana case law suggests that an easement by necessity can exist where suit is brought by a private individual.²⁹ For example, in *Herrin v. Sieben*, the defendant was charged with civil trespass on the plaintiff's land while attempting to gain access to enclosed public lands.³⁰ The Montana Supreme Court determined that the defendant had a way of necessity for public purposes.³¹

Public prescriptive easements present another area where courts have addressed access right acquisitions. When the public has used a road or trail adverse to the private landowner for a period of five years, public prescriptive rights are established over the private property.³² Moreover, the Montana Supreme Court has determined that once the public's use over private land is open, continuous, visible, and uninter-

23. 15 LAND & WATER L. REV. 119 (1980).

24. *Id.* at 121.

25. *Id.* at 119.

26. *Leo Sheep Co.*, *supra* note 1, at 678.

27. 1 PUB. LAND L. REV. 113 (1980).

28. *Leo Sheep Co.*, *supra* note 1, at 687.

29. MONT. LEGIS. COUNCIL, *supra* note 14, at 38.

30. 46 Mont. 226, 127 P. 323 (1912).

31. *Id.* *Herrin* was subsequently overruled by *Simonson v. McDonald*, 131 Mont. 494, 501, 311 P.2d 982, 986 (1957). However, the *Herrin* rule exists today because *Simonson* was specifically overruled by *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965). The *Simonson* rule was also abandoned by: *State By and Through Montana etc. v. Cronin*, 179 Mont. 481, 587 P.2d 395 (1978); *Ingals v. Mickalsen*, 170 Mont. 1, 549 P.2d 459 (1976); *Godfrey v. Pilon*, 165 Mont. 439, 529 P.2d 1372 (1974).

32. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 70-19-405 (1981).

rupted, a presumption arises that such use was adverse.³³ It is then incumbent upon the landowner to rebut the presumption by demonstrating that the use was permissive.³⁴ When the presumption is not overcome, a prescriptive easement vests in the user.³⁵ In *Hayden v. Snowden*, the Montana Supreme Court affirmed a public prescriptive easement although the use was described as "slight, irregular but continuous."³⁶ Public prescriptive easements were also found in *Lunceford v. Trunk*,³⁷ *Rostbade v. Metier*,³⁸ and *Lackey v. City of Bozeman*.³⁹ When the public raises this presumption, they can then sue the landowner to establish the easement. Where suit is not brought, public rights can be abrogated by a landowner who acts adversely to the public for five years.

Further access problems arise when federal permittees or lessees preclude federal land use by the public. Montana federal land lessees (60.7% with BLM leases and 20.3% with Forest Service leases), were asked by questionnaire whether they were required to grant public recreational use on leased lands. Seventy-three percent stated their leases contained no such requirement.⁴⁰ However, BLM and Forest Service leases only grant the lessee those specific privileges enumerated in each individual lease. Therefore, lessees cannot prevent public use on leased lands where no such provision is made in the lease.⁴¹ Since over one-third of federal lands are administered for livestock grazing,⁴² the survey suggests that landowners are misinformed about their rights as lessees. Not only do some lessees block access by closing roads, but also by protecting their land *and* federal land with armed guards.⁴³ Clearly, this practice conflicts with the policy of multiple use management of federal lands.

The PLRC specifically recognized the problem: "Without public access to public lands, intervening private owners can turn public values into private gain."⁴⁴ And in *Hardman v. King* the Court stated:

33. *Mountain View Cemetary v. Granger*, 175 Mont. 351, 354, 574 P.2d 254, 257 (1978); *Standinger v. Devries*, 177 Mont. 189, 191, 581 P.2d 1, 2 (1978).

34. *Mountain View Cemetary v. Granger*, *supra* note 33 at 354, 574 P.2d at 257 (1978).

35. *Standinger v. Devries*, *supra* note 33 at 581, P.2d at 2 (1978).

36. 176 Mont. 169, 576 P.2d 1115 (1978).

37. 163 Mont. 504, 518 P.2d 226 (1974).

38. 150 Mont. 139, 432 P.2d 382 (1967).

39. 42 Mont. 387, 113 P. 286 (1910).

40. MONTANA LEGISLATIVE COUNCIL, *supra* note 14, at 29.

41. Interview with Jim Schoenbaum, United States Forest Service, Northern Region Land Use Specialist, Missoula, Montana (Dec. 10, 1981).

42. PUB. L. REV. COMM., *supra* note 8, at 28.

43. Although this practice is uncommon, it has occurred with some regularity in particular areas. See Frome and Fairhurst & East, *supra* note 10. It is more common for lessees and permittees to post federal lands with no trespassing signs.

44. PUB. L. REV. COMM., *supra* note 8, at 224.

“by unlawfully enclosing government lands . . . one acquires the right to the exclusive possession of such government lands”⁴⁵ Although the Elk Mountain Safari Company had exclusive possession of government lands in *Leo Sheep*, the United States failed to make an argument concerning the company’s misuse of federal lands.⁴⁶

Finally, federal land use suffers from the public’s inability to differentiate public from private lands. The PLRC has determined that the public tends to assume lands are private if not otherwise marked.⁴⁷

V. CURRENT EFFORTS TO ALLEVIATE THE ACCESS PROBLEM

In its report, the PLRC recommended that “Congress should authorize a program for acquiring and developing reasonable rights-of-way across private lands to provide a more extensive system of access for outdoor recreation and other uses of the public lands.”⁴⁸ However, Congress has failed to act and federal agencies continue to utilize defunct land management policies. Following *Leo Sheep*, the government may no longer rely on easements by necessity. And although the BLM and Forest Service have a power of eminent domain specifically enumerated in FLPMA,⁴⁹ the use of such power has its handicaps. For example, these agencies must follow specific steps that take more time and money than is allotted by Congress for condemnation proceedings. Eminent domain is only used in the most dire circumstances; the United States government in *Leo Sheep* characterized eminent domain as unreasonable and unworkable.⁵⁰ After this decision, the BLM has stated that it will employ eminent domain proceedings as much as possible, but due to agency constraints and the intricate process involved, such a tool is not high on its priority list.⁵¹

The selection processes utilized by federal agencies in condemnation proceedings are not directed toward providing access where it is most needed. For example, the Forest Service determines which areas are to be condemned on a case-by-case basis from recommendations made by land managers in the field. No comprehensive survey is made to determine on which lands the need for access is greatest; thus, while access may sometimes be provided, lands with the greatest recreational appeal may still be inaccessible.

45. 14 Wyo. 503, 85 P. 382 (1906).

46. 15 LAND & WATER L. REV., *supra* note 23, at 119.

47. PUB. L. REV. COMM., *supra* note 8, at 214.

48. *Id.*

49. 43 U.S.C. § 1715 (1976).

50. 15 LAND & WATER L. REV., *supra* note 23, at 131.

51. Ansley, *Feds May Need to Buy Land*, Casper Star-Tribune, June 22, 1979, at 21 col. 4, 5, and 6.

Congress must respond positively to the recommendations made by the PLRC, an objective commission representing diverse views. Otherwise, agricultural factions in the western states will successfully continue access deprivation. For instance, in 1975 a bill was introduced into the Montana Legislature providing that state lands be open to the general public.⁵² After the bill's defeat, the legislature by a joint resolution requested an interim study to address the problems of hunting and fishing access in Montana.⁵³ After reviewing the interim study, which found an identifiable access problem, the Subcommittee on Agricultural Lands concluded that no legislative action need be taken.⁵⁴ Thus, where Congress fails to enact legislation assuring access, the public loses its right to the lands they own.

Current efforts to acquire access by private interest groups and individuals are limited by a lack of funding and planning. However, both groups have obtained access either directly or indirectly in a number of circumstances.⁵⁵

VI. DISCUSSION: WHAT SHOULD BE DONE

The public must attain greater access to public lands. Following the enactment of the Multiple Use Sustained Yield Act of 1960⁵⁶ and other Congressional acts incorporating its concepts,⁵⁷ federal lands are to be used for a variety of purposes including outdoor recreation.⁵⁸ Multiple use is defined as:

the management of the various . . . resources so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.⁵⁹

When public lands are inaccessible, outdoor recreation cannot be provided and multiple use of federal lands is frustrated.

52. H.B. 98, 44th Legis. (1975).

53. SEN. JT. RES. 26, 44th Legis. (1975).

54. MONT. LEGIS. COUNCIL, *supra* note 14, at 10.

55. See Frome, *supra* note 10, at 60 and Fairhurst & East at 35. For instance individuals or private interest groups can purchase access rights to private lands that block access to public lands.

56. 16 U.S.C. § 528 (1976).

57. 43 C.F.R. § 4100.0-.2 (1976).

58. 43 U.S.C. § 1701 (1976).

59. 43 U.S.C. § 1415(b) (1976).

Of all public land uses, recreational use is often confined to a few sites that are intensively used.⁶⁰ For example, campgrounds, ski areas, and other attractions on National Forests bear the brunt of recreational use.⁶¹ With the advent of the new outdoor recreationist,⁶² a greater number of new and varied recreational sites must be provided to satisfy the public's increased needs. However, outdoor recreation is not on an equal footing with other public land uses because of its new popularity and its nonrecognition as a viable public land use. For instance, federal lands support nearly one third of the nation's total timber production and simultaneously subsidize the livestock industry.⁶³ To balance these public land uses and meet multiple use requirements, greater public access to federal lands must be provided.

The government, private interest groups and individuals can all ameliorate public access difficulties. First, Congress should adopt a comprehensive public land policy to serve as a foundation for all future legislation. This policy should include a requirement that the public's need for access to public lands be satisfied.

The most important public access acquisition source is the government. The BLM and Forest Service should sponsor a broad program identifying areas where public access is barred. Based on public use, size of tract and other factors, these areas should be rated according to need. Access should then be obtained according to an area's recreational priority. This access should be acquired by agreement, if possible. And if an accord is made, the landowner should be given compensation. These agreements might include reduced charges for federal land use, a limit on the number of people entering private land, and the power to close all access under certain circumstances.⁶⁴ If negotiations fail, the BLM and Forest Service should acquire access by condemnation.

The Secretaries of Agriculture and Interior can condition permits and leases as a means of acquiring access to federal lands.⁶⁵ Clearly, the government has the authority to require that a landowner permit the public to cross his private lands to reach public lands before it issues a federal land lease or permit. If the landowner rejects such conditions and does not accept a lease or permit, the government could then condemn the land.

60. PUB. L. REV. COMM., *supra* note 8, at 30.

61. *Id.*

62. *See* 8 LAND & WATER L. REV., *supra* note 5.

63. PUB. L. REV. COMM., *supra* note 8, at 28.

64. For example, when users interfere with the lessee or permittee's operations or when use may damage the land.

65. 43 U.S.C. § 1752 (1976).

A similar method of assuring access to public lands is to require an applicant for a road right-of-way across public lands to grant a reciprocal public right to cross his property. In 1962, the United States Attorney General determined that the Secretary of Agriculture had such a right.⁶⁶ In its report, the PLRC stated:

land administering agencies should have statutory authority to require that public land lessees and permittees grant reciprocal public right-of-way across private land under certain circumstances. . . . [We conclude] that such a requirement should not be a mandatory condition of all leases and permits issued. It is unnecessary in most cases and undesirable as a matter of principle. Congress should, however, provide general authority to the administrator to require that such rights of way be made available as a condition of extending, renewing, or initially obtaining a lease or permit in circumstances where, because of topography, relief, or geographic conditions, the landowner controls key access to significant areas of public land and willfully blocks an important access route.⁶⁷

In accordance with multiple use concepts, the government could also lease public lands for purposes which do not conflict with public access.⁶⁸ Such a program would derive maximum public benefit from the land, and at the same time make the land available for private use.

Government agencies should better inform the permittee, lessee, and individual. Federal lands should be conspicuously marked to curb public assumption that fenced lands are private if not otherwise marked. And permittees and lessees should be better informed of their rights, which consist of only those privileges enumerated in their permit or lease.

The private sector can act on its own behalf in acquiring access to public lands. Private interest groups who purchase lands or access over lands are the most successful. These groups are attractive to landowners because they do not threaten to overrun private land. Landowners can limit the number of users by contract or other means. And although these groups provide access, their use is typically exclusive.

Finally, private individuals or groups can protect public prescriptive rights by obtaining a judgment after these rights have vested in the public. And as a final alternative, the private sector might sue the government for breach of duty where it has failed to acquire access in cases it clearly should have.

66. 42 Op. Atty. Gen. 7 (Feb. 1, 1962).

67. PUB. L. REV. COMM., *supra* note 8, at 224-25.

68. For instance federal lands that are used as a grazing source could provide outdoor recreation in the winter.

VII. CONCLUSION

Federal lands in the western United States are often inaccessible to the public user and the outdoor recreationist. Land management policies implemented by federal agencies have not ameliorated the access problem of federal lands. Therefore, Congress must enact legislation requiring federal agencies to acquire needed access. These agencies can acquire access by agreement, condemnation, and the conditioning of permits, leases and rights-of-way. Private individuals and groups can assist in obtaining access by defending public prescriptive easements and by monitoring federal agencies to assure they are fulfilling their functions under the law. Positive action must be taken against the growing problem of federal land inaccessibility; otherwise, public access will become a remnant of the past.

Charles S. Lucero

