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One Thousand Roads to Liberty: The Unexamined Case for RS 2477 and Sovereignty *by Benjamin Barr*

INTRODUCTION

This paper focuses on one method to secure an important aspect of state sovereignty: heightened control over public lands. Wyoming is no stranger to the continued loss of key aspects of its sovereignty. From deciding its own wildlife management priorities to how best to educate children, rising federal authority has gradually diminished local control. But what if one legal tool had not yet been used by many states to regain their sovereignty?

Growing federal intervention diminishes our ability to take responsibility for our lives and our communities by interposing its bureaucracy between citizens who wish to freely **associate to address their common needs**. As Alexis de Tocqueville noted, **"In the United States, as soon as several inhabitants have taken an opinion or an idea they wish to promote in society, they seek each other out and unite together once they have made contact. From that moment, they are no longer isolated but have become a power seen from afar whose activities serve as an example and whose words are heeded."**¹ Today, this lifeblood of association and local control has withered, often due to the intrusive effects of sprawling federal interference.

Yet, local communities and citizen groups still have recourse to powerful, if forgotten, legal tools to restore a healthy civil society. Under dated law, a wide array of property interests held by state and local governments, as well as private individuals, still exist through vast tracts of federal land. Because of the Mining Act of 1866 and amendments, cattle trails, roads, hiking paths, water ditches, and irrigation systems all receive heightened protection against federal intervention. Collectively, these property interests are still protected under **an obscure portion of federal law referred to as "RS 2477."**

"One Thousand Roads to Liberty" envisions a county-based movement in Wyoming to secure and define these property interests while enhancing local control. Counties must cata-

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log and record these property interests while individuals are still alive who can attest to the historical usage of these roads. This will enable landowners and local governments to defend their interests over roads held by them crisscrossing over federal lands. Cataloging and defending RS 2477 claims offers local governments an upper hand in thwarting federal intervention and establishes levers of authority to use in their favor.

Once local governments have cataloged and secured these interests, the creation of a rigorous private property exchange system for these segments of roads and trails would permit the creation of several economically beneficial uses – over federal land – such as toll roads or high-capacity delivery systems for natural resources. This would shift the balance of control to economic entrepreneurialism and local communities, as well as provide a visible victory over federal mismanagement of Wyoming’s affairs.

Initiative rests with individuals and local communities to assert Wyoming’s control over their affairs by being every bit as aggressive and focused as those who would diminish it. “One Thousand Roads to Liberty” offers one pathway to that result by standing firm and protecting rights never surrendered to the federal government.

Wyoming’s Strongest Approach to Reclaiming RS2477 rights-of-way:





-  Reform state law similar to Utah to recognize roads protected by RS 2477 more broadly.
-  Conduct systematic mapping and indexing by volunteers and state officials to preserve the fullest scope of RS 2477 rights-of-way.
-  Encourage and train county commissions to assist in RS 2477 endeavors.
-  File quit claim suits to apply pressure to the federal government to negotiate its own Memorandum of Understanding with Wyoming to protect RS 2477 interests statewide.

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I. WHAT IS “RS 2477” AND WHY DOES IT MATTER?

This paper relies on one legal tool in particular—“Revised Statute 2477” or “RS 2477” as a means for strengthening state sovereignty. In 1866, the Congress passed RS 2477, which provided for a “right of way for the construction of highways over public lands, not reserved for public uses.”² Do not let the term “highways” dissuade the reader, because, as used in 1866, this term often included footways, horse trails, and carriageways.³ Unique to RS 2477 was that it did not de-

a. The Basics

RS 2477 was repealed in 1976 by the Federal Land Policy Management Act, but rights-of-way created *before* the FLPMA remain valid.⁵ And while the FLPMA did away with any *new* RS 2477 claims, existing paths across federal land remain valid today. But why aren’t local communities and state governments protecting these property interests against federal intrusion? For some communities, fear about RS 2477 has limited its application because some believe it could lead to RS 2477 roads being established over their

Table 1 – RS 2477 Functions

-  Preserves property rights – trails, roads, water systems, and paths – held by local and state governments on federal land.
-  Applies only to federal land. No application of RS 2477 is supported over private land holdings.
-  Trumps most competing federal claims and has a winning record in courts.
-  Applies recognized legal pressure against the federal government to restore local control of public lands.

mand that anyone register or file with the federal government for these roads to be recognized.⁴ Instead, Congress realized that citizens had a need to travel and that many informal roads and paths lead across federal lands. The Congress then granted a right of way to local residents, communities, and state governments to travel these paths without having to invoke any formal legal claim.

private property. This is not the case. A few communities have favored open-handed compliance with the federal government, hoping that playing nice will engender respect from the federal government. **It hasn’t.**

Some confusion surrounds RS 2477 and what it can and cannot do. This is understandable—the law itself dates to 1866

and, while still potent, it remains a somewhat abstract topic of discussion for law and governance. Table 1 illustrates exactly what RS 2477 may accomplish.

Legally, RS 2477 offered one of the broadest recognitions of private property rights by Congress in an open and unrestricted manner.⁶ RS 2477 does not define how valid local right-of-ways were to be determined under the law, and subsequent congressional interpretation has been inconsistent, at best.⁷ Litigation in state and federal courts to determine the accuracy of RS 2477 claims has produced alternative lines of judicial reasoning, leading to three main bodies of thought. Valid RS 2477 Claims arise when:

1. State law recognizes claimed RS 2477 roads⁸; *or*
2. Public use recognizes RS 2477 claims as roads⁹; *or*
3. State or local governments formally recognize RS 2477 roads after construction.¹⁰

Likewise, and as detailed later in this paper, federal interpretation of RS 2477 claims and management has been similarly varied.¹¹ It is fortunate that within the Tenth Circuit (in which Wyoming sits) federal courts have given primacy to state court jurisdiction over RS 2477 claims. And it is within the Tenth Circuit that the most promising RS 2477 victories have occurred—just not yet in Wyoming.

- b. Property Rights Attendant to RS 2477

In the realm of property law, property **rights are considered to be a “bundle of rights.”**¹² These rights include, but are not limited to, the right of exclusion, the right to sell or dispose, and the right to establish covenants.¹³ In the context of RS 2477, Congress granted the right-of-ways themselves. Existing principles of real property law recognize additional bundled rights with them. After all, what good is a property interest if it has no meaningful purpose or value? The most common property right or interest associated with roads is the right to maintain and upgrade them.¹⁴ Most federal judicial interpretation of RS 2477 has affirmed the rule that state law defines the scope of associated rights connected to RS 2477 roads.¹⁵ As a property interest, RS 2477 roads are protected just like other forms of property through the Fifth, Fourteenth, and other Amendments to the Constitution.

Within the body of property law, RS 2477 **roads are deemed the “dominant estate” and federal property the “servient estate.”** A dominant estate is a piece of property (an “estate”) that has the right to beneficial use of another estate (the “servient estate”). Likewise, a servient estate is property that has some use imposed upon it from another estate. In short, these right-of-way easements, known as servitudes in the law, grant specific use rights to accomplish the purpose of the servitude. Because this transfers the legal question from a pure federalism issue to one of real estate law, the easement dominates any other uses the underlying fee owner (here, the federal government) might make of the land in question.¹⁶ Because this creates a question of real property law, the applicable

rule is that when the dominant owner's use of the land conflicts with the servient owner's use of the land, the dominant owner prevails.¹⁷ Boiled down, that means that the federal government cannot interfere with the grantee's exercise of its property rights, except for in but a few narrow instances.

Many left-of-center interest groups express great concern over the use of RS 2477 by local communities. These concerns generally boil down to two main points. First, RS 2477 is considered anachronistic because it values private property use over federal management.¹⁸ In that sense, fears that private property use might receive heightened protection over federal management are front and center. Second, RS 2477 is seen as a potentially viable means to oppose federal environmental and land-use law since 2477 rights-of-way could trump competing federal claims. In short, and as noted by one scholar worried over the strength of RS 2477, its use could put "federal lands at the mercy of state legislation" in a manner that wins in court.¹⁹

The concerns of left-of-center organizations boil down to fundamental disagreements with many Americans over the scope of power the federal government should have over public lands. Those advocating against RS 2477 usually begin with the premise that federal authority over federal and abutting lands should be plenary, that use of federal lands should be naturalistic, not productive, and that all competing claims—local, industrial, or otherwise—should subsume to federal control.²⁰ These notions are well seeded in federal precedent, with states losing

the ability to halt harmful pests and predation stemming from public lands and citizens gradually losing the ability to use their neighboring private land in ways they see fit.²¹ Left-of-center organizations' fear concerning RS 2477 is understandable, because it would put federal lands chiefly back into the control of state and local governments by exercising vested property rights superior to those held by the federal government.

Center-right organizations usually believe that the protection of private property should be sacrosanct, that local use and control should predominate over federal intrusions, and that federal power is limited in nature. In that sense, RS 2477 is a bulwark to those key values and reflective of the nature of federalism as it existed in 1866 at the time of the passage of the Mining Act. Since RS 2477 has not been extinguished, it offers a solid pathway to the reclaiming of federal public lands locally, so center-right organizations should pay detailed attention to this potent tool.

While many other legal tools remain available to state and local governments to exercise their sovereignty, they have not been effective. A favored pastime of many western states is banging the proverbial Tenth Amendment drum in federal court.²² Yet, in challenge after challenge, these states lose, and cement further bad precedent, only reducing their sovereignty further. Then there are odd and unsupported theories, often termed "custom and culture" or "county supremacy" movements that generate great emotional fervor but fail to produce any cognizable victories in support of federalism

and limited government. Properly implemented, RS 2477 offers proponents of limited government a credible method to severely reduce federal control over local land in a fashion that can result in long-lasting protection.

Before turning to a full exposition of RS 2477, some examination of fables and unsupported sovereignty movements of the past must be brought to light. Only after casting these fables aside can one construct a meaningful sovereignty approach.

II. SOVEREIGNTY STARTS AT HOME

As each state was admitted to the Union, the federal government imposed specific conditions on its statehood.²³ This usually occurred through enabling acts and specific state constitutional requirements that limited state control in certain areas. The Property Clause of the U.S. Constitution also plays a pivotal role in this regard. It provides that the Congress has **the power to “dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States.”**²⁴ Since at least 1840, the Supreme Court interpreted this power as being plenary in nature, and the Court has been consistent in its interpretation of the Clause since that time. The most important rule to take away from the **Court’s string of Property Clause cases is that where state laws “conflict with legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede.”**²⁵ The Supreme Court has gone yet further to state that the **Congress’ power over federal lands is “to control their occupancy and use, to pro-**

tect them from trespass and injury, and to prescribe the conditions upon which **others may obtain rights in them.”**²⁶ Even in the face of such adverse precedent, proponents of local control have advanced unsupported and odd legal theories in an attempt to undo this reality.²⁷

This paper takes the instructions of the U.S. Constitution seriously, as well as the binding precedent of the Supreme Court. Opportunities for meaningful local control over federal property must comport with existing precedent, lest they be relegated to the realm of erratic and quaint theories. This paper offers credible, proven techniques to establish a foothold that favors state sovereignty.

a. First Principles of Local Control

America’s founders purposefully designed a divided government between federal and state powers in order to ensure the greatest protection of our liberty. The maintenance of these federal-state barriers proves important—as local governments can secure individual rights and act as bulwarks against tyranny and abuse.²⁸ Following the Tenth Amendment, states and the people retain a large degree of sovereignty and authority over their own affairs. And that sovereignty naturally starts at home.

The classic approach to understanding federal power is that the federal government has the same powers as a proprietor would over its land.²⁹ The Court stated this view in 1897, when it explained:

The government has, with respect to its own lands, the rights of an ordinary

proprietor, to maintain its possession, and to prosecute trespassers. *It may deal with such lands precisely as a private individual may deal with his farming property.*³⁰

Under this scenario, in the case of RS 2477 both the servient (federal government) and dominant (state government) owners must cooperate to use their property in a reasonable manner. Thus, the owner of the servient estate may use its property so long as it does not unreasonably interfere with the use of the dominant estate. This reasonableness standard depends on case-by-case determinations.³¹ These sorts of determinations can weaken the overall strength of the RS 2477 approach since their scope can never be fully predicted due to their inherent subjectivity. Still, RS 2477, while imperfect, offers an arsenal of tools for state government and local communities to reassert control over their sovereignty.

As James Madison noted in *The Federalist Papers*, the proper balance between local, state, and federal governments offers **each the ability to “resist and frustrate the measures of each other.”**³² Pause for a moment over Madison’s deliberate phrasing—**“frustrate the measures of each other.”** While it is common today to decry the politics of frustration, it is important to understand that they were built into our Republic purposefully. This sort of division left the American Republic with a defined and limited government structure. Sovereignty is vested first in the people, with limited powers delegated to the federal government, and with the reservation of all other rights and powers to the people and the states.³³ However, for

this process to work *each segment requires the attention and involvement of citizens, lest apathy lead to tyranny.* Citizens in local communities must defend their liberty and protect their sovereignty. That is exactly what this paper proposes.

Abstract principles of federalism and sovereignty only take one so far in understanding how this division of powers between government bodies functions. **Most states follow the “home rule” doctrine** that affords local governments expanded powers and sovereignty over local affairs. The home rule doctrine follows the reasoning of the Tenth Amendment by providing certain powers and sovereignty for local government units.³⁴ The development of the home rule doctrine was controversial at its time because it gave local authorities the ability to initiate law without prior express permission from state government. This created a sort of constitutional localism that would protect local governments from infringements by state government.³⁵ In deciding whether a given government body has jurisdiction under this rule, courts usually ask whether a given matter is of local, statewide, or a mixed concern.

In the area of home rule, issues concerning **health, safety, and local “public welfare” are held to be matters of local concern.**³⁶ Another area frequently cited as a focus of local concern is determinations of land use and zoning and the protection of private property rights. Additionally, most local authorities enjoy limited powers of taxation so long as they do not overlap or conflict with state taxing authority. As might be expected, just as the federal government and states battle over

sovereignty concerns, so too do states and local governments spar in a similar fashion.

The Wyoming Constitution, through Article 13, Section 1, provides that cities and towns may provide for their own governance through the creation of ordinances.³⁷ The state constitution goes a step further by noting that the powers granted to cities and towns will be “liberally construed for the purpose of giving the largest measure of self-government to cities and towns.”³⁸ Thus, within Wyoming it is recognized that local governments enjoy a constitutional primacy in setting preferences for their own affairs, so long as they respect and follow the limits of the state and federal constitutions. This power of local control also extends to a defense of that power against an encroaching federal government. Local governments often overlook this home rule authority when resolving frustrations with national authority.

The promise of RS 2477 is this: local and state governments may regain control over portions of federal land by exercising their powers and rights responsibly. This paper illustrates just how to accomplish this task in a manner that is straightforward and attainable.

b. The Primacy of Protecting Individual Rights

It was the purpose of Madison’s dual federalism not to create a federal empire with looming powers, but one that pitted government actors against one another. If honored, this would achieve an important goal: the protection of individual

liberties.³⁹ Just one such liberty is found in the protection afforded to private property.

The principal constraint against government power to interfere with property rights is found in the Fifth Amendment to the U.S. Constitution which provides that **private property shall not be taken “for public use, without just compensation.”**⁴⁰ Likewise, the Fourteenth Amendment protects individuals against government deprivation of property without due process of law.⁴¹ At the state level, the Wyoming Constitution protects against government incursions against private property as well through Article 1, Sections 6, 7, 32 and 33.

Something more complicated occurs when federal regulatory regimes enter the mix with private property rights. Those rights usually suffer at the expense of protecting preferred species under the Environmental Protection Act or when local and federal land uses conflict. A few examples help illustrate how the primacy of private property protection has lost out to administrative convenience time and time again.

c. Federal Regulatory Experiments Abuse Individual Liberty

A striking case, *Wilkie v. Robbins*, is a helpful starting point in examining how federal programs place individual liberties in jeopardy.⁴² In this case, Robbins owned a ranch that the federal government wanted to put an easement, or path, over. In the past, it had tried to secure this easement, but made legal mistakes in doing so.⁴³ By the time Robbins owned

the land, the government called to demand a legal easement over the land. Robbins indicated he would negotiate with federal agents and the government **replied with “the Federal Government does not negotiate.”**⁴⁴ Over the next few years, government agents carried on a campaign of intimidation and fear to get Robbins to grant the easement.

For years, the Bureau of Land Management (BLM) put high priority on retaliating against Robbins. Eventually, the only public road that provided access to some portions of the ranch fell into a state of disrepair. The Bureau refused to fix it, and explained to Robbins that he would have to grant an easement if he wanted the road repaired.⁴⁵ Instead, Robbins repaired the public road himself and sent the bill to the federal government. After lengthy appeals, fines *against* Robbins were upheld for trespassing on federal land (the public road).

Later still, federal agents entered onto **Robbins’s land and Robbins ejected the agents immediately.** He was charged **with “knowingly and forcibly impeding and interfering with a federal employee.”**⁴⁶ News accounts following the story **revealed that “Robbins could not have been railroaded any worse . . . if he worked for the Union Pacific.”**⁴⁷ Still more friction occurred as part of his grazing permits were revoked and he had to move his cattle away from federal lands and through mountain passes with unmarked property boundaries. The Bureau monitored Robbins and videotaped his movement of cattle, as well as the private details of his guests when they **relieved themselves on Robbins’s private**

land.

Some nine years after starting his lawsuit against this federal abuse, the Supreme **Court accepted Robbins’s challenge.** The basis of the suit was simple: the continued actions and harassment by federal agents constituted extortion to obtain an easement over his land. Robbins asked that the federal government be prevented from doing this again and for compensatory and punitive damages to be awarded for past actions. Ultimately, the Supreme **Court did not accept Robbins’s claims** because he failed to pursue sufficient administrative remedies and court actions early enough.⁴⁸ As the Supreme Court **put it, “Robbins has an administrative, and ultimately, a judicial, process for vindicating virtually all of his complaints.”**⁴⁹ Because Robbins did not avail himself of the complicated and expensive administrative review process, the Supreme Court would not grant relief.

Robbins is not the only example. John Shuler lived in Northern Montana and raised sheep.⁵⁰ One night, he awoke to the sound of grizzly bears ready and willing to devour his sheep. Stepping outside, he faced three such bears and fired his rifle into the air, making them disperse. However, the mother of the bears appeared and was poised to attack. Mr. Shuler fired at the bear and killed it—protecting his life and that of his sheep.

After the attack, Mr. Shuler contacted the U.S. Fish and Wildlife Service to report that a grizzly had been shot. Agents arrived, surveyed the scene, and issued Schuler a \$7,000 fine for violating the Endangered Species Act.⁵¹ Mr. Shuler pur-

sued his own course of administrative review, and the government decided he put **himself “in the zone of imminent danger”** to cause the attack and that he provoked the bear by having a dog with him.⁵² Eventually, Mr. Shuler did win in the federal courts of Montana, but his review took eight years to complete and cost some \$250,000.⁵³

Predators abound in the Rocky Mountain West. Sometimes they are furry, and other times they are the federal government. In the Robbins example, not following the correct administrative process meant the full denial of his rights in court. And in the Shuler example, complying with the administrative regime meant wasting eight years of his life with a legal cost of quarter million dollars. So while there are plenty of examples of the federal government overstepping its bounds, there are not enough instances of local communities stepping up to that abuse of power and defending their own inherent sovereignty.

Not every case winds up like Robbins did, but there are enough examples to be found in Wyoming, and other western states, to suggest that the federal government carefully wields every legal tool it possesses to extend its authority. From the loss of grazing rights to making land non-usable due to environmental regulations, the cornerstone of private property protection has slowly dwindled away. Although courts may give less protection to traditional constitutional protections, other legal tools exist to re-exert local control against meddling federal intervention. It is incumbent on local communities to use each viable legal theory possi-

ble to regain lost elements of control.

d. How Local Law Can Thwart the Federal Leviathan

The federal government is skilled in building up its litany of ways to avoid, dodge, and overcome constitutional restrictions on its authority. Local communities should employ principled countermeasures to stop this dynamic. Defensively, local governments and citizens need to be more creative and aggressive in resisting federal intrusions into their sovereign affairs. This author, with others, notes these approaches in this and other papers. Offensively, local governments and individuals possess several tools, or levers of authority, to help lessen federal infringement on private and state land. It is not enough to willingly comply and hope for the best. It is not enough to bring failed Tenth Amendment challenges in an *ad nauseum* fashion. It is not enough to wait.

This paper sets out a trim legal theory easily employed by local governments and interested states to use in recapturing sovereignty. RS 2477 creates the means to effectively shackle the federal government's control and use of public lands. As described by left-leaning scholars, the fear of RS 2477 is that it will ultimately put public lands back into the control of sovereign states.⁵⁴ This approach has a proven pedigree in court and, if replicated, will provide other avenues of relief for the modern federalism movement. Before tackling the elements of constructing a proper RS 2477 system, popular **“custom and culture” and “county supremacy” movements will be illustrated**

for what they are—constitutional snake oil. More credible legal theories must win the day.

III. HISTORICAL HOBGOBLINS OF THE WESTERN SOVEREIGNTY MOVEMENT

The story of western states’ civil disobedience to public land management is hardly new. The very founding of Wyoming as a state was a move away from mismanagement of the Territory of Wyoming by the federal government. It is important, however, to separate meaningful challenges to federal abuse of its authority from those of a more erratic character. Within the push for state sovereignty there are a wide array of unsupported legal theories—hobgoblins of sorts. A good deal of the faux sovereignty movement came into being after changes in federal land management in the 1970s. At that time, a number of legal and political movements arose to challenge growing federal authority over public lands. The genesis of these movements is understandable: changes to the Federal Land Management Policy Act proved destructive to private property rights and local control. Since these movements have failed to produce any discernable victories for federalism, dependence on their theories is ill advised. Their summary is noted below.

a. **The Sagebrush “Rebellion” and Related Failed Movements**

The “Sagebrush Rebellion” of the mid-1970s is indicative of a lore-based approach in settling questions of federalism and local control. Ranching interests came together to assert that the Constitu-

tion demanded transfer of all federal land to the states. Arguments supporting the **“rebellion” surmised that all federal property was only to be held temporarily in trust by the federal government and that unequal federal holdings in different states violated norms of federalism.**⁵⁵ Their theories originated not out of accepted constitutional law, precedent, or scholarly research, but from unsupported lore.⁵⁶ Courts summarily and consistently rejected these challenges and the **movement rightfully went away in the ‘80s and ‘90s.**⁵⁷

By the 1990s, allies in the Sagebrush Rebellion, the new **“Wise Use” movement,** and others came together to form a **“County Supremacy Movement.”**⁵⁸ The theory behind the County Supremacy approach was simple: the federal government had to consult the **“custom and culture” of counties before making management decisions about neighboring federal lands.**⁵⁹ **Sadly enough, these “custom and culture” approaches to strengthening local control had a common nexus: no appreciable legal theory supported their success in court.** Because of this, these ordinances failed to advance federalism in a meaningful way.

The stated reasoning behind the failed **“custom and culture” movement was the theory of “equal footing.”**⁶⁰ Under this doctrine, all states admitted to the Union were to be entitled to the same sovereignty claims as the original thirteen. This went further to claim that because the federal government retained large portions of land in western states, they did **not enjoy the same “equal footing” as the remainder of the states.** To date, no court

has adopted the legal reasoning of the **“custom and culture” or “equal footing”** movements (in any measure, small or large).

The culmination of the equal footing movement found itself in the Nye County (Nevada) challenge to federal authority in the mid-1990s. On July 4, 1994, Dick Carver, Nye County Commissioner, got into a Caterpillar and began bulldozing a road through the Toiyabe National Forest.⁶¹ The county had previously asked the U.S. Forest Service for permission to open an old stagecoach trail, which was denied due to the need for a federal archaeological survey. Thus, Mr. Carver began bulldozing, Constitution in hand, with some 200 supporters waving guns and cheering.⁶²

Nye County’s bulldozing experiment came as a result of the county passing two resolutions in 1993 that declared that the State of Nevada owned all public lands in the county. The United States government filed suit to confirm that it owned and had the authority to manage all federal public lands. Quite easily, the **courts decided that the county’s claims were “unsupported, unconstitutional, and invalid as a matter of law.”**⁶³ In working its way through the judicial system, courts routinely noted that the **county’s argument that the federal government has no authority to retain the federal lands is baseless and entirely without merit.** The perseverance of Nye County to bring frivolous claims about the proper scope of federalism led one commentator **to note that “county supremacy ordinances have the durability of cow chips.”**⁶⁴

Today, remnants of these failed approaches can be found in the **“Sheriffs First” movement that proposes to make it a state crime for federal officers to act in a state without the advance permission of county sheriffs.**⁶⁵ This approach, while popular, lacks any serious support in constitutional precedent.⁶⁶ Supporters of local control and state sovereignty must re-examine viable legal tools that would give credible support to their claims. The proposed RS 2477 approach is but one example in this field.

b. The Sober Truth

Beyond the failed approaches described thus far, states have likewise largely failed to make serious headway in protecting their sovereignty in relation to the federal government. Because of this, it is understandable why citizens might cling to far-flung approaches to regain their sovereignty. The State of Wyoming, by means of example, has supported protracted litigation over the forced re-introduction of wolves—an approach that has suffered consistent failure in the courts.⁶⁷ Similarly, a great deal of Wyoming’s historical interaction with the federal government has been on the **losing end of “negotiations” and court settlements.** This chiefly results from two elements: (1) anemic treatment of state sovereignty claims under the Tenth Amendment since the New Deal era by courts, and (2) less-than-robust legal representation by the Wyoming Attorney General over these issues.

An example of Wyoming advancing less-than-robust claims in court to defend its sovereignty can be found in *Wyoming v.*

Livingston.⁶⁸ There, the state brought charges against federal Fish and Wildlife Service agents for trespassing and littering. The Tenth Circuit sided with the federal government to hold that the doctrines of qualified immunity and Supremacy Clause immunity protected the federal government actors in question. But the Tenth Circuit left an important clue about **the court's interpretation of Wyoming's** claims:

We also leave for another day whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy they were carrying out—where, for example, they commit a grievous state offense for the purpose of enforcing a trivial federal policy. *Wyoming has not argued that its laws against trespassing and littering are so significant that they outweigh the federal interest in wolf monitoring.*⁶⁹

The primary failure in Wyoming's push against the federal government in *Livingston* was that it did not present a crucial argument to the court. That argument would have claimed that one essential function of state government is to protect its residents against harmful animals. It would have claimed that preserving protection for private property is of fundamental importance for the state. It would also have argued that without these protections in place, core elements of state sovereignty are eviscerated. Such an argument does not create a silver bullet, but it does present more substantial an approach for the courts to follow. But when states fail to even raise these sorts of vigorous arguments, they cannot expect federal judges to treat these interests serious-

ly.

By understanding past mistakes, we can build a more cohesive and principled defense for federalism. It makes little sense to rely on areas of bad precedent with **hope that maybe "this time" things will** turn out right. Likewise, it is inadvisable to return to the emotionally-supported but legally-indefensible legal theories that led Nevada and other states to strings of losses. Instead, making innovative use of an early law—here, in the case of RS 2477—holds greater promise. Existing and valid federal statutes remain on the books that favor private property protection and local control over select areas of **federal land. What's more, the few cases** that have advanced in this realm have supported the claim of state sovereignty over competing claims of federal supremacy. Admittedly, the connection between historic footpaths, state sovereignty, and federalism may seem indirect. But where an otherwise unappreciated legal defenses exists, states should act.

IV. THE RS 2477 ROAD REVOLUTION

Returning to the focus of this paper, RS 2477 is but one example of a viable legal tool that can restore key portions of state sovereignty. Consider the following instances.

a. You can Fight City Hall and Win

In 2003, Darwin Floyd faced altercations with all-terrain motorists on his property near Divide, Colorado.⁷⁰ Public lands **surround Floyd's land, giving rise to the** controversy at hand. Though Floyd reported trespassers several times to his lo-

cal sheriff's office, Teller County sought to have Floyd convicted as a criminal for keeping people off his land (his official crime: "closing a public road"). The county's underlying legal claim rested in RS 2477: since there were public roads across public lands that went across private property, Floyd enjoyed "no right" to stop individuals from traveling on them. Floyd ultimately won, with the court understanding the effect of RS 2477, that is, it only applies to roads or trails on public lands. It has no effect over private property.⁷¹ Properly construed, RS 2477 claims should be understood as vested property rights held by local and state governments or individuals over federal land only.

Another case coming out of Nevada gained recent attention due to a ranching family's success in challenging the federal government over public land use. In *United States v. Estate of E. Wayne Hage*, the federal government sued the Hage family over its use of federal land for "unauthorized grazing."⁷² The Hage family would not sit idly by; indeed, this litigation has been underway since 1991. The family counterclaimed all water rights in the local area as well as "ditch rights" under the 1866 Act as well. These ditch rights ran across federal land and the family claimed a right to access over the federal land as a result. On August 2, 2010, the U.S. Court of Federal Claims entered a judgment in favor of the Hage family for more than \$14 million to compensate for its loss of water rights in this matter. While the Hage example is broader than RS 2477, it did draw from the same overarching law from 1866 that grants similar property interests over

ditches in federal land.

While many challenges against expanded federal power have failed, those claims related to RS 2477—at least in the Tenth Circuit—have met with resounding success. The Tenth Circuit has ruled unequivocally that state, not federal, law governs both the "perfection" (or creation) and scope of RS 2477 rights of way. Thus, where conflicts occur between state and federal interests over public land and RS 2477 rights-of-way, Wyoming can expect its state statutory and common law to apply to govern these issues. Because the Tenth Circuit defers or gives preference to state law, states are free to apply more relaxed definitions of a "highway" to effectively implement this precedent. In Utah and Colorado, these "highways" can be made by the passage of wagons and footpaths.⁷³ Beyond understanding just what sort of roads RS 2477 may capture, the Tenth Circuit has also protected the width and accessory use of these rights-of-way. Under Tenth Circuit precedent (interpreting Utah state law), the width of an RS 2477 right-of-way is that "which is reasonable and necessary for the type of use to which the road has been put."⁷⁴ Going even a step further, the Tenth Circuit has held that states may repair and revive long unused RS 2477 rights-of-way to "accommodate increased traffic or achieve safety requirements."⁷⁵

For those states with considerable RS 2477 rights-of-way, such as Wyoming, revamping RS 2477 strategy and law is very important. Wyoming should build on the examples provided by Utah and other states and carry them a step further to fundamentally alter Wyoming's power

position relative that of the federal government.

b. The Utah Experience

i. The Historical and Case Law Approach

Consider Utah's success in moving aggressively on the RS 2477 front. In 1993, the Utah Legislature passed the "Rights-of-Way Across Federal Lands Act," which provided that the "owner of an R.S. 2477 right-of-way and the owner of the servient estate shall exercise their rights without unreasonably interfering with one another."⁷⁶ This small movement aimed at reclaiming interests held locally or individually would go a long way in restoring Utah's sovereignty.

Because Utah stepped up to protect its property interests held across federal lands, it underwent some ten years of litigation to bring to the fore the issue of RS 2477 validity in the states.⁷⁷ Facing difficulty with its ability to access state lands near the Grand Staircase-Escalante National Monument, Kane County requested the Bureau of Land Management to **remove its "road closed" signs. Realizing** the strength of RS 2477 claims, Kane County pushed ahead in federal court to reclaim protection over its property interests. Ultimately, the BLM would not remove its road-closed signs.

Come August 2003, Kane County removed some thirty-one BLM road-closed signs and returned them to the BLM along with a letter detailing its actions. Kane County then posted its own signs and indicated which roads were open for

use as county roads. Of course, under RS 2477, if the roads in question were valid (or "perfected") **property interests running over federal land**, that would mean that even the federal government would be required to not trespass or otherwise infringe upon them.⁷⁸

Under controlling Tenth Circuit Court of Appeals precedent, the creation of RS 2477 rights locally **"required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."** Rather, all that would be required was for **acts on the part of the "grantee" to show an "intent to accept the congressional offer."**⁷⁹ As stated by the San Juan County Court, a **"right of way could be obtained without application to, or approval by, the federal government."**⁸⁰

In another action, a split victory was had for proponents of RS 2477 in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.⁸¹ In September and October of 1996, San Juan, Kane, and Garfield counties of Utah entered public lands managed by BLM and graded sixteen roads. No advance notice was given to the BLM, nor was permission sought. In the past, the counties had left most of the roads ungraded, though others showed some signs of minor maintenance.

The BLM undertook an "informal adjudication" of the matter and ultimately found that fifteen of the sixteen roads were not recognized as RS 2477 roads. As to the one road that was recognized, the BLM deemed that the counties exceeded

their right of way claim. After a lengthy challenge, the Tenth Circuit held largely in favor of the Utah government actors. First and foremost, the court reasoned that primary jurisdiction over these roads rests with the state judiciary, not with federal agencies.⁸² In doing so, the Tenth Circuit looked to the practices of the Interior Board of Land Appeals, which has explained over the years in differing fashions that the **“existence of an R.S. 2477 road is a question of state law for adjudication by state courts”** and the **“Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to [RS 2477], a road is properly deemed to be a ‘public highway.’”**⁸³ This principle is important because it signals the primacy of state courts in deciding the accuracy of RS 2477 claims, not the federal government.⁸⁴

Naturally, RS 2477 does not present itself as a silver bullet in the movement to reclaim federalism. One notable loss is found in the federal District Court of Utah, which held that widening of a road and cutting into a hillside on a RS 2477 right-of-way amounted to an **“unreasonable burden” on the federal government’s abutting property.**⁸⁵ In instances where local governments propose substantial disturbances or entirely novel uses of RS 2477 rights-of-way, the Tenth Circuit has demanded heightened federal cooperation.⁸⁶

In other contexts, the Tenth Circuit has upheld minor regulation of RS 2477 rights-of-way, such as requiring a permit to use these roads.⁸⁷ In *United States v. Jenks*, the Tenth Circuit held that while a citizen has

a compelling common law claim to RS 2477 rights-of-way, **federal “permit procedures are not inconsistent with Defendant’s asserted patent or common law rights. . . . Under basic principles of property law, these rights would still be subject to regulation by the Forest Service as the owner of the servient estate.”**⁸⁸ While the Tenth Circuit upheld the permitting requirement, it did so with a wrinkle: it **“overturned the District Court’s injunction barring Jenks from accessing the RS 2477 routes. The Circuit explained that all the federal government could do was demand that Jenks apply for a permit—once such application was in (but not approved), it could not bar him from using RS 2477 rights-of-way. Why? Under the common law principles of servitudes, permitting a servient estate owner to demand a permit over a dominant estate owner’s use of its easement would be “unreasonably burdensome.”**⁸⁹

The common law requirement to avoid unreasonable burdens can work in favor of the federal government just the same. In a case brought by the Southern Utah **Wilderness Alliance (“SUWA II”)**, the Tenth Circuit applied common law servitudes principles to explain that although Utah could maintain and improve its RS 2477 rights-of-way, advance notice must be given to the federal government.⁹⁰ By ensuring that advance notice was provided, both parties would not be unreasonably burdened in their joint uses of the dominant and servient estates.

ii. The State Legislative Approach

On the RS 2477 front, Utah has taken

some of the most aggressive steps to protect its local property interests over federal land. The state coordinated its efforts through the Public Lands Policy Coordination Office (PLPCO) and the Utah Automated Geographic Reference Center (AGRC) to assess the status of RS 2477 roads in Utah in order to preserve them.⁹¹ The agencies then adopted a consistent approach to catalog and give public legal notice about these roads. Usually, such notice is a public document indicating that the state or local government recognizes that one of its roads is protected under RS 2477 and provides supporting evidence.⁹² That supporting evidence consists of a map showing the location of the road in the county, photographs of the actual road, a legal description of the start and end points of the road, and road centerline descriptions. Also included in such a document is notice to the owner of the servient estate, the federal government, requiring it to file any objections to said claims in state district court within 60 days of filing the notice.⁹³

The language employed by the State of Utah is important to take note of:

This Acknowledgment and Notice of Acknowledgment applies only to the segments of the road that traverse land owned by the Bureau of Land Management, United States Department of the Interior, and does not apply to segments of the road that traverse land owned by another person or entity. The State of Utah and its political subdivisions reserve the right to make further acknowledgements and notices of acknowledgement with regard to road segments that traverse land owned by other entities, including the United

States of America, through one or more of its agencies.⁹⁴

Utah's language in its "Acknowledgement" and "Notice of Acknowledgement" is properly aimed at protecting private property interests across *federal land* while creating *no legal right* to cross private property. In that sense, it comports with the original intent of the 1866 Mining Act by protecting only private property interests and never interfering with them. Read as such, the advancement of just such a claim could never be used in a court of law to claim a right over neighboring land or other private property interests. Appendix A to this paper includes helpful samples of road survey entries added by the State of Utah in its RS 2477 project.

The controlling standards left from Utah's experiment and litigation with RS 2477 rights-of-way suggest that the common law and state law govern these disputes. As the Tenth Circuit has reasoned, **RS 2477 is a "federal statute and it governs the disposition of rights to federal property, a power constitutionally vested in Congress. U.S. Const. art. IV, § 3, cl. 2."**⁹⁵ And while the disposition of federal lands is a federal question, the "scope of a grant of federal land . . . may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as **applicable to its conveyances.**"⁹⁶ *In the matter of RS 2477, states have an effective set of property interests just waiting to be implemented for the cause of sovereignty and which have already proven effective in the courts. All that is required is a plan of action for interested jurisdictions.*

c. Considerations for Wyoming

Broadly following the approach taken by Utah, Wyoming—or any other western state seeking to expound its protection against federal interference—may move in a similar fashion. This section describes the legal overlay required to make the recognition of RS 2477 claims a reality and clarifies the boundaries for testing these claims.

It should be recognized that few states have created a clear system to validate the existence of RS 2477 rights of way. Whether certain roads and paths qualify for protection under the 1866 law remains controversial due to differing litigation approaches. Indeed, even determining what constitutes a recognizable **“highway” under the law is uncertain. “Highway,” as implemented in 1866, and understood in many states, could mean any avenue of travel open to the public, even including bridges and rivers. As to its interpretation on the ground, “any way open to the public” could include footpaths. Ultimately, what constitutes a highway under the RS 2477 claims falls back to state law, which must define the term, or its equivalent, itself. Thus, the legal inquiry is as follows:**

1. What state actions are required to create a public highway under state law to determine competing property interests; *and*
2. Whether said highways receive RS 2477 protection.

For purposes of federal jurisdiction, Wyoming is in the Tenth Circuit Court of Ap-

peals. This court has definitively held that:

The federal regulations heavily support a state law definition. At least since 1938, the Secretary of the Interior has interpreted R.S. 2477 as effecting [sic] the grant of a right-of-way **“upon the construction or establishing of highways, in accordance with State laws” BLM, the Secretary's designee, has followed this interpretation consistently and has incorporated it in the Bureau's manual: “State law specifying widths of public highways within the State shall be utilized by the authorized officer to determine the width of the RS 2477 grant.”**⁹⁷

The overarching instruction from federal courts could not be much clearer. If states have liberally defined RS 2477 road grants, they will be upheld by the courts. Unfortunately, Wyoming has missed this message and taken an unnecessarily narrow view of roads in the context of RS 2477. This is a situation that can be remedied, as illustrated later in this paper. Before addressing remedial concerns, a review of the technical aspects of RS 2477 within Wyoming is appropriate.

d. Technical Legal Components

The State of Wyoming, like any jurisdiction, has specific legal requirements for establishing public roads recognizable under the RS 2477 rubric. After 1924, the State of Wyoming required boards of county commissioners to decide which **roads were “necessary or important for the public use as permanent roads and to record them as county highways.”**⁹⁸ Thus, in accord with Wyoming law, it re-

mains necessary for county commissioners to take formal actions recognizing the validity of any would-be RS 2477 road. Examining both state and federal law, the creation of a valid RS 2477 road in Wyoming requires (a) formal recognition of the road by county commissioners, and (b) the road must have existed either before the formal creation of a National Forest if the road runs over National Forest Service land or before October, 1976 if it is on BLM lands.⁹⁹

Under Wyoming law, original roads were “developed from a haphazard diagram of trails established by Indians, pioneers, stockmen, miners and loggers, and more ‘proper’ roads as set out by railroads, stagecoaches, the federal government, and territorial, state, and local governments.”¹⁰⁰ In 1918, the Wyoming Supreme Court first addressed RS 2477 roads in *Hatch Brothers Company*, where it explained that a RS 2477 grant is

unconditional and contains no provision as to the manner of its acceptance. We think it is quite well settled that when land is granted for a right of way for a public highway, the *grant may be accepted by the public without action by the public authorities*. The continued use of the road by the public for such a length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant has generally been held sufficient.¹⁰¹

Upon rehearing, the Wyoming Supreme Court reiterated an important point: “**there is nothing in our statutes that takes away the right of the public to accept by unofficial use the federal grant of rights**

of way over the public domain so as to bind subsequent grantees of the government.” **The rulings by the Hatch Court** are important: under then-existing law, individuals could accept RS 2477 grants without state interference. Imagine just how powerful an effect this legal rule could produce: thousands of individuals could claim and protect their interests in RS 2477 roads without any state interference. The Wyoming Legislature would not let this win for liberty rest, and in 1919 enacted the following language:

On and after January 1st, 1922, all roads within this State shall be highways, which have been or may be declared by law to be national, state, territorial or county roads or highways. It shall be the duty of the several Boards of County Commissioners, within their respective counties, prior to said date, to determine what if any such roads now or heretofore travelled [sic] but not heretofore officially established and recorded, are necessary or important for the public use as permanent roads, and to cause such roads to be recorded, or if need be laid out, established and recorded, and all roads recorded as aforesaid, shall be highways. *No other roads shall be highways unless and until lawfully established as such by official authority.*¹⁰²

In 2003, the Wyoming Supreme Court addressed the issue of RS 2477 claims head on in *Yeager v. Forbes*.¹⁰³ There, it further strengthened the role the state played in determining whether given roads were public or not. It explained that the effect of the 1919 Wyoming law was to “**effectively vacate[] the public status of any road, including those established**

pursuant to R.S. 2477, which were not recorded and established by the pertinent **board of county commissioners.**"¹⁰⁴

The Wyoming Supreme Court's holding in *Yeager* coupled with its 1919 road law confines the reach of RS 2477, but not exceedingly so. Its most foundational importance is that historical research between 1919 and 1922 should be conducted to determine which roads were preserved under the statute. This requires archival and government historical investigation to see which counties passed provisions **recognizing roads before the "termination date" included in the 1919 road law.** As a matter of law, these roads that run over federal property would be recognized as valid RS 2477 claims.

The Wyoming public highways law was **later amended to note that "[n]o other roads, except roads located on federal public lands prior to October, 1976 which provide access for a private residence or agricultural operation shall be highways upon acceptance by the board of county commissioners of the county where the road is located shall be highways unless and until lawfully established as such by official authority."**¹⁰⁵ Even with amendments, **Wyoming's public highways law** is poorly drafted and open to several interpretations. The most sensible interpretation of this provision would hold that roads are useful for private residences or agricultural operations (and which run over federal land) need only be formally **"accepted" by county commissions to recognize their validity under RS 2477.** Note that the law itself has not defined any nexus or connection between these rights-of-way and related agricultural or resi-

dential needs. Is a footpath ten miles from a ranch that offers helpful access to grazing land considered a valid highway? If several dated wagon trails are situated near a small community with but one public road, would they be treated as highways? Nothing in the statutory law answers these questions. Instead, it seems to leave this determination to local communities. Besides those roads with connections to agricultural interests or residences, any others running over federal land must be lawfully established as such by a county commission.

It should also be observed that the Wyoming Supreme Court has given expansive interpretations to what constitutes a **"highway" within the state in other areas of the law.**¹⁰⁶ In *McClellan v. State*, the Court was called upon to decide whether common areas and driveways of a mobile home park that were not publicly maintained or dedicated to public use constituted **"public highways."** There, the Court explained that a road constitutes a **"highway" when "any part is open to the use of the public for purposes of vehicular travel."**¹⁰⁷ It went further to note that where a road is not publicly maintained, **"it is not required that the road be either formally statutorily dedicated . . . or dedicated in common law . . . for the road to be deemed a 'highway.'"**¹⁰⁸ Thus, while the Wyoming Legislature has adopted a rather narrow interpretation of **"highways" for purposes of RS 2477,** the Supreme Court has given more breadth to that term in other contexts – a fact that can only assist counties desiring to protect RS 2477 highways.

Other, less positive interpretations could

be given to Wyoming's poorly drafted public highways law. Courts might decide that all roads lacking some connection to private residences or agricultural operations running over federal land absolutely cannot be deemed protected by RS 2477. If that were the case, Wyoming's claim to roads protected by RS 2477 would be especially limited and weak. And it is because of this that this paper later suggests amendments to Wyoming's public highway law to clarify and correct this issue.

i. Statutory Changes

Rather than contend with unnecessarily narrow state statutes defining the scope of RS 2477 interests, local communities should be empowered to stake more liberalized RS 2477 like those recently successful in Utah. To do so, the Wyoming Legislature must agree that its 1919 public highway law needs to be uprooted and fundamentally redefined. An easy place to start an examination of how to adopt a more friendly RS 2477 law is found in Utah. To make similar changes, the Wyoming Legislature would have to trust its citizens and local communities to handle these issues properly.

Under the Utah Code, "Class B roads" comprise all "public highways, roads, and streets within the state that":¹⁰⁹

- Are situated outside of incorporated municipalities and not designated as state highways; *or*
- Have been designated as county roads; *or*

- Are located on property under the control of a federal agency and constructed or maintained by the county under agreement with the appropriate federal agency.

Further, the State of Utah provides that the state government and local communities have "title to the R.S. 2477 rights-of-ways" so long as a local government makes the finding that the "highway was constructed and the right-of-way was accepted prior to October 21, 1976."¹¹⁰ Utah even builds in a presumption in favor of RS 2477 protection, noting that the mere existence of such a road in a "condition suitable for public use establishes a presumption that the highway has continued in use in its present location."¹¹¹

While there is more legal verbiage used in defining the scope of RS 2477 roads in Utah, the primary points of most attention for Wyoming are:

- Fully devolve control over lesser, county highways to county commissions;
- **Affirmatively declare the state's** interest in RS 2477 rights, while permitting local communities the legal ability to reclaim them.

More specifically, Wyoming would need to rescind its unnecessarily confined public highways law and replace it with one more friendly to RS 2477 interests. That would require, at a minimum, the replacement of the 1922 deadline for staking claim to public highways and permitting a broader, more open approach as used in Utah. Wyoming should likewise

go a step further and presume, under state law, *in favor* of RS 2477 interests. Anemic changes to the law will not win the day. Suggested language for Wyoming statutory changes is included as Appendix B.

e. Getting it Done: RS 2477 in Action

Two approaches to preserving RS 2477 interests in Wyoming will be described in this paper. The first follows the law as it currently stands and the second opens a broader path of RS 2477 implementation based on amendment of existing state law.

Under the law as it currently stands, citizens interested in protecting RS 2477 roads should undertake several actions. First, they should pay a visit to their local county commission to determine how roads and rights-of-ways are recorded locally. Ordinarily, these should be made available as public documents in a rather straightforward manner. Map overlays of county highways and roads, as well as plats with available road data, should be accessible, though these may be available **in a manner that is less than “user-friendly.” In other words, it may take citizens many hours, days, or weeks to pour over detailed maps, graphs, and charts to be able to adequately discern the full list of highways and roads in a given county.**

The easiest way to conduct just such a search is to first become educated about the federal government land holdings in a particular county. This would include agency holdings like: Bureau of Land Management, Bureau of Reclamation, De-

partment of Defense, Fish and Wildlife Service, Forest Service, and National Park Service. Once these land holdings have been properly staked out, researchers may then conduct a search for any recognized roads on these properties within the halls of county government. In addition, the Wyoming Department of Transportation would offer other data sources for recognizing legally cognizable roads and highways in Wyoming.

Additional resources beyond county commissions and state departments are also helpful. The State of Utah, for example, passed legislation enabling the government to purchase Geographic Information Systems (GIS), including geospatial mapping, to better illustrate RS 2477 roads and their boundaries. Indeed, GIS data offers some 400 layers of geospatial data that helps make RS 2477 road detection and recording more efficient, but this would require assistance and perhaps budgeting by the Wyoming Legislature. **Talking to “old timers” in local communities** is also a helpful source of data and information for RS 2477 roads. Often times, local residents are able to better indicate where paths, roads, and trails exist than even the most advanced software. Individuals and volunteers on such a project would do well to visit with interested parties who may just have a treasure trove of local data on this front.

Once volunteers have studied available data, conducted historical research, and preliminarily staked out potential RS 2477 roads, additional work must be done. Under Wyoming law, residents must make a showing that the roads in question bear a reasonable nexus to agricul-

tural operations or residences. Thus, volunteers will need to find footpaths and trails in some close proximity to either of these categories to validly recognize them as protected RS 2477 roads under state law. The exact contours of how close these paths must be to residences or agricultural operations is undefined, and counties may need to set their own standards on this front. After these steps have been taken, volunteer submissions to county commissions can begin, formally asking for the recognition of these roads by the county government.

A second approach envisions the Wyoming Legislature making a substantive change to its public highways law as detailed earlier. Under this approach, the legislature would first amend the Wyoming public highways law to recognize that its earlier deadline for recognizing public roads in 1919 was incomplete. The amended law would provide for a new timeline, or unlimited timeline, in which county commissions could recognize public highways. In that sense, this approach re-opens the ability to find, document, and record RS 2477 claims that were valid (but not recorded at the county level between 1919 and 1922) before 1976 and continued in some use today. **Wyoming's earlier 1919 approach was entirely sovereignty-minimizing.** It put too small a window on determining the existence of RS 2477 roads in the state. Re-opening this law to provide for indexing and recording the totality of RS 2477 roads in Wyoming makes sense given advances in technology and information in 2011.

Under either approach, both county and

state governments need to play a lead role in ensuring any claims to RS 2477 roads are treated seriously. Different states have adopted diverse standards about what constitutes proper RS 2477 rights-of-way. For example, in Utah and Colorado, no actual construction of a road is required, one only needs some showing of a use by the public.¹¹² Other states demand formalized government action to **“perfect” or recognize RS 2477 roads.**¹¹³ Thus, it remains up to state governments to decide how broadly RS 2477 will be implemented in their jurisdiction. But if states fail to act and define the scope of RS 2477 to their favor, an advantage in our federalist system will be lost. In a similar regard, under the existing statutory provisions in Wyoming, counties have a considerable degree of authority in deciding whether roads in question should be protected under RS 2477. Clarifying these standards, and doing so explicitly in favor of RS 2477 recognition, would go a long way toward preserving these powerful tools.

i. Quit Claim Filing and Quiet Title Actions

In 2000, the State of Utah used the federal Quiet Title Act to give notice to the federal government that it would quiet title on thousands of RS 2477 claims in the state.¹¹⁴ To be clear: a judicial action to **“quiet title” seeks to establish a party's ownership over property free and clear of any other competing claims while a “quit claim deed” is a formal legal document transferring ownership in a property.** Before taking action on the Utah filing, a new administration had taken control in Washington and the new Secretary of the

Interior, Gail Norton, entered into negotiations with Utah to make a simplified process for handling these claims. As a result, Utah never finished its quiet title suits. Through the Utah-Norton discussions, a Memorandum of Understanding (MOU) was created in 2003 that allowed Utah to seek federal quit claim deeds if:

- The road existed before 1976 and was presently in use;
- The road can be identified by **“centerline description” or other appropriate legal descriptions** at the state level;
- The existence of the road before 1976 is documented by sufficient information to show that it meets the legal requirements of RS 2477. This may be made by evidentiary showings of: photographs, affidavits, surveys, government records, and information inferred from the **road’s current condition**;
- The road was and continues to be public and capable of accommodating automobiles and has been subject to some form of periodic maintenance.¹¹⁵

Bear in mind, these standards were developed as part of a negotiation. For other states, additional factors or criteria may make more sense. As part of the Utah-Norton deal, the BLM Director of Utah was required to recognize RS 2477 rights-of-way that met these four standards so long as Utah did not assert any claims in National Parks, Wilderness Areas, or National Wildlife Refuges.¹¹⁶

In very much the same way, Wyoming is encouraged to file quit claims under the Quiet Title Act once it has established enough data to identify its RS 2477 rights-of-way. Wyoming can follow the Utah model and push for a legal remedy, or use the Quiet Title Act to establish its own MOU (Memorandum of Understanding) with the federal government. This method is the most secure for establishing property rights relative to the federal government. By the very terms of the Quiet Title Act, the federal government waives sovereign immunity and permits for a permanent property interest to be established by states through the judicial process.

There are additional legal tools available to the state to reach the same goal. Under Section 315 of the Federal Land Policy and Management Act, the federal government may issue recordable disclaimers to portions of federal land. These disclaimers offer formal attestation that the government validates the claimant's interest in the RS 2477 right-of-way.¹¹⁷ Additionally, the state can rely on Title V of the FLPMA that permits the BLM to grant rights-of-way for roads.¹¹⁸ This process, however, is longer and less robust for securing these paths as it opens the procedures to public participation and environmental review.¹¹⁹ Lastly, and least robustly, the state might enter into road maintenance agreements or nonbinding administrative determinations to protect RS 2477 claims.¹²⁰

Ultimately, Wyoming’s strongest approach to reclaiming RS 2477 rights-of-way is as follows:

- Reform state law similar to Utah to recognize roads protected by RS 2477 more broadly.
- Conduct systematic mapping and indexing by volunteers and state officials to preserve the fullest scope of RS 2477 rights-of-way.
- Encourage and train county commissions to assist in RS 2477 endeavors.
- File quit claim suits to apply pressure to the federal government to negotiate its own Memorandum of Understanding with Wyoming to protect RS 2477 interests statewide.

ii. Implications

If the State of Wyoming were to rigorously re-assert its rightful ownership of RS 2477 rights-of-way, what would be the result? At first glance, it may prove difficult to become excited in any manner about antiquated roads established **through the 1866 Mining Act. But “One Thousand Roads to Liberty” is much** more than its surface admits. It is a project to fundamentally shift the power structure away from Washington and back to local communities when it comes to public lands.

By aggressively asserting its RS 2477 interests, the State of Wyoming no longer suffers as some wayward colony under federal rule, but rather elevates itself to level of peer when dealing with the federal government. The federal government has considerable land holdings in Wyoming, and for them to have value or prac-

ticality they must be functional or useable. As it stands now, the federal government’s property in Wyoming is largely under Washington’s control, subject to some state and private interests scattered within these properties. In addition, governing memoranda of understanding also help define these relationships.

What if it were to be shown that the State of Wyoming had competing and superior property interests over federal public land? What if those RS 2477 interests criss-crossed federal lands so extensively that federal management of these lands became impossible or impracticable? And what if the State of Wyoming could move the legal question from one of federalism, where it usually loses, to one of real property, where it can win? The natural answer to all these inquiries is that these lands, and their control, would devolve back to state and local authorities.

RS 2477 is a starting point in the pursuit of a healthy balance of federalism in the Republic. Once these interests have been indexed, catalogued, and recorded, imagine what more could be made of these parcels. Existing RS 2477 roads could be linked together into functioning highways or transport paths across federal land. The associated interests connected to these claims could be used as well – permitting, for example, oil pipeline transport systems to be developed under them while running across federal lands. The options are only as limited as one jurisdiction’s creativity. **In the end, RS 2477** is a principled and proven method to recapture lost sovereignty of the state and to place it on equal footing with the federal government. To let these claims slowly

disappear would amount to negligence in managing the state by surrendering a powerful tool of sovereignty.

V. CONCLUSION

Wyoming faces a choice: continue to shake its collective fists about the evils of excessive federal intervention, or do something about it. When Wyoming has attempted to stand up against federal programs, it managed only to retain the **status quo or reduce the state's own authority**. But when a proven legal tool exists to seize a sizeable victory for federalism, it should not be ignored. That tool is RS 2477.

Through a concentrated RS 2477 campaign, Wyoming could restore its public lands to a position that left-of-center organizations fear, placing them wholly **"at the mercy of state legislatures."** But Wyoming must take aggressive and principled steps to achieve this result, and soon, lest the RS 2477 interests dissipate over time. Utah has been a proven leader on this front by resolving its outstanding RS 2477 interests against the federal government and largely winning in court. Wyoming can do this and more if its goal is to be truly a sovereign state.

ENDNOTES

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 599 (Penguin Books ed. 2003).

² Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified as 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976).

³ California courts have, for example, devised functional and flexible tests for discerning the presence of a valid RS 2477 right-of-way. *See, e.g.,* Ball v. Stephens, 158 P.2d 207, 210 (Cal. Ct. App. 1945) (“The route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of occasional improvement and use until it became a road **suitable for automobiles and trucks**”). In Colorado, RS 2477 highways can be formed by the passage of wagons over soil. *Wilkenson v. Dep’t of Interior*, 634 F.Supp. 1265, 1272 (D. Colo. 1986).

⁴ *See* Michael J. Wolter, Comment, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL’Y 315, 319 (1996).

⁵ *See* 43 U.S.C. § 1701 (1994).

⁶ Of course, the Mining Act of 1866 did not just deal with RS 2477 claims, but also allowed for rights-of-way for ditches and canals. *See* Mining Act of 1866, ch. 262 §§ 1, 3, 9, 14.

⁷ Leroy K. Latta, Jr., *Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811 (1988).

⁸ *Barnard Realty Co. v. City of Butte*, 136 P. 1064, 1067 (Mont. 1913).

⁹ *See, e.g.,* *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA II)*, 425 F.3d 735 (10th Cir. 2005); *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 413–41 (Alaska 1985); *Wilson v. Williams*, 87 P.2d 683, 685 (N.M. 1939).

¹⁰ *See, e.g.,* *Wilson*, 87 P.2d at 685; *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975); *Tucson Consol. Copper Co. v. Reese*, 100 P. 777, 778 (Ariz. 1900).

¹¹ *See, e.g.,* *SUWA II*, 425 F.3d at 745 (state law defines scope of RS 2477 interest); *Volger v. United States*, 859 F.2d 638 (9th Cir. 1988) (avoiding the determination of whether state or federal law defines the scope of RS 2477 interests); *United States v. Gates of the Mountains Lakeshores Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984).

¹² *See* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing the bundle of rights connected to property).

¹³ *See* Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 283 (2002).

¹⁴ *Sierra Club v. Hodel (Hodel II)*, 848 F.2d 1068, 1084 (10th Cir. 1988), *overruled on other grounds by* *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

¹⁵ *Hodel II*, 848 F.2d at 1073; *SUWA II*, 425 F.3d at 762; *Wilkenson*, 634 F. Supp. at 1272 (state law decides whether there was acceptance of a RS 2477 claim); *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 335 (D. Nev.

1963) (RS 2477 claim resolution depends upon resolution of state law interpretation); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975) (any standards available in state law define the scope of RS 2477).

¹⁶ *SUWA II*, 425 F.3d at 747 (“A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way”).

¹⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (2000).

¹⁸ Matthew L. Squires, *Federal Regulation of R.S. 2477 Claims*, 63 N.Y.U. ANN. SURV. AM. L. 547 (2008); Stephen H.M. Bloch & Heidi J. McIntosh, *A View From the Frontlines: The Fate of Utah’s Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U.L. REV. 473 (2003).

¹⁹ Squires, *supra* note 18, at 597.

²⁰ The unfortunate origin largely attributed to this view is *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

²¹ **Wyoming v. United States Dep’t of Interior**, 360 F.Supp.2d 1214 (D. Wyo. 2005) (rejecting **all challenges to the federal government’s rejection of Wyoming’s wolf management program**); *Connecticut v. United States*, 369 F.Supp.2d 237 (D. Conn. 2005) (rejecting challenges against federal fishery management plans); *Wilkie v. Robbins*, 127 S.Ct. 2588 (2007) (rejecting claims against landowner who suffered harassment against him and trespass against his land by federal actors).

²² See S.J. 0002, 60th Legis. (Wyo. 2011), available at <http://legisweb.state.wy.us/2010/>

[Bills/HJ0002.pdf](#) (demanding Congress “**cease and desist**” from enacting certain mandates).

²³ See, e.g., Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

²⁴ See U.S. CONST. art. IV, §3.

²⁵ *Kleppe*, 426 U.S. at 543.

²⁶ **One’s conceptual approach to the Property Clause** governs how the resolution of RS 2477 conflicts would occur. A narrow view of the Clause would hold that the federal government acts as a proprietor of the land in question and is subject to the same claims faced by any other abutting land owner. A more liberalized view of the Property Clause would **hold that the Clause’s power is plenary and its only constraints are those found in the Constitution itself.**

²⁷ See, e.g., SHERIFFS FIRST, <http://sheriffsfirst.com/> (last visited Oct. 6, 2011).

²⁸ THE FEDERALIST No. 51 (James Madison).

²⁹ *Kleppe*, 426 U.S. at 540–41.

³⁰ *Camfield v. United States*, 167 U.S. 518, 524 (1897).

³¹ See *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1258 (D. Utah 2000) (explaining that with respect to RS 2477 servitudes, the “**entire debate concerning impact on Park lands, resources and values, including the ‘visitor experience,’ is inescapably context-driven, perception-driven, and deeply subjective**”).

³² THE FEDERALIST No. 46 (James Madison).

³³ See U.S. CONST., pmbi.

³⁴ See, e.g., WYO. CONST. art. 13, §1(b); Cook v. Zoning Board of Adjustment for the City of Laramie, 776 P.2d 181, 186 (Wyo. 1989).

³⁵ See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DEN. U. L. REV. 1337 (2009).

³⁶ See Dent v. West Virginia, 129 U.S. 114, 121–23 (1889).

³⁷ WYO. CONST. art. 13, §1.

³⁸ *Id.*

³⁹ THE FEDERALIST No. 51 (protecting individual liberty as part of the “double security” of federalism).

⁴⁰ U.S. CONST. amend. V.

⁴¹ U.S. CONST. amend. XIV.

⁴² 551 U.S. 537 (2007).

⁴³ *Id.* at 542–44.

⁴⁴ *Id.* at 543.

⁴⁵ *Id.* at 545–46.

⁴⁶ *Id.* at 546 (citing 18 U.S.C. § 111).

⁴⁷ *Id.*

⁴⁸ If there is one lesson to be learned from a review of efforts challenging federal government authority is that challengers should never forego the opportunity to defend their rights in the first instance. Failure to do so waives those claims in future challenges, less-

ening their strength and otherwise diminishing chances of success. *Robbins*, 551 U.S. 537.

⁴⁹ *Id.* at 553.

⁵⁰ *Shuler v. Babbitt*, 49 F.Supp.2d 1165 (D. Mont. 1998).

⁵¹ *Id.* at 1168.

⁵² *Id.*

⁵³ See *Obey the law – forget about the grizzly*, LEGAL REFORM NOW!, http://www.legalreformnow.org/menu4_1.htm (last visited Oct. 6, 2011).

⁵⁴ *Squires*, *supra* note 18.

⁵⁵ See, e.g., Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

⁵⁶ Innovative legal arguments are a welcome addition to the bevy of constitutional theories tossed about in debates concerning federalism. However, these theories must be centered in norms of accepted constitutional precedent. Moving courts away from a centralized view of public land management and ownership will take time and no proverbial silver bullet is available. In time, it may well be feasible to make a compelling showing to the courts that the trust doctrine compels that public lands be managed locally, but that vision remains distant at present.

⁵⁷ See, e.g., *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997), cert. denied, 522 U.S. 907 (1997); *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991); *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996), aff’d mem., 133 F.2d 930 (9th Cir. 1997).

⁵⁸ See Andrea Hungerford, *Custom and Culture Ordinances: Not a Wise Move for the Wise Use Movement*, 8 TUL. ENVTL. L.J. 457 (1995); Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1993/1994).

⁵⁹ The State of Wyoming is no stranger to the **failed lore “custom and culture” movement**. See, e.g., *Land Use Plan (Sept. 7, 2004)*, FREEMONT COUNTY WYOMING, <http://fremontcountywy.org/wp-content/uploads/2010/01/Fremont-County-Land-Use-Plan.pdf>.

⁶⁰ It should be noted that the Constitutional Convention expressly rejected an “Equal Footing” clause in the Constitution. See Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617, 634 n.127 (1985). The Equal Footing doctrine is read impliedly in Article IV, Section 3, Clause 1 of the Constitution: “New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”

⁶¹ Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523 (2005).

⁶² See *Nye County*, 920 F.Supp. 1108.

⁶³ *Id.* at 1114.

⁶⁴ Reed, *supra* note 58, at 527.

⁶⁵ See, e.g., *Sheriffs First Legislation*, TENTH AMENDMENT CENTER, <http://www.tenthamendmentcenter.com/nullification/sheriffs-first-legislation/> (last visited Oct. 6, 2011).

⁶⁶ There are many reasons to disagree with judicial precedent concerning constitutional principles. But at the end of the day, any claims brought concerning constitutional issues must survive judicial, not popular, review. See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁶⁷ See, e.g., *Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160, 1163 (D. Mont. 2008); *Wyoming v. United States Dep’t of Interior*, 2010 WL 4814950 D. Wyo. (Nov. 18, 2010); *Defenders of Wildlife v. Salazar*, 729 F.Supp.2d 1207 (D. Mont. 2010); *Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir. 2006); *Wyoming v. United States Dep’t of the Interior*, 360 F.Supp. 2d 1214 (D. Wyo. 2005); *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F.Supp. 1349 (D.Wyo. 1997).

⁶⁸ 443 F.3d 1211.

⁶⁹ *Id.* at 1222 n.5.

⁷⁰ Terje Langeland, *Rules of the Road, Teller County prosecuting man for blocking road across his property*, COLO. INDEPENDENT, Nov. 13, 2003, available at <http://www.csindy.com/colorado/rules-of-the-road/Content?oid=1121361>.

⁷¹ *Judge acquits Teller County man who blocked road*, COLO. INDEPENDENT, May 27, 2004, available at <http://www.csindy.com/colorado/judge-acquits-teller-county-man-who-blocked-road/Content?oid=1123826>.

⁷² See *United States v. Estate of Hage*, 2011 WL 3585402 (D. Nev. 2011); see also *United States v. Estate of E. Wayne Hage*, 2011 WL 1882366 (D. Nev. 2011).

⁷³ *Wilkenson*, 634 F. Supp. at 1272 (citing *Cent. Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 467 (1932)); *Heath v. Parker*, 30 P.3d 746, 750 (Colo. Ct. App. 2000).

⁷⁴ *Sierra Club v. Hodel (Hodel II)*, 848 F.2d 1068, 1083 (10th Cir. 1988).

⁷⁵ *Squires*, *supra* note 18, at 564.

⁷⁶ UTAH CODE ANN. § 72-5-303 (2010).

⁷⁷ See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Kane County v. United States*, 597 F.3d 1129 (10th Cir. 2010); *Kane County v. Salazar*, 562 F.3d 1077 (10th Cir. 2009); *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc); *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006); *SUWA II*, 425 F.3d 735; *Sierra Club v. Lujan*, 949 F.2d 362 (10th Cir. 1991); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).

⁷⁸ The federal government could, of course, use the RS 2477 roads just like any other member of the public. It could not, however, trespass or use the roads in a manner inconsistent with their purpose.

⁷⁹ *Wilderness Soc. v. Kane County*, 632 F.3d 1162, 1165 (10th Cir. 2011) (quoting *SUWA II*, 425 F.3d at 741)).

⁸⁰ *San Juan County*, 503 F.3d at 1168.

⁸¹ 425 F.3d 735 (10th Cir. 2005).

⁸² *SUWA II*, 425 F.3d at 752.

⁸³ See *Kirk Brown*, 151 IBLA 221, 227 n.6 (1999); *James S. Mitchell, William Dawson*, 104 IBLA 377, 381 (1988).

⁸⁴ The recognition that the state courts are the primary arbiters of state land disputes arising under RS 2477 is otherwise consistent with some 145 years of history and practice. *SUWA II*, 425 F.3d at 757.

⁸⁵ *Garfield County*, 122 F. Supp. 2d at 1242–43.

⁸⁶ See *SUWA II*, 425 F.3d at 746–47.

⁸⁷ *United States v. Jenks*, 804 F. Supp. 232, 233 (D. N.M. 1992).

⁸⁸ *United States v. Jenks*, 22 F.3d 1513, 1518 (10th Cir. 1994).

⁸⁹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (2000).

⁹⁰ *SUWA II*, 425 F.3d at 746.


⁹¹ See, e.g., GOVERNOR'S PUBLIC LANDS POLICY COORDINATION OFFICE, <http://www.governor.utah.gov/publiclands/default.htm> (last visited Oct. 6, 2011); UTAH GIS PORTAL, <http://agrc.its.state.ut.us/> (last visited Oct. 6, 2011).

⁹² See UTAH RECORDED RS2477 ROADS, <http://recorded2477roads.utah.gov/> (last visited Oct. 6, 2011).

⁹³ See *id.*

⁹⁴ See, e.g., *Acknowledgment and Notice of Acknowledgement for Wayne County Road, Cedar Draw Road, County Road Number 5B*, available at <http://recorded2477roads.utah.gov/wayne/b-roads/preamended/280337.pdf>.

- ⁹⁵ See *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917) (observing that the Property Clause gives Congress the power over the **public lands “to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them”**).
- ⁹⁶ *United States v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984).
- ⁹⁷ *Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988).
- ⁹⁸ ***Boykin v. Carbon County Bd. of Comm’rs***, 124 P.3d 677, 681 (Wyo. 2005).
- ⁹⁹ Wyoming also recognizes the existence of roads by adverse possession or prescription. See WYO. STAT. ANN. § 24-1-101(c) (2011).
- ¹⁰⁰ *Yeager v. Forbes*, 78 P.3d 241, 247 (Wyo. 2003).
- ¹⁰¹ *Hatch Bros. Co. v. Black*, 165 P. 518, 519 (Wyo. 1917), *aff’d on rehearing*, 171 P. 267 (1918) (emphasis added).
- ¹⁰² Session Laws of Wyoming, ch. 112, sec. 1 (1919); later amended in Session Laws, ch. 100, Sec. 1 (1921), currently codified at WYO. STAT. ANN. § 24-1-101 (2011).
- ¹⁰³ 78 P.3d 241 (2003).
- ¹⁰⁴ *Id.* at 255.
- ¹⁰⁵ WYO. STAT. ANN. § 24-1-101(c) (2011).
- ¹⁰⁶ See *McClellan v. State*, 62 P.3d 595 (2003).
- ¹⁰⁷ *Id.* at 597 (citing Wyo. Stat. 31-1-101(a)(viii)).
- ¹⁰⁸ *Id.* at 598.
- ¹⁰⁹ See UTAH CODE ANN. § 72-3-103 (2011).
- ¹¹⁰ UTAH CODE ANN. § 72-5-302(3) (2011).
- ¹¹¹ *Id.*
- ¹¹² See *SUWA II*, 425 F.3d at 770–71; *Wilkenson*, 634 F. Supp. at 1272.
- ¹¹³ See, e.g., *Tucson Consol. Copper Co. v. Reese*, 100 P. 777, 778 (Ariz. 1909).
- ¹¹⁴ See 28 U.S.C. § 2409a(a) (2010).
- ¹¹⁵ Memorandum of Understanding Between the State of Utah and the Department of Interior on State and County Road Acknowledgment (Apr. 9, 2003), available at http://www.rs2477.com/documents/MOU_Utah_DOI.pdf.
- ¹¹⁶ *Id.*
- ¹¹⁷ See 43 U.S.C. § 1745(a) (2010); 43 C.F.R. § 1864 (2010).
- ¹¹⁸ 43 U.S.C. § 1761(a) (2010).
- ¹¹⁹ *Id.*
- ¹²⁰ See, e.g., Memorandum from Gale A. Norton, Sec’y, Dep’t of the Interior, Departmental Implementation of *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735 (10th Cir. 2005); Revocation of Jan. 22, 1997, Interim Policy; Revocation of Dec. 7, 1988, Policy (Mar. 22, 2006), available at http://www.doi.gov/archive/news/06_News_Releases/Norton_3-22-06.pdf.



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