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An Examination of Freedom to Roam Principles and Access of Undeveloped Lands in Idaho, USA.

By
Dylan Stiegemeier

A dissertation
submitted in partial fulfillment
of the requirements for the degree of
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Committee Approval

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**An Examination of Freedom to Roam Principles and Access of Undeveloped Lands in
Idaho, USA.**

Dissertation Abstract -- Idaho State University (2019)

This dissertation explores the history of the concept of freedom to roam and the perceptions of stakeholders engaged with issues concerning open space. More specifically, it looks at these stakeholders' perceptions to changing land access within the state of Idaho and the possibility of some manner of incorporating the idea of freedom to roam. As such, the main questions to be addressed are: What are the views of key role players in Idaho concerning access to undeveloped lands within the state? And, do they believe there is support for some middle point between private property and a freedom to roam policy within the state of Idaho? Key individuals working indirectly or directly with some manner of freedom to roam policy were interviewed. D.F. Development land closures in Idaho and the 2018 new trespass law were key topics evaluated. More specifically, this dissertation recognizes that Idahoans do need to respect private property, yet aims to examine if there is a middle point between private property closure and freedom to roam that can help resolve current land use disputes?

Key Words: freedom to roam, land access, land use, Idaho, D.F.

Development, trespass law, undeveloped land

Chapter 1: Overview of Proposed Research

Historically, residents of Idaho have had access to large expanses of undeveloped lands, many of which were/are timberlands. Some of these were/are public lands, but some were/are owned by private entities such as logging or timber companies that allowed public access. Over time, with population growth and greater urbanization, some of the privately held lands were sold and closed to public access. This dissertation attempts to address issues concerning the changing landscape of these lands and perceptions concerning access to these lands.

Currently, Idaho has 21.5 million acres of forest land spanning from the Canadian border to the southern edge of the state. The U. S. Forest Service manages 13 national forests which lie completely or partially within the state and include 73%, or 12.8 million acres of Idaho's timberlands. The rest of Idaho's timberlands are divided between public and private ownership. The State of Idaho and other public agencies own 9% or 1.6 million acres, forest products companies own 7% or 1.2 million acres, and the remaining 11%, 2 million acres, is owned by ranchers, farmers, tribes and other landowners (Idaho's Forests Archives). Historically and continuing through today, timber companies play an integral role in state economics and land use policies. As private owners of these large pieces of land yet also well-connected, active members of the state, companies like Potlatch, Stimson, Inland Empire Paper, and Boise Cascade among others have always allowed access to recreational users. Ultimately, Idahoans have historically been able to access millions of acres of land, including both public and private, for recreation and hunting.

Idahoans access to recreate on millions of acres of private land has been allowed via permitting programs run by various timber companies operating in the state. However, the time of greater public access is coming to an end within the state of Idaho. This change is impacting

activities that have traditionally been a part of many Idahoans' lives. For example, access to hiking, fishing, and hunting have been limited by these land closures. With these changes come questions about tradition and history, current access, and future use. As Idaho continues to grow, these questions need to be addressed. Many people's answer to these questions is "private property." However even that "answer" is somewhat unclear. Can private individuals close and gate formally public roads crossing their property, as is currently happening in Valley County outside Boise?

This dissertation examines both the private property response and looking back at tradition and history, the idea of "freedom to roam." (Freedom to roam is the general public's right to access certain public or privately owned land, lakes, and rivers for recreation and exercise.) More specifically, this dissertation recognizes that Idahoans do need to respect private property, yet aims to examine if there is a middle point between private property closure and freedom to roam that can help resolve current land use disputes?

Research Questions

This dissertation explores the history of the concept of freedom to roam and the perceptions of stakeholders engaged with issues concerning open-space. More specifically, it looks at these stakeholders' perceptions to changing land access within the state of Idaho and the possibility of some manner of incorporating the idea of freedom to roam.

As such, the main questions to be addressed are: What are the views of key role players in Idaho concerning access to undeveloped lands within the state? And, do they believe there is support for some middle point between private property and a freedom to roam policy within the state of Idaho?

In order to address these questions, particular attention will be given to individuals who work for organizations that have members regularly accessing undeveloped lands. Key

individuals working indirectly or directly with some manner of freedom to roam policy will be interviewed. The interviews will provide insight into freedom to roam policies and their feasibility in Idaho. In addition, this dissertation focuses on the case study, within Idaho, of the Wilks brothers and D.F. Development. This case study will be used to help explain why freedom to roam may be something those living in Idaho support and as such, attempt to find answers to the larger questions.

It is important and timely to gain an understanding of key role players and freedom to roam policies in Idaho. Idaho has large amounts of undeveloped public and private land and a long history of residents enjoying and accessing this land. With D.F. Development and the Wilks brothers purchasing large tracts of land previously managed for open access, and closing these tracts of land, Idaho is placed on the frontline in the debate over private property rights and freedom to roam principles. Not only has D.F. Development closed access to formerly open private lands, they have also gated two public US Forest Service roads that cross their property. The result of these changes, in addition to a new trespass law took effect July 1st, 2018 in Idaho, is increasing levels of conflict--something that needs to be addressed. Gaining an understanding of attitudes and perceptions of the possibility of incorporating some manner of freedom to roam principles may be a way to move forward to address future conflict associated with land closures and the new trespass law.

Structure of this Dissertation

To address changing access to undeveloped land in Idaho, Chapter 2 of this dissertation gives an overview of the idea of freedom to roam. It includes a definition of the term and an historical examination of where the basic liberties and freedoms in the right to roam developed. Following this, an examination of the principles of freedom to roam historically in the United States is undertaken. In addition, recent examples of freedom to roam legislation in Scotland,

England and Wales, guaranteeing their citizens the basic liberty to explore the nature of their countryside, are examined. Chapter 3 outlines the development of environmental thought and underlying tenets related to freedom to roam philosophies in the United States. Chapter 4 of this dissertation examines property rights and freedom to roam, with a particular focus on private property rights vs social obligation or progressive property rights. Chapter 5 highlights the case study of D.F. Development and their purchase of 172,000 acres of land in Idaho and subsequent closure of the undeveloped land and gated forest service roads in Adams, Valley and Boise counties. Chapter six focuses on methods and interviews conducted. Chapter 7 outlines insights gained from personal interviews conducted with key players in Idaho. Individuals interviewed work with constituents recreating on undeveloped land, organizations fighting land closures by D.F. Development Corporation, and Idaho Fish and Game working to expand the right to roam in Idaho through Large Tracts Lease Program and the program “Access, Yes.” The information collected from the interviews is then used to help answer the research questions and determine the feasibility of some form of freedom to roam policies in Idaho. Finally, chapter 8 concludes with a discussion of freedom to roam principles within the state of Idaho and suggestions for future research.

Chapter 2: History and Development of Freedom to Roam Principles

What is Freedom to Roam and Where Does it Come From?

Everyman's right, the freedom to roam, right to wilderness; all are different terms for the same idea. The concept of freedom to roam has been around for hundreds, if not thousands of years. It goes back to time immortal, as undoubtedly man roaming the earth predates the establishment of property rights. It has historically been recognized as a basic liberty throughout Europe, since at least the middle ages, and even has historical roots in the United States. Freedom to roam in Sweden is called “*allmansrätten*” or everyman's right, in Finland it is referred to as “*jokameihen oikeus*” (Ilgunas 69). Freedom to roam has been codified and protected in many different countries in many different ways. Sweden, the country with the longest standing right to roam expresses the freedom to roam in the following way:

The freedom to roam is the principle, protected by the law, that gives all people the right to roam free in nature. Sleep on mountaintops, by the lakes, in quiet forests or beautiful meadows. Take a kayak out for a spin or experience the wildlife firsthand. Pick berries and mushrooms and flowers from the ground – all completely free of charge. The only thing you have to pay, is respect for nature and the animals living there (visitsweden.com).

Ilgunas, author of a well respected book on freedom to roam in the United States titled, *This Land Is Our Land, How We Lost The Right to Roam and How To Take It Back* stresses,” suggests the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland) offer some of the most generous roaming rights in the world. Landowners in Denmark and Iceland have a bit more power to exclude, but Norway, Sweden, and Finland offer responsible access to virtually the whole countryside” (Ilgunas 70). In Scandinavian countries, freedom to roam allows individuals to walk, camp, light campfires, or even pick berries and mushrooms on private land (The Economist, Sandell & Fredman). In particular, the Swedish system of *allmansrätten* has been studied extensively as it is “among the most successful, comprehensive, and longest running

system in the world” (Ilgunas 92). Thus, to truly comprehend the extent to which freedom to roam may extend, understanding the history of the idea, much of which is via the Swedish system, is key.

History of Freedom to Roam: Medieval Roots

Swedes tend to regard the Right of Public Access as part of their cultural heritage, sometimes even as a national symbol. Its origins go back in part to provincial laws and customs dating from the Middle Ages. The notion that anyone can walk anywhere in Sweden dates back to at least 1350 A.D. (Perle 95). Carlsson stresses, “from time immemorial the country people of Sweden have regarded certain lands as their common property. These were mainly forest lands, waters, and pastures outside the cores of the villages. The so-called Everyman's Right, i.e. legal right of access to private property is a contemporary reminder of this situation” (Carlsson 4).

Ultimately, Freedom to Roam in Scandinavian countries dates back to medieval times. The right has been expanded throughout time, through the creation of Forest Commons. The Right to Public Access or the Freedom to Roam has been constitutionally protected in Sweden, Norway, and Finland’s constitutions (Sandell & Fredman; Sténs & Sandström). Although the right is loosely defined and operates culturally under the premises of mutual respect – Don't Disturb, Don't Destroy. Perle stresses, “Allemansrätt is symbolic of citizens' rights and duties, 'grounded in rules of reason ... basic respect and personal responsibility’” (Perle 95).

Freedom to roam has been an enduring concept around Europe for centuries. However, the concept and practice of freedom to roam is varied around the countries of Europe. The notion that man should be free to roam and explore undeveloped land, remains the central tenet when looking at the practice across Europe. Differences in how freedom to roam is adopted around Europe abound as well.

What Does Freedom to Roam Look Like Today Around Europe?

Scandinavian Model:

Sweden, Norway, Finland and Iceland enjoy the ability to roam anywhere in their countryside. These countries, “enjoy possibly the most relaxed approach to the right to roam in the developed world, for a variety of reasons. The region's low population density has mitigated conflict over land ownership, the forests have always been regarded as 'existing for the common good', and fully-fledged feudal systems never developed in these countries” (Perle 95).

As mentioned above, in Sweden, *allmansrätten*, or 'everyman's right,' is the ability to roam freely. This right has been codified into law in the Constitution but ultimately it operates off the principle “Don't Disturb, Don't Destroy.” The Swedish EPA maintains, “While the Right of Public Access is guaranteed in the Swedish Constitution, it is not enshrined in law and there is no statute that precisely defines its scope. On the other hand, it is hedged around by various laws that set limits on what is allowed. It is therefore not always possible to say exactly what you may or may not do in the countryside. While the courts have the power to interpret the Right of Public Access, not many cases have actually come before a court of law” (Kuruzovic, S. 1). Thus, in Sweden *allmansrätten* is included in the constitution but the rights are not formally codified. Similarly in Finland, *jokamiehenoikeus* (*in Finnish*) is also included in the constitution, although not formally codified. Gorovitz Robertson stresses, “the rule is that if it's not forbidden, it's allowed. In Norway and Iceland, the right [freedom to roam] was codified in law in 1957 and 1999 respectively” (Robertson 67).

Campion and Stephenson highlight how the custom developed into current law by stating, “*Allemansrätt's* modern origins lie in the 1930s when the Swedish Government recognized the need to provide for the steadily-growing demand for outdoor recreation. As in other countries in the same period, the Swedish State was faced with the costly and problematic

possibility of having to acquire new parks and reserves” (Campion and Stephenson 21).

Reviving everyman's right was put forward as an alternative solution which although not popular with landowners was embraced enthusiastically by the public. Ultimately, Campion and Stephenson stress, “the roots of modern *Allemansrätt* are thus found in the 20th century, and its existence today is a result of conscious governmental decision-making, rather than being circumstantial” (Campion and Stephenson 21). Everyman’s right or freedom to roam became a constitutional protected right in Sweden in 1994 but the right still operates using norms or golden rules for how to practice the right. Ilgunas sums up the current state of *Allemansrätten* in Sweden by stating,

Interestingly, there is no official *Allemansrätten* law. It was, however, included in the Swedish constitution in 1994, which states: 'There shall be access for all to the natural environment in accordance with the right of public access.' Rather than specific legislation, there is an informal code known as the 'golden rules,' which form the tradition's guiding principles. These rules can be summed up with the credo, 'Don't disturb. Don't Destroy (Ilgunas 94).

Proponents of *Allemansrätten* are reluctant to formalize the custom into law, perhaps because they fear that walking rights might get lost in a series of strict entanglements, as happened to a certain degree under the English and Welsh Countryside Rights Of Way Act, (CROW). The Swedes are proud that *Allemansrätten* is embedded in Swedish culture, and Swedes fear that legalizing a cultural norm may come with unforeseen consequences. Anna Stens and Camilla Sandstrom write that Swedes may worry that regulating *Allemansrätten* “would mean that everything left outside of the description would automatically belong to the private landowner. In other words, a formalized law runs the risk of tarnishing the currently open-ended understanding of the custom” (Sténs & Sandström 115). However even though it has not been extensively codified it does come with limits. Campion and Stephenson note, “the

right to roam is thus a rather deceptive term as there are many limitations on where users may go and what they may do, and any serious transgression against these restrictions can result in legal penalties, including fines and even imprisonment” (Campion and Stephenson 21). The active behavioral code or ‘golden rules’ promoted by the Swedish Environmental Protection Agency can be seen in Appendix B.

Ultimately, the Freedom to Roam and Right to Public Access in Scandinavia relies upon common sense. Perle maintains, “The right [freedom to roam] is constrained by common sense: roamers must not invade landowners' privacy and they must do no damage. This means that cultivated land is out of bounds during the growing season when crops might be damaged but, for instance, skiing across snow-covered fields is permitted” (Perle 95). Due to that fact that there is limited codified or specific laws, there is no specific definition for how near a homestead one can roam in Sweden. The rule of thumb generally speaking is, “if you can see and hear people, you are too close” (Perle 98). Ultimately, the freedom to roam, in Sweden, is robust, culturally accepted and been around in different forms for hundreds or even thousands of years. What does the freedom to roam look in countries where it has been newly codified into law?

Newly Codified Freedom to Roam Laws England, Wales, Scotland:

Freedom to roam systems in England, Scotland and Wales have recently been expanded and offered legal protections. The expansion and codification of the right to roam in these countries are relatively recent and were passed in early 2000s (Anderson). While not as robust as Scandinavian countries the laws ensure that all people are able to roam freely across land whether in public or private ownership. In England, people are allowed access on private land to walk, but are not permitted to camp or pick berries (Anderson). The right to pass roaming legislation in England and Wales was long spanning nearly a century. Campion and Stephenson

stress, “the struggle for a real ‘right to roam’ spanned over 100 years and no less than 20 failed parliamentary bills” (Campion and Stephenson 19). Tony Blair’s Labor Government began fulfilling an election promise by introducing right to roam legislation. Starting in 2000 countries like England, Wales, and Scotland began codifying what exactly the long established custom of freedom to roam means. In 2000, England and Wales passed the Countryside and Rights of Way Act (CROW), to give people access to “mountain, moor, heath, or down.” The 2003 Scottish Land Reform Act opened the countryside to many recreation opportunities as long as they are non-motorized. The right to roam was expanded in these countries because the right of public access and the freedom to roam are seen as essential components of protecting individual freedom and liberty. To pass these acts required a delicate balance and understanding of existing property owners rights (Perle 90-91).

The Countryside & Rights of Way Act 2000 (CROW)

CROW “provides a statutory right of access to registered common land and four categories of privately-owned 'open access' land in England and Wales: mountain, moor, heath, and downward. The Act excludes cultivated land, as well as buildings and their curtilage. In total, 940,000 hectares (2,322,790 acres) or 7% of England has been classified by Natural England as open access land on which people are free to roam” (Perle 90). Passage of CROW involved an extensive effort to define and map the areas where the law was to be applied. The mapping was completed Oct. 31st, 2005 at a cost of £69 million pounds or \$85 million (Klick and Parchomovsky 20).

The land that was considered for open access was split into three categories for the purpose of mapping. The first category consisted of “open country.” Open country was defined as, a. appears to the appropriate countryside body to consist wholly or predominantly of

mountain, moor, heath, or down, and b. is not registered as common land. The second category was mountain land, or land higher than 6,000 meters or 1,968 ft high. The third category, coastal land was added to CROW in 2009 with the enactment of the Marine Coastal Access Bill of 2009 and extended the original right to roam to include 'coastal margins' in order to form a through hiking trail extending 2,7000 miles along the English coast. With the addition open access area along coastal regions, “the right of public access covers 3.4 million acres (between 8% and 12% of the total amount of land) in some of the best hiking areas in England and Wales” (Klick and Parchomovsky 20). Ilgunas stresses, “to be clear, this land is still privately-owned, though now it's accessible to the public” (Ilgunas 72).

Despite the newly found freedom to roam across hundreds of thousands of acres in England and Wales the activities allowed are a far cry from those of Scandinavia. The right to roam in England and Wales is subject to several limitations. Firstly, “the right does not apply to freshwater bodies such as rivers, streams, and lakes. Second, the act excludes cultivated agriculture areas. Third, the act specifically exempts sports fields such as golf courses, racecourses and aerodromes. Fourth, the act provides that the right does not extend to 'land within 20 meters [60 feet] of a dwelling,' as well as parks and gardens, thereby creating a 'privacy zone' for landowners in the ground adjacent to their homes” (Klick and Parchomovsky 20). Lastly, the right to roam is only allowed for foot traffic in England and Wales. Other activities that are permitted in Scandinavia and Scotland like cycling, horseback riding, skiing, camping, hunting, boating, swimming, and lighting campfires are not permitted. Ilgunas notes while the land is open he stresses the activities permitted are quite limited. He states,” while CROW opened up lots of land, the activities that are allowed on it are quite few. These activities are limited to walking, picnicking, and sightseeing. That's it. Walkers in this newly opened

terrain are not allowed to build fires, hunt, fish, camp, cycle, ride horses, swim in rivers and lakes, or forage . . . unless the landowner chooses to welcome these activities” (Ilgunas 72). Like in Scandinavia, hikers are expected to respect the land and protect plants, animals, and not litter. Ultimately, CROW required landowners, “to give the public free access to their properties if they are subject to the right to roam. In keeping with this obligation, owners must ensure that all rights of way on their property are clear and must not post or maintain misleading notices on, near, or on the way to, access land” (Klick and Parchomovsky 20).

In giving up access rights in England and Wales, landowners are guaranteed additional protections not found in Scandinavian countries or Scotland. Private landowners, “can restrict or bar access altogether for up to 28 days a year for any reason without permission from the authorities. Any restriction in excess of that period [28 days] must be justified and requires special approval from the authorities, which may be granted for reasons of land management, conservation, or fire prevention” (Klick and Parchomovsky 20). Landowners are also exempt from tort liability or being sued for harm to hikers caused by natural features of the property or resulting from improper use of gates, fences, or walls. However, landowners can be held liable for materialization or risks they have intentionally or recklessly created. Hypothetically if a cow or sheep that had been released to graze on property attacked a visitor, the owner could be held liable for the injury sustained by the visitor (Klick and Parchomovsky 20).

Overall CROW attempted to balance private property owners’ rights with the right to open public access. CROW ultimately expanded liberty and freedom for all people in outdoor areas all over England and Wales. England and Wales was the first recent example of government codifying rights of open access or freedom to roam. It took lots of money, time, and resources but today the countryside of England and Wales are truly open and accessible to the

public. Following the example that CROW established in England and Wales, Scotland tackled drafting legislation to codify open access in their countryside as well. Klick and Parchomovsky assert, “the scope of the right to roam in England and Wales is modest relative to its scope in other countries. In Scotland, the right to roam as established by the Land Reform (Scotland) Act of 2003, covers almost the entire country...and contains fewer exclusions and exemptions” (Klick and Parchomovsky 20).

Scotland and the Recent Expansion of the Freedom to Roam, The Land Reform Scotland Act:

Scotland passed the Land Reform (Scotland) Act (LRSA) in 2003, to provide a statutory right of access to all land for recreation, so long as that the right is exercised responsibly. By the 1990s landownership in Scotland was recognized as grossly inequitable. Sellar stresses, “2/3 of private land was owned by just 1,252 people, with 60% of the Highlands owned by a mere 100 people.” This pattern has been called, “the worst in Europe” (David Sellar 60). Klick and Parchomovsky maintain, “the right to roam, as established by the Land Reform (Scotland) Act of 2003, covers almost the entire territory of the country” (Klick and Parchomovsky 20). In Scotland walking, horse-riding, canoeing, and camping is permitted on all private land. However, it should be noted that hunting, shooting, and fishing (sources of revenue for the Highland Estates) is not permitted. Like in Scandinavia the right to public access is rooted in medieval custom. Perle notes, “in the Highlands, landowners had tolerated hillwalkers for generations. In fact, a widely-held but inaccurate myth held that a right to roam actually existed, despite the absence of any basis in law” (Perle 91). Like in Scandinavia, a clear privacy zone is not codified, but “instead it employs a reasonableness standard, requiring hikers to use their access rights reasonably and provide owners with a reasonable measure of privacy and refrain from unreasonably disturbing them” (Klick and Parchomovsky 21).

Overall the Land Reform (Scotland) Act has open private land to public access and recreation all across Scotland. Ilgunas notes, “the most remarkable thing about the LRSA is how open-ended it is. One of the few rules outlined in the actual law is that anyone can do pretty much anything so long as they're behaving responsibly” (Ilgunas 81). The law reads: A person is to be presumed to be exercising access rights responsibly if they are exercised so as not to cause unreasonable interference with any of the rights (whether access rights, or rights associated with the ownership of land or any others) of any other person (Combe 287). Overall, the Scottish system much like the Scandinavian system is very open and focuses on responsible use.

Following the passage of the LRSA Scotland also passed Scottish Outdoor Access Code in 2005 to provide detailed guidance on the exercise of the ancient tradition of universal land access in Scotland. The code has been approved by both the Scottish Government and the Scottish Parliament and provides sufficient guidance to ensure that most access problems can be resolved by reference to it. The code is based on three main principles: 1. Respect the interests of other people 2. Care for the environment 3. Take responsibility for your own actions. It should be noted that failure to comply with the code is not, in itself an offense, however if a dispute cannot be resolved then the dispute is referred to the Sheriff for determination and ultimately resolved in court (Scottish Outdoor Access Code 1). Ilgunas sums up the system of roaming and public access in Scotland by stating, “protecting the interests of the environment, of business, and of landowners was critical from the start. The law isn't just about the public's roaming privileges. It's about the public's *responsibilities*. . .the 'right of responsible access' is a better term for Scotland's new roaming regime” (Ilgunas 83).

When comparing LRSA in Scotland to the CROW act in England and Wales it is readily apparent that the legislation applies to the whole country not just specific areas and it is

much less limiting on activities that can be undertaken while roaming and exploring. Perle maintains that the LRSA, “is more radical than CROW in that it covers all land (not just certain restricted categories)” (Perle 92). Ilgunas notes, “while CROW opened up just a small percentage of English and Welsh land, the LRSA opened up virtually all of Scotland” (Ilgunas 79). By opening up access to the entire country it had interesting impacts on cost of implementation when compared to the English CROW act. One key difference between CROW and LRSA was the cost of implementing each system. The English and Welsh spent a lot of money mapping the whole country, determining where all the mountains, moors, heaths, and downs were. Between mapping and implementation, this boundary-drawing cost England and Wales £69 million or about 102 million. . . The Scottish, on the other hand, didn't task themselves with elaborately mapping their country. Instead, they just opened up the whole country, which cost them very little. The annual cost for the Scottish government to administer the right to roam is about \$10 million, which is distributed to thirty-two local authorities that employ access officers, host several local access forums every year, and pay other recreation related costs (Ilgunas 79).

The LRSA has proven to be less bureaucratic and was implemented much quicker and cheaper than the CROW act passed in England and Wales. Sawers echoes this sentiment, “the greatest advantage of Scotland's right of access is that costly and time-consuming mapping is not required” (Sawers 686).

Overall when looking at the various systems of public access in Europe, many similarities can be found. Even if newly codified in statutes the freedom to roam has long historical roots in Europe. In addition, the use of land is given with the caveat that use will be respectful and not infringe upon landowners rights or damage the land. Ultimately, freedom to roam or freedom of

access grants freedom and liberty to everyone alike and ensures that wild spaces can be enjoyed by all. Sawers sums up the various systems by asserting, “the right to roam varies considerably across Europe, there are a few common features. Landowner's interest, including privacy, are balanced against the public's interest in outdoor exercise. The right to roam never extends to home and garden, nor to anything that would damage the land, including grazing or motor-sports (Sawers 688).” Clearly, these European examples still have private-property rights. Individuals and corporations who own land in Sweden, Finland, Norway, Denmark, Switzerland, Germany, Latvia, Estonia, England, Wales, Scotland, still have rights associated with their ownership. However, what is also clear is that the right to exclude individuals from that property is a right that has evolved and is no longer prevalent as before the passage of freedom to roam, or freedom to access legislation, in the various countries of Europe. In addition to Europe, other parts of the world also had a history of freedom to roam. In particular, the United States had elements of this within its historic tradition.

Is the Right to Roam Something the United States Had and Lost?

Again looking at the work by Ilgunas, he stresses, “the right to roam is an American tradition dating back to our origins” (Ilgunas 15). According to Brian Sawers, a visiting scholar at Emory University Law School who was interviewed for an opinion piece on April 23rd, 2016 for the *New York Times* by Ilgunas, “The right to roam 'was something we had and lost.’” Early in American history, “the right to roam – specifically the right to hunt on private, unenclosed land – was cherished by early Americans because it distinguished them from the English, whose aristocracy held exclusive hunting rights and owned a great majority of the country” (Ilgunas 2). Perle stresses, “At independence, the public [in the United States] had broad rights to use unimproved land, including the right to graze, fish, hunt, and forage. Until 1860's open access

was the norm” (Perle 93). Roaming rights began to erode in the late 19th century. Open range and open access was the norm especially in the western part of the United States. Overtime this open access was eroded and many private property signs popped up in their place.

Sawers notes in his interview with Ilgunas, “In the South, states passed trespassing laws for racial reasons, seeking to keep blacks from hunting and fishing so as to starve them into submission. Elsewhere, wealthy landowners of the Gilded Era became concerned with game populations, and trespassing and hunting laws were passed to restrict immigrants” (Ilgunas 2). In 1922, the Supreme Court ruled in *McKee v. Gratz* that in areas where there is a common understanding, the public may be permitted to hunt, fish and travel unenclosed land. However, this right is revoked the second the landowner posts a No Trespassing sign. Perle notes, “in effect, two systems operated in 19th century America – one on improved, enclosed farmland, and the other on unimproved land. In many states, the presumption is still that owners must act to prevent access; 29 states limit trespass to land 'posted as private, effectively qualifying the right to exclude” (Perle 93).

Sawers stresses that many early court cases in the United States dealt with freedom to roam principles and the right was seen as important to protect.

Until the late nineteenth century open access was the norm in the United States, enclosure was 'suitable to an old and highly cultivated country [i.e. England] . . . but it has no suitable and proper application in Ohio.' Referring to enclosure, an Illinois court opined that 'no principle of the common law [was] so inapplicable.' A South Carolina court noted: 'unenclosed land, for many purposes such as hunting and pasture, is regarded as common' A Georgia court wrote that if the English rule were law, 'a man could not walk across his neighbor's unenclosed land . . . without subjecting himself to damages for trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the law (Sawers, 674).

Clearly, early Americans looked at the freedom to roam and even hunt on unimproved land as a freedom and liberty that was important and undoubtedly their right. The country and frontier was wide open at this period of time and people were able to use and roam the land freely. Sawers notes the United States pre 1850s was very different than the America of today. He notes, “to understand the right to roam, it is essential to imagine a country in 1850 very different from our own today. Only a portion of the land area was under cultivation; planted fields and towns were few and far between. Fences and roads were rare. People were accustomed to crossing unenclosed land, while unfenced land was open to roaming livestock” (Sawers 676). Clearly, early America was vastly different from American today, “fencing may be the norm today (particularly in the East), America was largely open before 1870 and fenced land was exceptional” (Sawers 676).

Early Americans undoubtedly enjoyed the right to roam across unenclosed land. This right to roam was almost a necessity. Free-roaming hogs and cattle and open range were the norm. As the country was settled the right to roam and open range law were slowly closed down by statute. Sawyer stresses, “As a creation of statute, the open range was also dismantled by statute. . . [and] by mid-century, the closed range was spreading quickly” (Sawers 679). Early American's had the freedom to roam. Ilgunas sums it up best by stating, “in 1860s America, walking over people's land did not mean what it means to us today. Americans had been hunting and fishing and walking on each other's lands since before our country was founded. People thought of land that was unimproved (which means with no crops) and enclosed (which means no fences) with a flexibility and nonchalance that many of us today would find unimaginable” (Ilgunas 101).

Closure of the Right to Roam in the United States and Creation of the Right to Exclude:

Slowly statutes developed to close open range and the freedom to roam (Kenlan; Sawers). Sawers maintains pressure to clamp down on the freedom to roam came from three different sources farmers, railroads, and planters. Sawers stresses, “pressure for closing the range came from three sources: farmers who resented the expense of fencing, railroads who wanted to avoid liability for killing livestock, and planters who wanted a docile workforce after emancipation” (Sawers 681). Following emancipation of the slaves during the Civil War labor became a major concern for many southern states. Sawers notes, “if blacks could hunt, fish, forage, and let their hogs roam free, there would be little need to return to plantation labor. . . to keep black people off white land, states enacted trespass law with harsh penalties. Louisiana criminalized trespass in 1865. The following year, Georgia made it a crime to take anything of value. Also, the states closed the range to livestock owned by blacks. The states closed the range in some counties by fiat. Elsewhere, the legislature allowed local ballots, but limited voting to white landowners” (Sawers 684). Racism and desire for a docile workforce was a key component in closing open range and the freedom to roam in the South.

In 1869 the Golden Spike was driven home at Promontory Summit, Utah Territory linking the first transcontinental railroad in America. Before 1850 railroads were confined to mainly the Northern United States but following the Civil War railroads were being constructed everywhere. Sawers notes, “as late as 1848, Illinois courts understood the open range to mean that railroads were liable for all stock losses unless the track was fenced” (Sawers 682). To reduce liability railroad often sought to codify and force legal changes to reduce this liability. Sawers stresses, “Illinois is the best example of both the role of railroads in legal change and

how limits to the open range were often confined to railroad law (Sawers 686).” Undoubtedly, open range came under attack from large railroad companies as they wanted to decrease legal liability on newly made tracks being constructed all across the United States.

Lastly, Farmers were one of the main sources for the degradation of open range and freedom to roam practices. From an economic standpoint it was very expensive to fence and keep free roaming cattle out of fields and crops. Sawers maintains, “the changing economics of fencing played a major role in the impetus for and the time of enclosure” (Sawers 682). However, the advent of barbed wire made what was once an expensive proposition relatively cheap. Sawers maintains, “after the 1870s economical fencing made it cheaper to fence livestock in than out. As the economies of fencing changed, the balance of interests underlying the open range changed” (Sawers 682). No longer was open range and freedom to roam seen as liberties that ensured freedom and economic opportunities for many Americans. Rather newly acquired parcels of land using the Homestead Act become quickly surrounded by barbed wire. In Joanne S. Liu's *Barbed Wire: The Fence That Changed the West*, she stresses, “before the mid-1800s, much of the American West was a vast expanse of open plains. Native tribes followed buffalo herds unimpeded for hundreds of miles, cowboys ran cattle wherever water and grass led them, and the cattlemans Law of the Open Range ruled. All this changed when settlers pouring into the West under the Homestead Act of 1862 brought with them the Eastern farmers concept of fencing in farms. With the invention and mass production of barbed wire in the 1870s, it soon became possible” (Liu 2).

The United States and the notions of freedom to roam and open range for livestock were altered dramatically in 100 years. What were once liberties seen as necessary for protecting freedom and economic opportunities for average Americans were changing. Property rights and

the right to exclude became prevailing themes from the late 1800s through the 1900s and thru today. Where does the right to exclude come from and how was this codified into law in the United States?

Great Britain vs United States:

While both the United States and Great Britain have a long history of individuals enjoying and enacting freedom to roam principles there are differences that could make it more difficult to pass freedom to roam principles in the United States than Great Britain. Legislative adjustments to property rights are significantly limited by the United States Constitution, making an American ‘Right to Roam’ law extremely unlikely. Anderson stresses, “The most salient difference between the United States and British property law is the limitation on government intrusion contained in the takings clause of the Fifth Amendment to the United States Constitution. The language is strikingly simple: ‘nor shall private property be taken for public use, without just compensation’. While the United States Supreme Court has often had difficulty identifying when regulations of land constitute a compensable ‘taking’, there is little doubt that CROW, by imposing public access without compensation, would be struck down by American courts as unconstitutional” (Anderson 249). If freedom to roam principles were enacted on private land in the United States would this have to be viewed as a taking of rights and property from landowners?

Currently courts in the United States have maintained that the right to exclude is a key if not fundamental right of a property owner (Anderson; Kenlan). Anderson stresses, “The United States Supreme Court has furthered a formalistic, absolutist conception of property rights by adopting the bundle of sticks metaphor and placing the landowner’s “right to exclude” at the top of the woodpile. In a series of cases, the Supreme Court has canonized the right to exclude others as “essential” to the concept of private property. Completely absent from the Court’s analysis is

recognition that the landowner's right to exclude involves a balance with the public's interest in access. The public may desire access to these lands for the purpose of reaching some communal property, such as a beach or park, or it may value access for its own sake, to enjoy the aesthetic values the private land and its surroundings offers. While the public interest has figured into a few state court decisions on access, the Supreme Court has not so much as mentioned it in upholding a seemingly absolute right to exclude" (Anderson 377). The takings clause and previous court precedents present a significant limitation to the development of freedom to roam principles in the United States. Of course, if the United States Congress were willing to provide compensation, it could enact a right to roam. In the United States we are left wondering pondering if citizens place more value on the landowner's right to exclude than on the public's right to roam?

Not only are there major differences between legislative statutes and court interpretations of property rights between the United States and Great Britain but there are major cultural differences. Anderson stresses, "In the US, the moral high ground seems to rest more often with the landowner, whose labor has, under the philosophy of John Locke, made the land an extension of himself and thus given him a natural right to exclude. Indeed, Locke's writings heavily influenced the framers of the American Constitution and Bill of Rights, which contains the strong protection for property. This Lockean vision contributes to a discourse dominated by individualists rather than communitarian notions. In plain terms, in America the man with the fence wins" (Anderson 257).

Historically in Britain there has always been communal values of land use ingrained its citizenry. Anderson notes, "the British commitment to improving countryside access is grounded in values such as providing for transportation by foot, enhancing the enjoyment of

nature, promoting mental and physical health, facilitating a historical and cultural connection, and building a sense of community. Cultural differences may lead Americans to place less emphasis on those values. Significantly, there is no American equivalent to the UK's Natural England agency, which is specifically committed to the promotion and preservation of the countryside and rural life. Americans rely primarily on publicly owned lands, which comprise over a third of all property, to provide recreational opportunities, such as hiking and picnicking. In Britain, where 80 per cent of land is privately owned, few government properties contain the natural scenic values suitable for public enjoyment. Therefore, enjoyment of nature in Britain necessarily must include in some measure private land" (Anderson 255). Clearly, there are cultural, judicial, and legislative differences between the United Kingdom and the United States which can be used to explain how freedom to roam principles differ between the two countries.

However, despite the fact that constitutionally private property cannot be taken without compensation does not mean that freedom to roam principles and practices cannot come about in the United States. In examining the differences between the United Kingdom and the United States in regards to freedom to roam principles Anderson ultimately concludes,

the right to roam suggests that Americans should reconsider whether we have undervalued the public access side of this equation, and whether there are ways, consistent with our own culture and legal framework, to further the important public interests represented by CROW. The British experience reminds us of the importance of ensuring public access to natural areas, even those on private lands. Americans, however, are more likely to use a different set of tools to achieve that goal, such as providing economic incentives for access agreements or providing a registry of open areas. As the nation matures and becomes more crowded, Americans may begin to place more emphasis on the public's freedom to roam and less on protecting an absolute right to exclude (Anderson 259).

Ultimately, the case study of Idaho serves as a good testing ground to determine if citizenry in Idaho and possibly the United States support freedom to roam principles or if citizens remain

staunch private property defenders. Gaining understanding of where United States citizens stand with the freedom to roam idea is the first step in discerning if some manner of right to roam, or combination of right to roam and private property, can be utilized within undeveloped land access situations. The closure of land within Idaho, by D.F. Development LLC, that formerly granted access to citizens is a timely case study to shed light on citizens and the two ways of defining property rights within Idaho.

Chapter 3: Environmental Thought -- Why Freedom to Roam is Important

As discussed above, the idea of freedom to roam is not a new concept and has had proponents and opponents. As is true with all political issues, how a topic is explained and thus understood determines to some degree reactions to the issue. Aside from the history of the concept, much of what builds an individual's understanding of freedom to roam within the United States comes from classic scholars of Environmental Thought. An overview of three classic thinkers on the issue of access to undeveloped lands gives a needed background to how people perceive the benefits and drawbacks of freedom to roam. This chapter provides an overview of John Muir, Aldo Leopold and Edward Abbey's environmental thoughts public access.

To be human is to connect to the Earth in some way. We depend on the Earth for our survival. The following individuals advocate for the key role of experiences in the natural world to being fully human.

John Muir

John Muir was an author, environmental activist, and founder and first President of the Sierra Club. He was known for his nature writing and as an advocate for preserving wilderness in the United States. Many scholars consider Muir the father of American Environmentalism. The Sierra Club stresses that Muir was, "America's most famous and influential naturalist and conservationist" (Wood, H 1). Muir's writings were instrumental in the creation of National Parks, Forests, and Monuments across the United States. Through his writing and teachings Muir inspired the next generation of environmental activists and aided individuals like Theodore Roosevelt in conserving vast amounts of the American west. Muir recognized the transformative power nature possesses, that nature was in all humans, and that to truly be whole individuals

needed to access nature. In a letter from July 1877 in Salt Lake Muir notes, “In every walk with nature one receives far more than he seeks” (Muir, John).

Ultimately, Muir forced humanity to question our anthropocentric notions. Is humanity the most important entity in the universe - that everything was made for our use and pleasure. Or are we just part of an interconnected system and no more or less important than any organism or living creature giving function to the system?

The world, we are told, was made especially for man - a presumption not supported by all the facts. A numerous class of men are painfully astonished whenever they find anything, living or dead, in all God's universe, which they cannot eat or render in some way what they call useful to themselves. . . From the dust of the earth, from the common elementary fund, the Creator has made Homo sapiens. From the same material he has made every other creature, however noxious and insignificant to us. They are earth-born companions and our fellow mortals.... This star, our own good earth, made many a successful journey around the heavens ere man was made, and whole kingdoms of creatures enjoyed existence and returned to dust ere man appeared to claim them. After human beings have also played their part in Creation's plan, they too may disappear without any general burning or extraordinary commotion whatever (Muir, *A Thousand-Mile Walk to the Gulf* 136,139).

John Muir is an excellent example of an environmentalist who used inspiration as a form of activism. He literally used the power of the pen to persuade others and mobilize a movement to preserve what he loved – the wilderness. His writings made sure vast tracts of undeveloped land were put into protection for future generations and suggest that he stood behind freedom to roam principles on undeveloped land. In his book *Our National Parks*, he stresses, “Climb the mountains and get their good tidings. Nature’s peace will flow into you as sunshine flows into trees. The winds will blow their own freshness into you, and the storms their energy, while cares will drop off like autumn leaves” (Muir, 56).

Muir truly believed man needed to immerse himself in nature to survive and thought all of nature and its organisms were connected. As such, Muir’s ideas seem closely related to

freedom to roam principles; he was an advocate of allowing individuals to wander on underdeveloped land. A clear indication of his view on roaming or “sauntering” was given by by Albert W. Palmer in, *The Mountain Trail and its Message*.

On a Sierra Club Outing, author Albert Palmer tells of a conversation he had with John Muir on the trail. He asked Muir, "someone told me you did not approve of the word hike? Is that so? [His blue eyes flashed, and with his Scotch accent he replied]:

"I don't like either the word or the thing. People ought to saunter in the mountains - not hike! Do you know the origin of that word 'saunter?' It's a beautiful word. Away back in the Middle Ages people used to go on pilgrimages to the Holy Land, and when people in the villages through which they passed asked where they were going, they would reply, 'A la sainte terre,' 'To the Holy Land.' And so they became known as sainte-terre-ers or saunterers. Now these mountains are our Holy Land, and we ought to saunter through them reverently, not 'hike' through them" (Palmer, 27, 28).

Whether you call it a hike, sauntering, roaming, walking, access or any other term to describe the action, what remains is the idea that humans are free when they can interact and commune with nature and her wild places. The tenets and philosophies of John Muir closely align with freedom to roam and its foundational principles.

Edward Abbey

Similar to Muir, Edward Abbey was an author, environmental activist, and supporter of hiking in undeveloped lands. Abbey was one of the fiercest defenders of the western United States until his death in 1989. Through his novels, essays, letters and speeches, Edward Abbey consistently voiced the belief that the West was in danger of being developed to death, and that the only solution lay in the preservation of wilderness. One of his greatest works, *Desert Solitaire*, remains a keystone of environmental literature and defense of wildness in nature. Abby maintains, “wilderness is not a luxury but a necessity of the human spirit, and as vital to our lives as water and good bread. A civilization which destroys what little remains of the wild, the spare, the original, is cutting itself off from its origins and betraying the principle of

civilization itself” (Abbey, 169). This perspective of land, the idea for a need to have open spaces within which to spend time, suggests ideas of support for freedom to roam principles. Rather than closing privately owned lands, allowing there to be undeveloped areas was vital to Abbey.

In a speech to environmentalists in Missoula, Montana and in Colorado, which was published in *High Country News*, (24 September 1976), under the title "Joy, Shipmates, Joy!" Abbey explains his love of accessing nature,

One final paragraph of advice: [...] It is not enough to fight for the land; it is even more important to enjoy it. While you can. While it's still here. So get out there and hunt and fish and mess around with your friends, ramble out yonder and explore the forests, climb the mountains, bag the peaks, run the rivers, breathe deep of that yet sweet and lucid air, sit quietly for a while and contemplate the precious stillness, the lovely, mysterious, and awesome space. Enjoy yourselves, keep your brain in your head and your head firmly attached to the body, the body active and alive, and I promise you this much; I promise you this one sweet victory over our enemies, over those desk-bound men and women with their hearts in a safe deposit box, and their eyes hypnotized by desk calculators. I promise you this; You will outlive the bastards (Abbey, Edward *High Country News* 4).

While Abbey did not speak directly to the principle of freedom to roam it is easy to see that he would support the concept. Abbey was one of the biggest proponents of going to nature to find yourself. Nature and accessing nature is needed to allow the human spirit to live.

Aldo Leopold

A final classic environmental thinker, Aldo Leopold is considered by many to be the father of wildlife ecology and the United States’ wilderness system. Leopold was a conservationist, forester, philosopher, educator, writer, and outdoor enthusiast. Among his best known ideas is the land ethic, which calls for an ethical, caring relationship between people and nature. In his seminal work Leopold stresses, “we abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may

begin to use it with love and respect” (Leopold, Foreword, *A Sand County Almanac VIII*). He further explains his idea of land ethic by stating, “all ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively the land” (Leopold, 204). Ultimately, Leopold maintains we can be ethical only in relation to something we can see, feel, understand, love, or in which we have some other form of faith.

That said, Leopold was not opposed to private ownership of property. Thus he can be seen as a supporter of the middle ground: recognizing the value in both private property rights, but also recognizing the dilemma that arises when applying conservation principles to land and land use and thus supporting elements of the freedom to roam. Ultimately, Leopold describes conservation as managing land in the public interest. Leopold stresses that economics did not have a satisfactory way of handling concepts like wilderness or beauty or land health. In *Thoughts on Recreational Planning* he clarifies these sentiments by stating,

The crux of the problem is that every landowner is the custodian of two interests, not always identical, the public and his own. What we need is a positive inducement or reward for the landowner who respects both interests in his actual land practice. All conservation problems—erosion, forestry, game, wild flowers, landscapes—ultimately boil down to this (Leopold, 136).

When taking a position at University of Wisconsin, as Professor of Game Management, Leopold asserted one of his stated goals was, “the development of some vehicle whereby the community can prevent the abuse of private land, and encourage uses which are in the public interest” (Leopold, Aldo *Biographical Materials*, 185). Ultimately, in his writings Leopold maintained and highlighted an enormous quandary in land use, ownership and conservation--seemingly a combination of private land and freedom to roam principles. Leopold understood the balance

and conflict that often exists between public interest and interests of the private landowner. To truly achieve conservation of land he noted you needed to combine public and private interests.

In Conservation Economics he maintains,

The thing to be prevented is destructive private land-use of any and all kinds. The thing to be encouraged is the use of private land in such a way as to combine the public and the private interest to the greatest possible degree. If we are going to spend large sums of public money anyhow, why not use it to subsidize desirable combinations in land use, instead of to cure, by purchase, prohibition, or repair, the headache arising from bad ones? (Leopold, 200)

Finding a balance between private ownership and freedom to roam principles seems to do exactly this maintaining some private property but also allowing individuals to roam on land, experience the adventure and energy of our natural surroundings while maintaining the utmost respect for the land by leaving no trace of our journey on to it.

The crux of Leopold's Land Ethic is that we need to apply ethical regard to the land. We need to recognize that instrumental value, particularly value to us humans, is not the sole important factor for our decisions about and attitudes towards nature. We need to take into account the intrinsic value of nature and its members. We need to practice humility, and understand that we are just a part of an interconnected community of natural beings. In addition, humans and our needs are not more important than the needs of other individuals or the community in general. We need to respect our place in the natural world and take responsibility for our actions, because they impact more than just our immediate (human) neighbors.

Although Leopold did not specifically mention freedom to roam principles they are found within his writings. Leopold sums up his conservation principles best in *A Sand County Almanac* by stating, "we shall never achieve harmony with the land, anymore than we shall achieve justice or liberty for all people. In these higher aspirations, the important thing is not to achieve, but to

strive...” (Leopold, 210). Allowing individuals access to large tracts of undeveloped land, to use in a respectful way would be something to strive for as a society and would produce positive effects in land conservation. How can you care for something if you are not allowed to experience it? Leopold concludes in *Conservation Economics*, “Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest.”(Leopold, 202).

Leopold’s ideas of combining the private with the public is pertinent today. Researchers are using his ideas to study and discuss current land-use issues. Vaske and colleagues note, “Aldo Leopold believed that the primary path to conservation on private land was to foster a moral obligation in farmers to take care of their land” (Vaske, Miller, Toombs, Schweizer, & Powlen, 1). Is allowing public individuals access to undeveloped land a small part of the moral obligation? Do farmers and private landowners support these ideas of land ethics and moral responsibility towards land?

A study conducted in 2018 titled, *Farmers’ Value Orientations, Property Rights and Responsibilities, and Willingness to Adopt Leopold’s Land Ethic* examined these issues. Specifically, the study examined, “the relationships among farmers’: (1) general value orientations of mutualism and domination, (2) specific beliefs about property rights and responsibilities, and (3) reported willingness to adopt Leopold’s land ethic” (Vaske, Miller, Toombs, Schweizer, & Powlen, 2). A random sample of 3,000 Illinois farmers were sent a questionnaire in the mail of which 910 usable surveys were returned. Vaske and colleagues concluded, “farmers agreed with both rights and responsibilities suggesting that they understood the balance between the rights of individuals and the rights of society to benefit from responsible ownership. Respondents more strongly agreed with responsibilities than rights items, which is

consistent with the mutualism” (Vaske, Miller, Toombs, Schweizer, & Powlen, 9). Ultimately, they sum up their conclusions by stating,

Leopold made a connection between mutualism, moral obligation (responsibility), and the land ethic. He believed that farmers were more likely to use their land responsibly if they felt that they were a part of the land community and had an emotional appreciation for it (mutualism). Our results demonstrated this connection empirically by showing the close relationship between social psychological constructs of mutualism and responsibility, and willingness to adopt the land ethic. The model shows that mutualism, property rights, and responsibility influenced the land ethic. Thus, in the case of Illinois residents, our research supports Leopold’s views. Respondents with a mutualistic orientation were more likely to believe they should use land in a responsible manner (Vaske, Miller, Toombs, Schweizer, & Powlen, 10).

Muir, Abbey, and Leopold, as well as many other writers and scholars instrumental in developing American environmental and conservation movements echo many of the same sentiments. Mainly that all life is interconnected and operating in systems together. Man is a small part of this system. Man is most free and liberated when operating and interacting with nature. We need wild places and access to wild places to ensure our spirits are healthy and pure. Although freedom to roam principles are not specifically mentioned by any of these authors if you read their prose you can see that wildness and the ability to interact with nature are key components of all of their philosophies. Thus, freedom to roam and allowing individuals to walk, saunter, or meander on undeveloped tracts of land is a commonality in all of their works. Limiting man's ability to explore undeveloped land serves to limit individual freedom in a communal sense.

The writings of Muir, Leopold and Abbey show some of the thought behind public access to lands, the freedom to roam. This literature is often cited and plays a role in how individuals understand and perceive public access. Of course, in contrast to this literature, there is a discussion of the importance of private property. The following

chapter examines these two ways of viewing undeveloped lands with a discussion of the benefits and drawbacks, or pros and cons, of freedom to roam.

Chapter 4: Freedom to Roam and Property Rights

The right to roam and right to public access has historic roots in the United States, as in many countries of Europe, and is addressed in a variety of environmental thought writings. However, overtime the right to roam the land freely in the United States was replaced by fences, trespassing signs, and the right to exclude. Understanding how the United States shifted attention to property rights and the right to exclude, begs the question if this is now firm and unchanging or rights can continue to change and evolve overtime? Again, answering the question if there is (or can be) support for some manner of a freedom to roam policy within Idaho, necessitates understanding how people in the United States view freedom to roam, the benefits and drawbacks.

Property Rights: The Right to Exclude - Historically and in the United States

The right to exclude has long been recognized as an important element in the protection of property rights. Klick and Parchomovsky note, “the right to exclude may be tracked back to Roman law” (Klick and Parchomovsky 917). Property was even debated among the great thinkers of antiquity. Aristotle in his seminal work *Politics* stated, “Property should be ... as a general rule, private; for when everyone has a distinct interest, men will not complain of one another and they will make progress, because everyone will be attending to his own business” ...(*Aristotle. (1905). Aristotle's Politics. Oxford: Clarendon Press*).

John Locke is among the most influential political philosophers of the modern period writing in the mid-1600s. In the *Two Treatises of Government*, he defended the claim that men are by nature free and equal against claims that God had made all people naturally subject to a monarch. He argued that people have natural rights and that these natural rights have a foundation independent of the laws of any particular society. His theory describes natural laws

which permit individuals to exercise and control over things in the world like property and other material resources. In other words, Locke's theory justifies the legitimacy of private property rights. Locke originally posted in *Two Treatises on Government* the idea that a person's right to live a healthy life, free to amass and maintain property -- "life, health, liberty and property" -- is one granted by God (Locke, John 102). Jefferson used this line in the Declaration of Independence but with a small change from property to pursuit of happiness. Clearly, the United States used Lockean philosophy in its foundational documents and still heavily identifies with it and property rights today. Private property rights have been a central theme in the development of the United States. The right to exclude when focusing on private property was first discussed by William Blackstone in 1765.

Within the United States (or what would become the United States), the discussion of the right to exclude started early. The *William Blackstone Commentaries*, published in 1765, and which played an essential role in the United States adopting British Common Law, defined property as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (William Blackstone Commentaries). This set the stage for decisions that has since been viewed as support for the right to exclude.

In United States jurisprudence, the right to exclude was ruled on by the Supreme Court in several cases. In 1922, in *McKee v. Gratz*, the United States Supreme Court ruled that in areas where there is a "common understanding," the public is permitted to hunt, fish and travel over private land. However, this right is removed the instant the landowner post 'No Trespassing' or constructs a fence (*McKee v. Gratz*, 260 U.S. 127). In the late 1970s the right to exclude was further expanded in *Kaiser Aetna v. United States*. Here the Supreme Court characterized the

right to exclude as one of the most essential elements of property rights and a universally held, fundamental element of the property rights (Kaiser Aetna, 444 US). Sawers stresses, “The *Kaiser Aetna* opinion has spawned a whole jurisprudence of exclusion. Scholars have accepted the notion that exclusion is inherent in a regime of private property; the only remaining question appears to be whether the right to exclude is *the* seminal property right” (Sawers 666). In other words, the United States Supreme Court has held that a landowner must be given the right to exclude. What is less clear is if this is true on unimproved land – or land that has not been developed in any way. Sawers maintains,

The Supreme Court, however, has not addressed whether this right [right to exclude] must extend to unimproved land. In many states, the law presumes that unimproved land is open to the public until affirmatively closed by landowners. The question becomes, should states be free to revive the freedom to roam across unimproved land on foot, regardless of ownership? The 5th Amendment of the United States Constitution deals specifically with property rights, most notably the final clause, The Takings Clause. The Amendment reads, "private property [shall not] be taken for public use, without just compensation (U.S. Const. Amend V).

Several Supreme Court cases have dealt explicitly with the Takings Clause. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court said that in American legal culture, landowners must be compensated for harmless intrusions, or even helpful improvements, when a landowner is kept from using even a small part of what they own. The case, “dealt with a cable company that, in the end, had to abide by the Taking Clause and compensate landowners for installing wires and cable boxes on people's properties” (Ilgunas 123). With such a strict interpretation of the Taking Clause freedom to roam principles and expansion of land access can become problematic. Ilgunas echoes this sentiment by stating, “consider recent rail-to-trails initiatives, in which abandoned railroad tracks are converted to trails for public use. Even though a walker is less of a nuisance than a train, and even though the path has historically been a public

passageway, the courts recognize that under legal precedent and the Fifth Amendment, landowners may have the right to exclude and to be compensated” (Ilgunas 123). Undoubtedly, legal precedent and strict interpretation of the Taking Clause make it difficult to expand freedom to roam and open access land principles. There are scholars who are taking up this mantle.

Progressive Property Rights -- Can Property Rights Evolve to Something More than Just the Right to Exclude?

The idea of Progressive Property rights have countered the view that property rights are fixed and centered on the right to exclude. The progressive property movement endorsed a pluralistic vision of property, where a wide range of values. These values include individual interests and needs, social interests (civic responsibility), and general interests (physical protection, acquisition of knowledge and freedom) (Klick and Parchomovsky 934). Ultimately, the pluralistic vision of progressive property scholars rejects the right to exclude as the essence or core of property. The argument over whether landowners have the right to exclude others and that exclusion is a core property right or if exclusion is just one of a bundle of rights included with ownership has yet to be taken up and resolved in the United States Supreme Court. Klick and Parchomosvsky sum up the debate between the two sides by stating,

If courts accept the proposition that the right to exclude is the sine qua non of private property and grant it special protection, it would significantly undermine the ability of the state to advance the other goals of the progressive property movement. Any incursion on the right to exclude might require the government to pay just compensation to the affected property owners. Conversely, if courts accept the view that the right to exclude is merely another stick in the property bundle that may be removed without any special consequences, it would give the state the liberty to adopt policies that curb owners' right to exclude with impunity (Klick and Parchomosvsky 935).

The debate continues about whether property rights are exclusive and unchanging or whether states can follow the logic of progressive property scholars and expand property rights

and the freedom to roam. The Supreme Court has been hesitant to take a case or offer a verdict to clear up the position of the Court. While the United States Supreme Court has been hesitant to adjudicate cases involving opening private land to the public District Appellate Courts have sided with expanding access to the public. Cases in Hawaii, Oregon and New Jersey have resolved issues of beach access on undeveloped land by expanding public access at the expense of the landowners right to exclude (Sawers 670).

Formal Exclusion vs Social Obligation Theories

Perle refers to the two approaches as formal exclusion vs progressive property or social obligation theories. Social obligation theory conceives of property as, “inherently social: an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. Property rights are viewed as a bundle of rights and such lack a fixed core” (Perle 82). While, exclusion theories stress property is a natural right and the right to exclude is paramount to protection of liberty. The table below highlights the main differences in the two approaches.

Formal exclusion theories	Social obligation theories
Historical advocates: Locke, Blackstone	Historical advocates: Mill
Property is a natural right	Property is socially constructed
Right to exclude is paramount	Right to exclude is one of a bundle of rights
Emphasis on landowners’ privacy and freedom	Emphasis on shared social interests
Spatial configuration of property rights	Functional configuration of property rights
Presumption in favour of the right to exclude	Presumption in favour of responsible access
Simplicity, predictability	Complexity, contingency
State should protect owners’ rights	State should balance competing interests

Table 1. *Two Approaches: Formal Exclusion vs Social Obligation Theories* (Perle 83).

Where Does Liberty Live Between Formal Exclusion and Social Obligation Theories?

In the debate over the right to exclude and the freedom to roam where does liberty live? Perle reminds us that liberty can be found on both sides of the debate. She maintains, “by definition private-property represents a massive restriction on everybody's freedom, and that in fact liberty lives on both sides' of the debate (Perle 101).” Landowners are given lots of liberty in determining who can access their land, but liberty can also be lost if the public is closed out of an area they previously had access to. Perle notes in order to resolve or lessen the conflict of the debate it is necessary to realize that viewing public versus private property as mutually exclusive is not the only option available (Perle 101).

Considering the possibility of combining elements from private property and the right to roam could help move this discussion forward. Could some combination of the two, maintain individual need or desire for privacy but also support the social and general interests? Freedom to roam policies serve to benefit individuals and society in many ways. To start, the ability to roam freely ensures everyone can access land for recreation which gives individuals a sense of adventure. The act of roaming is guaranteeing freedom and adventure to everyone in the United States. Ilgunas stresses, “deep in the American subconscious, [there is] a love for roaming. To be able to roam is the mark of a free and adventurous life. To roam is not merely to walk. To roam is to explore. To roam is to blaze our own trail and find our own way. Roaming is an act of nonconformity, of independence, of self-reliance” (Ilgunas 15). Roaming and the right to roam ensure that the social and general interests of liberty and freedom can be put into action.

In addition to maintaining freedom and adventure, the right to roam also serves to ensure many places do not become a playground for the rich. Roaming rights ensure everyone can access land despite financial situations. This is increasingly important as land ownership in the United States is increasingly distributed unequally. In 1978 the wealthiest Americans (top 1

percent) owned 48 percent of the private land by acreage; the top 5 percent owned 75 percent (Geisler 242). Today it is even more extreme, with wealthy individuals and corporations buying up vast tracts of land in the United States. According to *The Land Report* (100), the top 100 landowners in America own a staggering 38 million acres, which is 1.5 percent of all American land, or 2.3 percent of all American private land. The Wilks brothers, who are buying once publicly accessible land in Idaho, are number 12 on *The Land Report* owning over 700,000 acres (Land Report 100).

Allowing access, via some form of freedom to roam principles, to private lands in the United States could provide multitudes of recreation opportunities. Ilgunas stresses, “if we opened up the portion of our country that is privately owned we would have an additional billion and a half acres for countryside recreation: 614 million acres of grassland pasture, 408 million acres of cropland, approximately 444 million acres of privately owned forests, and thousands of miles of river, lake, and ocean shorelines (Ilgunas 14).” Clearly, millions of acres of land to roam would support social and general interests, in addition to individual interests, giving freedom and liberty to Americans but also ensuring equity and justice to prevail. Ilgunas notes, “the right to roam is, at best a small consolation prize for a society afflicted with gross inequality” (Ilgunas 164). Recognizing the value of not only individual interests but also the social and general interests for our communities creates a country that is trusting and neighborly. Ilgunas concludes freedom to roam, “transcends modern political attitudes of conservative and liberal, Republican and Democrat, because the freedom to walk in the woods is something far more timeless, far more ancient, far more fundamental to leading a good life as a human being” (Ilgunas 164).

Critiques of and Possible Solutions for Freedom to Roam

As with everything in this world, freedom to roam has its critics. Arguments against freedom to roam center around irresponsible use, over use, and decreasing land values. Freedom to roam calls for everyone using the land to be educated in responsible use and a land use ethics like Leave No Trace. Yet, how to prevent litterbugs and people intentionally harming land is a big question. Even on public land in the United States there are many dump sites, shooting ranges, mudding holes, etc. from individuals who do not recreate responsibly. To combat litter and irresponsible use many countries have education campaigns and groups that strive to foster responsible land use. Sweden has Håll Sverige Rent [Keep Sweden Clean], in the United States there is Keep America Beautiful actively working on keeping recreation places clean and trash free. Education campaigns are successful and help fight the ongoing battle of irresponsible land use. England, Scotland and Wales, “have included right for landowners to temporarily close off their property, ranging from a few days to several weeks” (Ilgunas 175). The same could be done in the United States if the freedom to roam was expanded and landowners could demonstrate irresponsible use of their property had taken place.

Johnathan Klick and Gideon Parchomovsky empirically linked expansion of freedom to roam in England and Wales to reduction in property values. They used the passage of the Countryside and Rights of Way Act of England and Wales in 2000 as a natural experiment to provide empirical insight into how it affected property values in the country. Klick and Parchomovsky “show that the Act’s passage led to statistically significant and substantively large declines in property values in areas of England and Wales that were more intensively affected by the Act relative to areas where less land was designated for increased access” (Klick and Parchomovsky 917). Even if there was an immediate reduction in property values for property that allowed the freedom to roam, it remains to be seen if this reduction will last over time.

Secondly, if policy makers opened all land like Scotland rather than specific areas in England and Wales, this reduction in prices might not be seen.

Undoubtedly, freedom to roam is a complex topic. Land access and land access issue will remain prevalent and important topics for decades to come. The western United States is growing and as places like Idaho become more inhabited these issues will remain. The case study of D.F. Development shows how timely this issue is today. The following chapter examines that case study in an attempt to put into perspective the issues within the state of Idaho, setting the stage for better understanding the views from Idaho's land access stakeholders and furthering the discussion on if there is support for some middle point between private property and a freedom to roam policy within the state of Idaho.

Chapter 5: Idaho and the D.F. Development Case Study

Why research freedom to roam in Idaho?

Although the concept and practice of freedom to roam has been in the United States since its founding, limited research has been done on freedom to roam in the United States. When researching freedom to roam in the United States, Idaho is the front line of the battle between public access to land and private property rights being strictly enforced. Over 60% percent of Idaho is public land and belongs to all United States citizens by birthright (Public Lands and Wilderness 1). Forest lands are designated when at least 10% of the land is covered by trees. Of the 21.5 million acres of total forest lands in Idaho, most of it -- about 86% -- is owned and managed by government entities. The rest -- about 14% -- is owned by private entities (Idaho Forests Products Commission 1). Timberland is important to focus in Idaho because most of the land in Idaho falls into this category. In addition large tracts of land being opened for access or in the D.F. Development case closed, happen on timberlands in Idaho.

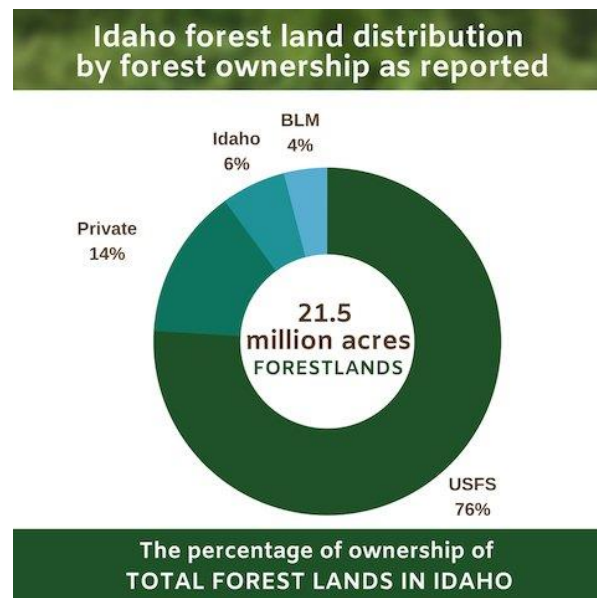


Figure 1. (Idaho Forests Products Commission 1).

Idaho has 3 million acres of privately owned forest; 1.7 million acres of which is owned by what is classified as family forests (Idaho defines family forests as privately-owned forested lands

between 5 and 5,000 acres). This means that 1.3 million acres of Idaho is owned by corporations or paper companies or 46% of privately-owned timberland in Idaho are owned by corporations or paper companies (Idaho Family Forest Owners, McClure Center for Public Policy Research).

See Appendix B for a map of land distribution in Idaho.

Freedom to roam in Idaho

Idahoans love open space and many people reside in the state because of the access to open space. Historically this open space included both public lands and undeveloped forest lands. Today Idaho still holds vast swaths of public lands, but the access to forest lands is shifting.

Historically in Idaho paper companies owned and managed large tracts of forest for paper and wood production. These paper companies often granted access to the public, provided the public purchases a use permit to recreate on the private land. The public was expected to use the land respectfully and recognize that not all activities were permitted. Today this tradition continues with some companies. Inland Empire Paper (IEP) Company owns and operates 117,000 acres in Northern Idaho and Western Washington and PotlatchDeltic owns and operates 629,000 acres in Idaho. Both of these companies have hired a private company, Quality Services Inc. (QSI) to manage and operate recreational use on their land. Additionally, other companies are working with Idaho Fish and Game to help manage public access on their lands via the “Large Tracts” land lease program and the Access Yes! Program.

QSI Management

QSI stresses, “Today’s forest land managers are faced with increasing public use of their properties which is resulting in additional costs associated with road maintenance, trash removal and repairing environmental damages. In today’s streamlined world of operations, land managers often lack the staff or expertise to deal with public use issues such as criminal

activities, trespass, or unsafe recreation practices that can no longer be ignored” (Quality Services 1). To manage these issues, QSI runs a permit system for accessing land. For IEP land QSI provides 4 types of permits: Individual annual (\$50), Family annual (\$80), Daily motorized (\$15/vehicle), and Non-motorized daily (\$2.50/person). Certain activities, such as camping, fireworks, target shooting, and snowmobiling are restricted, but many activities are allowed as long as they are not for commercial use. Activities like berry/mushroom picking, christmas tree cutting, firewood gathering, hiking, horseback riding, hunting/fishing, motorcycle/ATV riding, mountain biking, sightseeing, snowshoe/cross country skiing are allowed with the proper permit. QSI points out that they “share a common interest in ensuring the public has an opportunity to achieve a quality recreation experience in their forests while protecting the varied resources that are dependent upon a healthy forest environment, such as; watersheds producing clean water for municipal consumption, habitat to sustain and support the many species of fish, birds and animals that reside there, and by protecting native species from non-native noxious weeds” (Quality Services 1). Overall, QSI management allows, Idaho paper companies to continue their tradition of allowing public access to their millions of acres of timberland. The permit system both grants people access at an affordable rate and also generates revenue for maintenance and upkeep of the land.

Idaho Fish and Game “Large Tracts” Land Lease Program

A second way paper companies in Idaho are choosing to manage public use on their private lands is through a partnership with Idaho Fish and Game. Idaho Fish and Game, with help from PotlatchDeltic, is actively working with large landowners to open large tracts of land, known as their “Large Tracts” land lease program. The program targets parcels that are larger than 50,000 acres for public access. Currently more than 567,000 acres of private land in

Benewah, Clearwater, Idaho, Latah and Shoshone counties now allow access to hunting, fishing and trapping through this program (Wright, S 1). In October of 2019 Fish and Game reached an agreement between PotlatchDeltic allowing the public access on their timberlands. A second agreement opened an additional 336,000 acres of private timberland in the Gem State. Overall, the agreements were between 12 companies and Idaho Fish and Game and opened nearly a million acres of land for recreation use in Idaho. Previously each company would require a permit and a fee. A permit will still be required to access the land, and each landowner can decide what activities will be permitted on their private property, but fees to individuals users are being removed. Most of the access is limited to non-motorized use (Bartholdt, Ralph 1).

Idaho Fish and Game pays \$1 per acre annually for the provision of access to hunting, fishing, trapping, wildlife viewing, hiking and recreational travel limited to motor vehicle travel on roads open to full-sized vehicles. Restrictions on camping and ATV use may apply depending on the landowner's rules. Idaho Fish & Game's Private Lands/ Farm Bill Program Coordinator, Sal Palazzolo, maintains, "These agreements demonstrate Fish and Game's continued commitment to putting money from the access/depredation fee to good use and provide hunters, anglers and trappers with access to private lands while compensating landowners for their support of those activities" (Roger Phillips 1).

Access, Yes! Program

A second Idaho Fish and Game program to allow public access to private land within Idaho is Access, Yes! This program started in 2003 in an effort to bring sportsman, recreation users, and landowners into a collaborative process, with the goal of expanding land access in the state of Idaho. According to Fish and Game stated that it was created as a means to develop

cooperation between landowners and recreationalists in a manner that benefits both sportsmen and landowners. Idaho Fish and Game outlines Access, Yes Program by stating,

Access Yes! is a voluntary landowner incentive program where landowners receive compensation for providing sportsmen access to or through their land. Landowners specify conditions of access that best meet their needs. In addition, the program: 1) provides access to wildlife that may cause depredation problems, 2) improves relationship between landowners and sportsmen, and 3) improves hunter ethics. Landowners participating in the Access Yes! Program are covered by the state recreational liability statute (36-1604), which provides a liability shield to landowners who allow recreation on their property. The liability shield applies to landowners that provide recreational opportunities without charge or have entered into a cooperative lease agreement with the state (Access, Yes! 1).

Landowners must apply for the program through a bid. Landowners are paid through dues collected from hunting fees. Ultimately, the program seeks to open access to recreation and hunting on private land. The program works as follows. The landowner submits an application or bid to Fish and Game stating which parcels, how long access will be granted, and the activities allowed on the land. Idaho Fish and Game reviews the bid with input from a board of regional sportsmen. Criteria for selection include opportunity offered, cost per acre, habitat/wildlife availability, size of area, and other considerations such as vehicle access restrictions. The program is funded from hunter and angler license fees. Ultimately, the use of the private land can have restriction but the program is designed to provide prime locations of private property with access for all kinds of outdoor activities (Access, Yes! 1). Access Yes! Program was implemented because of the alarming trend of limiting access on private land. An Idaho Fish and Game article from April 2003 stresses, “from Mackay to Malad hunters complained to Fish and Game about the alarming trend of posting private land to "No Trespassing"(Access, Yes! 1). Access Yes! Attempts to keep private land open to increase hunting, fishing and recreational opportunities around the state of Idaho. The program has been successful in opening tracts of

private land, having provided access to 371,707 acres of private land for recreationalists (Access Yes! 1).

Inaccessible Lands

As is seen with these efforts, there is still access to some private land within Idaho. However, much of the push to open access centers around the concern that there is public land that cannot be accessed due to the fact it is surrounded by closed private lands. The Theodore Roosevelt Conservation Partnership published a report, *Inaccessible State Lands in the West*, that notes within the Western United States there are 15.87 million acres of state and federal lands entirely landlocked by private property (Theodore Roosevelt Conservation Partnership 1). As can be seen in the image below, within Idaho along, there are 208K acres of inaccessible public land.

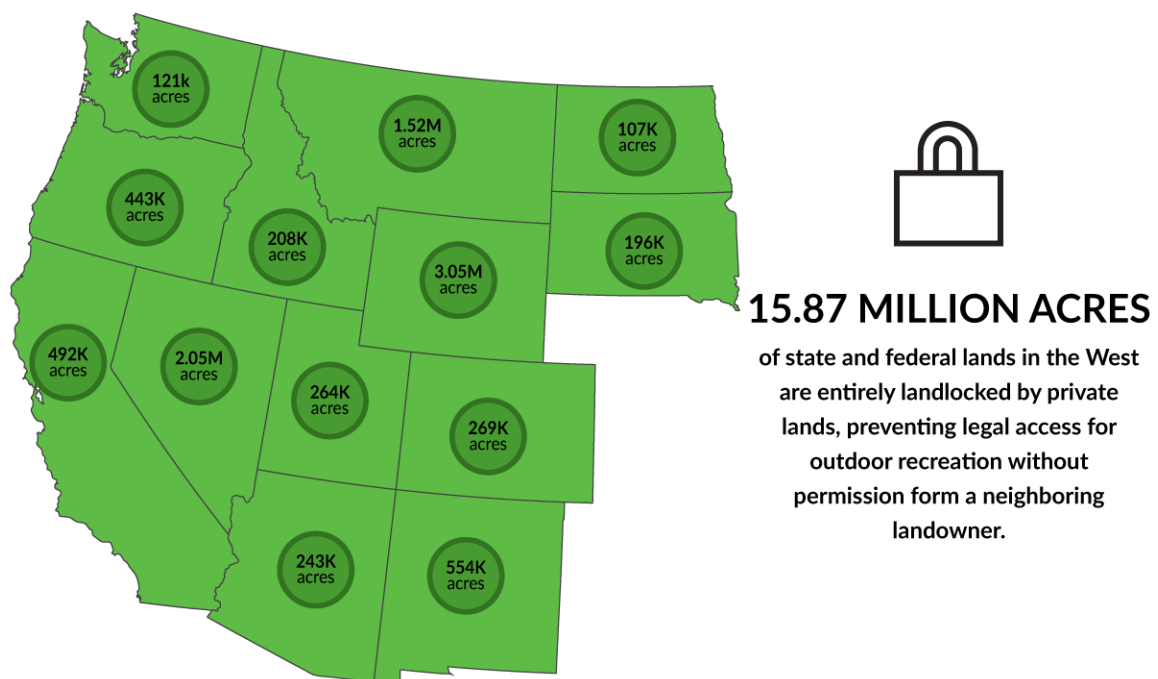


Figure 2. *Inaccessible State Lands in the West, The Extent of the Landlocked Problem and the Tools to Fix It.* (Theodore Roosevelt Conservation Partnership 1).

Finding a way to allow individuals access to these public lands, lands that they own, is an additional concern. Again, it is possible that some manner of a combination of private property and freedom to roam principles could help negotiate this issue.

Clearly, work done by QSI, and the Access Yes! and Large Tracts programs have opened a large amount of land to hunt, fish and recreate on within Idaho. These efforts demonstrate that combining freedom to roam principles with private property can benefit the landowners, Idaho's communities and the public at large. However, even though programs like Access, Yes! are opening up lands to recreate for outdoor enthusiasts, it is not a permanent solution. Lands in Access Yes! Program are not permanently accessible due to the need for regular renewals with the agreements. Thus, despite the many recent successes in opening land to public access in Idaho, there are also examples of large tracts that are being closed to public access due to changing ownership.

D.F. Development and Wilks Brothers Case Study - Closing of Land Previously Managed for Open Use:

Boise Cascade Corporation was formed in 1957 through the merger of Cascade Lumber Company of Yakima, Washington, and Boise Payette Lumber Company of Boise, Idaho. The history of timber companies in Idaho involves many mergers. Midwestern investors incorporated the Boise-Payette Lumber Company on December 24, 1913, with a subscribed capital of \$9,000,000. When tracing the history of Boise Cascade and logging in and around Boise you can find acquisitions and mergers going back all the way to territorial times of Idaho 1863 - 1890. The roots of Boise Cascade start in the early 1900s in Idaho. The Barber Lumber Company and the Payette Lumber and Manufacturing Company merged to form the Boise-Payette Lumber Company in 1914. In 1957, Boise-Payette became the Boise Cascade Corporation. Idahoans have been able to wander much of this land from before statehood,

through Boise Cascade ownership starting in 1957 (TAG Historical Research 1 -12). The sale of timberland to D.F. Development in 2016 changed access to the land for Idahoans.

Boise Cascade sold the land to Forest Capital Partners in 2004. The La Grande Observer notes, “in 2004, Boise Cascade LLC [sold] all of its 2.2 million acres of United States timberland, for \$1.65 billion cash to Forest Capital Partners LLC of Boston” (T.L. Petersen 1). Potlatch acquired the land in 2007 from Western Pacific Timber who had purchased it in 2004 from Forest Capital Partners, which had originally purchased it from Boise Cascade. Potlatch, a Spokane-based timber company, sold it to South Pine Plantations in April of 2016 for 114 million dollars (Rocky Baker Letters from the West August 25, 2016). Despite all the changes in ownership the land was managed as open to Idaho residents to snowmobile, hike, fish, etc, until purchased by the Wilks brothers and their D.F. Development LLC. Rocky Barker asserts, “Boise Cascade, Potlatch and the other companies that previously owned the tracts chose to open them to the public. Campers, hunters, snowmobilers and other users couldn’t tell the difference between these private forest lands and public land for most of this period” (Rocky Barker Letters from The West August 3rd, 2017). The purchase and resulting land closure caused widespread consternation among the public and recreationists who were locked out of lands they previously had access to. D.F. Development, “told county officials the lands were closed because they had been over logged and treated poorly by campers and other users” (Rocky Baker Letters from the West August 25, 2016).

Clearly, by limiting access to land that had previously been managed as open for public use, conflict escalated. Idaho is a state known for outdoor recreation. Millions of dollars are generated annually for the state’s economy and outdoor recreation is a reason many people choose to reside in Idaho. Idaho senator Mike Simpson echoes this sentiment when addressing

the Appropriations Interior and Environment subcommittee, “Let me tell you why people live in Idaho. They live in Idaho because they love their public lands. They like access to them for hunting, for fishing, for recreation” (Congressional Hearing H.R. 2406 Feb 2016). When asked about the D.F. Development and the Wilks brothers senator Simpson notes, “All of a sudden, they denied access . . . All of a sudden, people couldn’t access their favorite fishing hole or hunting ground” (Rocky Barker Letters from the West August 25th, 2016).

Gating of Forest Services Roads and Resulting Conflict from Closure of Land:

In August of 2016 D.F. Development Company began limiting access to their land for loggers, snowmobilers, hunters, and other recreationalists. The company hired security guards to enforce the closure. These closures created conflict, as recorded and posted to YouTube ([DF Development Security Guard Video](https://www.youtube.com/watch?v=Tt2ndalulYA) <https://www.youtube.com/watch?v=Tt2ndalulYA>). The video depicts an interaction between a citizen and D.F. Development security guard who is attempting to limit access on a road that the guard claims is private property. The video highlights how the closure on previously managed land open for public use was controversial, especially since many of the roads in the closure area are still maintained Forest Service roads and legally open to public use. In addition, a pair of gates were installed in 2018 on public forest service road 374 also known as the Boise Ridge Road. The Idaho Statesman stresses, “A popular road in the Boise Foothills used by hunters and other recreationists has new gates and “no trespassing” signs as the billionaire Wilks brothers of Texas continue to exert their private-property rights in Idaho. Forest Service road 374 — also known as Boise Ridge Road — crosses Wilks-owned property between Bogus Basin and Harris Creek Summit. The summit is north of the ski area and 13 miles east of Horseshoe Bend” (Cripe, C. 1). A video clip summarizing the controversy by KTVB Channel 7. [Forest Service Road 374 Closure](https://www.youtube.com/watch?v=6JO90H7cCwc) <https://www.youtube.com/watch?v=6JO90H7cCwc>

Clearly, D.F. Development has the right to sign and gate their own private property. However, local environmental groups maintain the closure of Forest Service road 374 is illegal. The Idaho Wildlife Federation maintains the closure is illegal because the road was built and maintained using taxpayer dollars. And The Wilderness Society accessed government records that revealed taxpayers paid to maintain the road for nearly 90 years, fulfilling prescriptive road easement requirements (Aceto, B. 1).

Reopened Access

Undoubtedly, closing 172,000 acres of forest used for logging, mining, and recreational use in 2016 had blowback in the communities affected. In December of 2017 Idaho State Snowmobile Trails Association was able to negotiate with D.F. Development LLC to open some of the previously closed land to allow grooming of trails and snowmobile access until May 1st of 2018. There is continued work between land rights and open access groups to expand access for ATV use.

Sandra Mitchell a lobbyist for Idaho State Snowmobile Trails Association sums up the current land use conflict in Valley County, Idaho by stating,

if we are going to be allowed to continued access to their property beyond what is covered by easements, we are going to have to prove that we can be good neighbors and dependable partners. We will need to demonstrate that they can trust us to use their land in a responsible manner. Remember they are under no legal obligation to allow public access anymore than you have to let people use your property. It is truly a privilege and we must respect their right to determine how their property is used (Mitchell, Sandra 1).

54,000 Acres Up for Sale

Despite the hard work of various recreation groups and D.F. Development to come to the bargaining table and hammer out use agreements to get users back into the closed forestland a new wrinkle has been thrown into the mix. D.F. Development group has listed for sale 54,000 acres of the land they acquired in 2016. The parcels are listed on the Country Homes of America

website and are offered by Wilks Ranch Brokers. The Lewiston Tribune states, “Farris and Dan Wilks of Cisco, Texas, have listed six tracts of forest, mountain and riverfront property. They are:

McCall Red Ridge Ranch: 31,000 acres south and west of McCall; Asking price \$61 million.

Paddy Flat Summit Ranch: 1,980 acres southeast of Lake Fork; \$2.9 million. Clear Creek

Mountain Ranch: 4,100 acres south of Cascade; \$5.6 million. Big Creek Ranch: 853 acres with 3 miles of river frontage near Cascade; \$2.1 million. Salmon River Ranch: 4,664 acres near White Bird with 9 miles of Salmon River frontage in Idaho County; \$4 million. Boise Ridge Mountain Ranch: 11,300 acres between Horseshoe Bend and Idaho City; \$10.3 million. Total 54,000 acres listed for 85.9 million dollars by Wilks Ranch Brokers. *In April of 2016, Potlatch Corporation sold the 172,000 acres to Southern Pine Plantations for 114 million dollars (Lewiston Morning Tribune Staff 1). Changes in land ownership by D.F. Development was quickly followed by a push for an updated trespass law in Idaho in 2018 to strengthen penalties for trespass.

New Trespass Bill Idaho

A coalition of 34 mostly large landowners was able to pass new trespass bill in Idaho in 2018. The coalition stressed the need for updated trespass laws citing that trespassers have caused serious damage to private land, equipment, and livestock. In the past, simple trespass in Idaho was a misdemeanor punishable by up to six months in jail and/or a fine of \$25 to \$1,000. However, in July of 2018 a new trespass pass bill HB 658a was passed by the Idaho state legislature. Governor Otter chose not to sign the bill because of his many reservations with the law. This resulted in HB 658a becoming law without his signature in March of 2018. The bill creates tiers of fines, starting at \$500 to \$1,000 for a first offense and reaching \$5,000 to \$10,000 for a third conviction within 10 years. Jail time would cap at one year for the third offense. The

bill was supported and pushed through the legislative process by the Idaho Property Rights Coalition.

The bill updates three different sections of Idaho trespass law. It revises private property notice requirements and increases trespassing penalties. For the second and third offenses with damage, trespassers would lose their hunting or fishing license for one or five years, respectively, if the trespassing involved hunting or fishing (Sewell, C. 1). The bill also requires recreationalists to get written permission from the landowner to use private land, whereas verbal permission was sufficient before passage of the new law.

In addition to increased fines and jail time the bill also addressed legal costs. The bill allows landowners to collect attorney's fees if they win the suit, however, if the person being tried for trespass wins the suit a similar clause does not exist to recoup their legal fees. Attorney Forrest Goodrum states in the Idaho State Journal that he, "objected to a provision in the civil trespassing portion of the bill which allows a landowner to collect attorney's fees if they win the suit. There's no equivalent provision that allows someone sued frivolously for trespassing to recoup their legal expenses if they are found to be innocent," he said. Clearly, this shifts financial obligations mostly to the party being prosecuted for trespassing" (Clark, Bryan 2).

The Governor of Idaho was also highly conflicted with the new legislation and its policy implications. In Governor Otter's transmittal letter to the Speaker of the House Scott Bedke he notes, "The myriad problems and bad actors plaguing the agricultural community and other large landowners need to be addressed," Otter wrote. "This bill sends a strong message and undoubtedly will serve as a deterrent to those who brazenly disregard private property laws. However, this legislation laudably calling for a 'renewal of the neighborly way' also could have a

chilling effect on recreationists, sportsmen and other outdoor enthusiasts, and ironically even neighbors afraid of inadvertently subjecting themselves to strict trespass laws” (Poppino, N. 1).

Did the Wilks brothers play a role in the new Idaho trespass bill HB 658 a? Rocky Barker and Cynthia Sewell note, “The two controversial Texas brothers who have bought thousands of acres of Idaho forest land weren’t listed as a part of the coalition that successfully carried a trespassing bill to the governor's desk. The Wilks brothers were involved. But they weren’t the driving force, said House Speaker Scott Bedke, “to attribute this trespassing bill to the Wilks brothers is not completely accurate” (Russell, Betsy 1). The HB 658 bill has been very controversial, especially among sportsmen. The Spokesman Review notes, “that law-abiding sportsmen weren’t involved in drafting the bill, which also is opposed by the Idaho Sheriffs” Association (Russell, Betsy 1). According to records in the Idaho Secretary of State’s office, lobbyist Suzanne Budge is registered to represent the Wilks brothers of Cisco, Texas, the family that purchased the Valley County land, during this year's legislative session; and lobbyist John Foster is registered to represent the brothers' company, DF Development, also based in Cisco, Texas (Russell, Betsy 1).

Letters from the West by Rocky Barker followed all the conflict and passage of bill HB 658 a. He interviewed a self-described sportsman and opponent to the bill Attorney Kahle Becker. Becker, filed several public records requests seeking to learn who paid lobbyists, and who reportedly drafted the legislation [HB 658a]. Ultimately Barker stresses, “Becker said the earlier lack of transparency made critics like him skeptical. And, he [Becker] said, the Wilkses’ role was larger than it seemed because of Budge. She was at the center of all of it, ‘Becker said” (Barker, R., & Sewell, C. 1). The overall role the Wilks brothers and their lobbyists for D.F. Development aided in the passage of bill HB 658 a, is hard to ascertain. Clearly, lobbyists for

D.F. Development helped push and drive the passage of the bill along with other large landowners in Idaho who comprised the Idaho Property Rights Coalition.

Sportsmen and their various affiliated groups felt left out of the process of the formulation of the new trespass law and the creation of HB 658 a. Idaho Wildlife Federation, Idaho's oldest conservation group, formed in 1936, had major concerns with the new legislation. Idaho Wildlife Federation's mission is “dedicated to promoting the conservation and protection of our natural resources, wildlife, and wildlife habitat for future and current generations.” Idaho Wildlife Federation states, “probably the most important aspect of this bill- there was no formal invitation to collaborate and formulate a bill to address trespass problems. It’s easy to understand how troublesome trespassing can be for a landowner, which is why an increase in fines isn’t necessarily a bad thing- honest sportsmen will still avoid trespassing, close gates, and respect livestock. Sportsmen are willing to come to the table to resolve such issues. But legislation that makes such broad strokes without public input is not the Idaho way of resolving issues” (Iwfstaff, A. A. 1). The new trespass law tips the balance of power to the landowner by lessening posting requirements, requiring written permission to access private land, increasing fines for trespass, and making individuals convicted of trespass responsible for court costs. The law increased landowners ability to enforce the right to exclude while limiting the ability to roam. However, recreationalists one of the key users of land in Idaho were left out of the drafting and implementation process. The new trespass laws were framed as a way to give clarity to land access issues, but have they accomplished their goal?

No Civil Remedy Exists

Undoubtedly, there are many Idahoans upset with closure and gating of Forest Service Road 374. However, no civil remedy exists in Idaho in property disputes. Idaho Wildlife Federation stresses, “Current Idaho law prohibits marking public lands and roads as private.

However, as a criminal violation only, a government entity must initiate the lawsuit for its enforcement. The law lacks a civil remedy common in property disputes, which would give Idaho citizens the power to resolve the issue peer to peer in court” (Aceto, B. 1). Often times rural counties are strapped for cash are where these land disputes are happening. Brian Brooks with the Idaho Wildlife Federation maintains, “Choosing to derail county budgets to prosecute billionaires over access issues, while burdened with more heinous crimes, is not financially practical. It’s time we give citizens legal recourse to enforce public access. By adding a civil remedy to the existing law we can save taxpayer dollars and mobilize enforcement procedures faster” (Aceto, B. 1).

Undoubtedly, the closure of a public road that has been used for decades is sure to stir controversy. In all reality the conflict of land users and land closure is just heating up in Idaho. D.F. Development cite poor treatment of the land, damage by ATV and Snowmobiles, trash and garbage left behind as reasons for the land closure.

Thus, understanding the idea of freedom to roam and how citizens of Idaho feel about the freedom to roam is both timely and important. Interviews with stakeholder groups addressing the land and road closures and the concept of freedom to roam are timely and could help policymakers understand the views of the Idaho citizenry in the conflict.

Chapter 6: Methods and Interviews

Standardized open-ended qualitative interviews phone interviews were conducted in November 2019 with individuals of key stakeholder groups working with land access issues in the state of Idaho. Qualitative interviews have been shown to be a valuable research tool and aid in understanding complex phenomenon. Steiner Kvale, in his seminal work *Interview Views* maintains qualitative research interviews seeks to describe and the meanings of central themes in the life world of the subjects. The main task in interviewing is to understand the meaning of what the interviewees say. (Kvale, 1). Kvale stresses interviews are an “interchange of views between two persons conversing about a theme of mutual interest” (Kvale 2). Qu and Dumay assert qualitative interviews, “provide a useful way for researchers to learn about the world of others, although real understanding may sometimes be elusive. . . However, done with care, a well-planned interview approach can provide a rich set of data” (Qu and Dumay, 239). Turner notes, “the standardized open-ended interview is extremely structured . . .this open-endedness allows the participants to contribute as much detailed information as they desire and it also allows the researcher to ask probing questions as a means of follow-up. Standardized open-ended interviews are likely the most popular form of interviewing utilized in research studies because of the nature of the open-ended questions, allowing the participants to fully express their viewpoints and experiences” (Turner, 756).

In depth open interviews were undertaken to better understand land access on undeveloped land in Idaho. Interviewees were questioned about the perceived feasibility of freedom to roam policies in Idaho. In addition, interviewees were asked about their understanding of the D.F. Development land closure of formally accessible timberlands in Idaho, as well as the new trespass law passed in July of 2018. Lastly, respondents were asked about their perceptions of Idaho Fish and Game’s Access Yes! and Large Tracts program working to

open public access on private lands in Idaho. Appendix A has all questions posed to key stakeholders interviewed.

Interviews conducted:

1. Brian, Brooks. Idaho Wildlife Federation [IWF], Executive Director. (2019, November 7) Personal phone interview.
2. Cox, Katie. Kaniksu Land Trust, Executive Director. (2019, November 10) Personal phone interview.
3. Grace, Eric. Land Trust of the Treasure Valley, Executive Director. (2019, October 30) Personal phone interview.
4. Green, Breann. Lemhi Regional Land Trust, Restoration and Stewardship Coordinator. (2019, October 31) Personal phone interview.
5. Kuntz, Josh. Board member at Backcountry Hunters and Anglers [BCHA] -- Idaho Chapter. (2019 October 29) Personal email interview.
6. Lucia, Matt. Sagebrush Steppe Land Trust, Pocatello, Executive Director. (2019, November 7) Personal phone interview.
7. State Governmental Employee - Administrator of land access programs in Idaho. (2019, October 31) Personal phone interview.
8. Thornberry, Rob. Theodore Roosevelt Conservation Partnership - Idaho Field Representative. (2019, October 28) Personal phone interview.

The interviews and information provided by interviewees were key to understanding and addressing the freedom to roam research questions. The results from the interviews are reported in the next chapter.

Chapter 7: Results from Interviews

Introduction

The interviews conducted covered a variety of questions (see Appendix A). Each of these questions add to a piece of understanding more about the views of Idaho's stakeholders as to undeveloped lands within the state and if there is a possible middle point between private property and the idea of freedom to roam. The following results look at responses from interviewees to each question.

Idaho Stakeholders and Open Lands

All individuals interviewed whether from non-profits, or governmental agencies stated their constituents frequently used and accessed undeveloped land in Idaho. Rob Thornberry with Theodore Roosevelt Conservation Partnerships sums up his users activities by stating, "yeah, hunting, fishing, hiking, exploring, camping." Breann Green with Lemhi Regional Land Trust also maintains her constituents like to access undeveloped land. Green noted that Lemhi County had 92 percent public land and 8 percent private land, and that Salmon, Idaho was on the edge of the Frank Church Wilderness. Green stated that hunting, fishing, ATV use on public lands were favorite activities of individuals in the area.

Matt Lucia with the Sagebrush Steppe Land Trust noted, "our service area is about 6 million acres and 3 million acres are privately owned that is where we focus our work. Working with private landowners to place conservation easements on their properties to protect the integrity of the property from development, to further our mission of protecting wildlife habitat and open spaces". Brian Brooks with Idaho Wildlife Federation maintained, "that is who we represent, specifically folks that use undeveloped landscapes to pursue all sorts of recreational opportunity from hunting, fishing, backpacking, rock climbing. We call them public land users in Idaho. We exclusively represent people who use undeveloped lands" (Brian Brooks). Katie

Cox with Kaniksu Land Trust stresses, “yes, our supporters use lots of undeveloped lands, mostly our supporters our trail users and hunters” (Katie Cox Interview). All people interviewed noted that their constituencies frequently used and accessed undeveloped land in Idaho for a range of recreational activities. Hunting, fishing, and hiking were the most frequently mentioned activities.

Freedom to Roam, An Unfamiliar Concept

When questioned about Freedom to Roam principles no interviewee claimed to be very familiar with the principle. Eric Grace with Land Trust of the Treasure Valley in the Boise area noted that countries in Europe specifically England allowed access on private land and that individuals could access private beaches (Eric Grace Interview). However, he was not aware how Freedom to Roam worked exactly. Rob Thornberry stated, “I am not familiar with Freedom to Roam fill me in” (Rob Thornberry Interview). A governmental employee with the state of Idaho noted “I am not super familiar with the term . . . my understanding is the European model where individuals can access parcels of private land without landowner permission” (State Employee Interview). Breann Green stated, “No, I am not familiar with freedom to roam other than intuitively what the phrase means” (Breann Green Interview). Matt Lucia, “I am familiar with the concept, new to the terminology” (Matt Lucia Interview). While Brian Brooks stressed, “I think so, I am familiar with the philosophy and some of the laws. For me the freedom to roam is something that places the quality of life of every citizen above the privileged few whether that is monarchies or any system that has set up a generational system of the ruling class” (Brian Brooks Interview). Katie Cox with Kaniksu Land Trust notes, “I am semi familiar. I have a cursory understanding. From my cursory understanding I would say it is about having access to responsible use of private land” (Katie Cox Interview). Overall, freedom to roam was not an

easily defined concept for people working with land access issues in Idaho but many were familiar with the ethos of freedom to roam tenets.

Freedom to Roam and Its Importance in the United States

Those interviewed also generally agreed that the freedom to roam idea is important, but not as important as private property, and thus the right to exclude. Freedom to roam principles were clarified for all participants as they were asked whether freedom to roam principles were important in the United States and Idaho. Overwhelmingly most participants stressed while the concept was important, it was not as important as private property rights. Breann Green with Lemhi Regional Land Trust maintains, “I don’t know that Lemhi County folks would be up for [freedom to roam], they definitely like their private property rights”. Green continued on, “[Freedom to roam] is definitely important in the right places and right circumstances.” Green noted that Lemhi Regional Land Trust often works on bike path easements for public access on private land but that if the land is not donated “they must be financially compensated” (Breann Green Interview). Brian Brooks stated, I like the tenets of it [freedom to roam] but I also see the benefits of private property” (Brian Brooks Interview). Katie Cox maintains “I don't believe it is important in the USA. Awareness of the concept is not very high in the USA. I think private property reigns in the United States and respect of private property. It would be wonderful to have areas where you could utilize the concept but it could never be the way it is in Europe” (Katie Cox Interview).

Eric Grace with Land Trust of the Treasure Valley echoes this sentiment. He notes while personally he supports freedom to roam principles in his role as an executive director of a land trust it is not feasible in practice. Land Trust of the Treasure Valley often works with private landowners to conserve land from future development by placing the land in conservation easements. However, these easements do not require the landowner to grant access to the public.

The landowner can grant access if they choose but it is not something that is required. Eric Grace maintains that if granting public access was a requirement of a conservation easement that it would be tougher to work with private landowners to place their land into conservation easements and ultimately hamper their ability to complete conservation agreements with private landowners (Eric Grace Interview). Matt Lucia with Sagebrush Steppe Land Trusts echoes similar thoughts, noting, “the concept [freedom to roam] is an important one. Especially in Idaho as you see large tracts of land the public could access being closed off but I think it is important for people to understand the complexity of private land ownership. People need to respect the landowners ability to grant or deny access” (Matt Lucia Interview). Josh Kutnz with Backcountry Hunters and Anglers also highlights Idahoans love of private property rights. He maintains, “on private lands in Idaho, you must have permission from the landowner to be on the land. My perception is that Idaho residents are overwhelmingly in support of keeping it this way. In other words, I think the general public's appetite to create "freedom to roam" on private lands is very low” (Josh Kuntz Interview).

Idaho and the power of wealthy property rights were repeated throughout every interview conducted. Rob Thornberry with TRCP maintains, “Idaho and the USA has rich property rights which should be respected . . . just so we are clear, I do not think I should be able to use private property unless given permission” (Rob Thornberry Interview). A governmental employee with the state of Idaho noted, “the ability of folks to get out and access and enjoy the outdoors is really important. Access to some of those private parcels is definitely important, I am not sure a concept like [freedom to roam] would fly in Idaho. From the sportsman's side they would be supportive of it, from the cattleman's or private landowners side they would be pretty resistant to some kind of open legislation like that” (State Employee Interview). Overall, in Idaho roaming

rights and access to land is very important but somewhat controversial. Often times in Idaho individuals must cross private property to access their beloved public land. Breann Green of Lemhi Regional Land Trust stresses, “all of the private grounds in Lemhi County are mostly river corridors or valleys where you would want to go hunt and fish” the public land is often at elevation in the mountains (Breann Green Interview).

As alluded to in the comments above, a conflict exists between the land user or recreationalist and landowners whose property rights give them the right to exclude. An Idaho state employee working with land access issues sums up the divide. He stresses, “there is a pretty big split within Idaho if you asked the mountain biking, dog walking, even hunting side of Boise, Meridian, Nampa, Pocatello, etc. they are going to be fairly pro in supporting a right to roam, but if you go in front of cattlemen associations, or grain growers, or some of the big ranchers in the state you would probably get the exact opposite reaction as a right to roam concept” (State Employee Interview). Matt Lucia notes that while it would be quite difficult to foster freedom to roam in Idaho, there are many in Idaho who might adopt freedom to roam ideas; but it would take time, education and a concerted effort. Lucia notes, “I think it is feasible with the right amount of time and the right messaging. It is an interesting concept that would take would take an awful lot of messaging, outreach, and commitment to education. People in Idaho live and die by private property rights and to change a culture is not going to happen overnight. It is feasible but it is a very long-term commitment and requires a philosophical change of mindset” (Matt Lucia Interview). Katie Cox with Kaniksu Land Trust also maintains freedom to roam policies might be feasible but not for all private land in Idaho. Cox maintains, “I would like to think freedom to roam policies are feasible in certain places. We have talked about a trail corridor and depending who the private property owner is, there might be interest in

opening it to access. Something like camping on trail in your backyard. I would encourage areas of demonstration where freedom to roam could work” (Katie Cox Interview). Cox notes that expanding access in test cases and showing landowners and the public that freedom to roam concepts can be successful could go a long way in expanding freedom to roam in Idaho.

However, Cox also notes the culture of fear and fear of others as the main reason individuals in the United States are resistant to freedom to roam and staunch defenders of the right to exclude. Cox maintains, “sad enough people are fearful of other people. Fear of others is a growing issue in the United States and even though studies say that recreational users are not likely to destroy property the fear remains. You can’t unwind that [fear] from people’s psyche. They like to have their property and know that it is protected. The majority of people like to think of their land as their land and it is for their access only” (Katie Cox Interview).

Brian Brooks was very frank in his assessment noting, “No, I don't. It would be immediately be labeled an attack on private property. Anything that changes someone's ability to do what they want on their private property would be labeled an attack on America itself” (Brian Brooks Interview). Overall, the vast majority of interviewees did not think expanding freedom to roam in Idaho to the entire state would be feasible. Rob Thornberry with TRCP stressed if freedom to roam was put into practice in Idaho there would be a backlash from landowners. Thornberry notes, “while I like the idea of freedom to roam we have to be good partners with private landowners and acknowledge their right to own the land and manage it as they see fit” (Rob Thornberry Interview).

Public Access on Private Land and Changing Ownership

When questioned about land access occurring on private land and whether or not public access should continue on tracts of land that previously allowed public use even with change of ownership occurs, answers by interviewees were also very similar. Every interviewee stated

they hoped there would be some way or remedy for public access to continue if it was granted in the past. Rob Thornberry maintains, “I would hope [access rights] would continue but that is between the buyer and seller. Plum Creek in Western Montana has granted access for decades, I don’t think that requires them to do it forever.” He concludes that if land was previously managed for open use he hopes it would remain open by stressing, “anything that keeps hunting and fishing for important lands available for public use I am for” (Rob Thornberry Interview).

Breann Green with Lemhi Regional Land Trust notes, “I am sure it is within private property landowners right to close the land, but if the land historically was open it would be a disservice to the public to close it. I hope a land trust comes in and puts a public access easement on it before they sold it” (Breann Green Interview). Lucia also maintains that ideally a land trust or governmental agency could find a way to continue access but according to the rule of law the landowner has the right to limit access if they choose to do so. Lucia stresses, “personally I would love to see the opportunity to work with landowners to see access continue but I also understand private property rights and landowners ability to make decisions regarding their property” (Matt Lucia Interview). Katie Cox with Kaniksu Land Trust also expresses the desire for land trusts or the state to work with the landowner to grant easements and access before the sale of the property. Cox maintains, “conceptually it would be great if public access could continue. I would encourage landowners of large tracts of land, to consider doing easements before the sale of the land so individuals could still travel through it. But knowing that private property rights are essential here we cannot expect access to continue” (Katie Cox Interview). Brian Brooks finds the loss of access a societal loss. When questioned if access should continue on private land if the access was allowed historically, he stressed, “my personal belief is that is should. A loss of accessible land is a loss for society” (Brian Brooks Interview).

A repeated theme throughout the interviews was that even though access was important, private property rights trumped any public right of access. A governmental employee with the state of Idaho clarified, “Idaho is a private property rights state. I hope the new landowner takes into consideration past uses and allows as many of those as possible. But I think mandating something especially from a government agencies would be tough” (State Employee Interview). Eric Grace with Land Trust of the Treasure Valley also maintained that while he hoped access would be allowed by the new owner, current law in Idaho does not require public access to continue and therefore it should not be forced.

Incentive-Based Voluntary Programs

When asking about the potential to have freedom to roam principles codified within Idaho, nearly everyone interviewed was hesitant to adopt or force freedom to roam principles across private land in Idaho. However, incentive based voluntary programs that encourage landowners to open access had overwhelming support. Eric Grace stressed, “many people in Idaho strongly identify with property rights but if you can find ways to incentivize public access it can be a great way to open private land to the public” (Eric Grace Interview). Matt Lucia with Sagebrush Steppe Land Trust stresses, “when it comes to private property rights anything a landowners feels is forced upon by the government or by law, they immediately bristle up and there is a push back. Incentives, typically financial incentives are more effective than legislative or forced action” (Matt Lucia Interview).

Clagstone Meadows and the Forest Legacy Conservation Easement is a good example of a program doing this” (Eric Grace Interview). Clagstone Meadows is located in Bonner County near the south end of Lake Pend Oreille and is 13,169 acres of timberland. The property was permanently opened to public access in perpetuity on August 1st, 2017. Idaho Fish and Game declared,

Idaho Department of Lands Forest Legacy Program, the Idaho Department of Fish and Game, and The Trust for Public Land raised \$9.5 million to purchase the permanent easement, which included federal funding from the Forest Legacy Program and Pittman-Robertson Wildlife Restoration Act. It should be noted that the Trust for Public Land secured a substantial private donation. In conjunction with Stimson's land conservation efforts, they sold the conservation easement at significantly less than full market value – a conservation donation that will forever benefit the people of Idaho (Idaho Fish and Game, Clagstone Meadows 1).

Expanding access to public and private lands was supported by every interviewee especially if it involved a voluntary component and was fostered through collaboration and mutual understanding. Brian Brooks cited Clagstone Meadows as an example of how a voluntary incentive program brought joint partnerships together to protect access, ecosystems and deliver an outcome that was far superior than what was initially slated for the land. Brooks maintains, “Clagstone meadows is a good example of a permanent solution to grant land access in perpetuity. It was slated to be luxury homes and horse tract, now it will be a working forest, functioning ecosystem with access rights for the public forever” (Brian Brook Interview).

A governmental employee with the state of Idaho stressed that their agency is working to increase public access in the state of Idaho in a variety of ways. He states we are expanding public access by, “acquisitions, every year we buy a few parcels to add on to existing wildlife management areas, we are working with the forest service through forest legacy to acquire perpetual easements that often have public access. There are a lot of different tools we are looking at to increase public access within the state”. Whether individuals were representing non-profit land trusts, government agencies, or recreationalists groups nearly all interviewees placed importance on expanding public access. Although many land trusts noted that the decision of public access should be left up to the landowner. Matt Lucia maintains, “Private land conservation is so individual and particular to that specific parcel and the specific landowner.

We recommend leaving those decisions up to the individual landowners. Our focus as an organization is protecting habitat and there are benefits for protecting land habitat that the public may not be able to access” (Matt Lucia Interview).

Katie Cox notes that Kaniksu Land Trust raised 2.1 million dollars to purchase, conserve and open public access to 180-acre parcel near Sandpoint, Idaho. She notes the project has been wildly successful and embraced by the community. Cox notes, “Pine street woods is a conservation easement that is owned by private property owners. It is 180 acres and they allow public use of the trail for all trail users. A beautiful concept that our town really utilizes and is grateful for. The community loves it. It is educating the community as to what you can do with land under a conservation easement. It is great because we are creating awareness that we can create public access parcels” (Katie Cox Interview). Clearly, if funding becomes available to purchase properties to fulfill conservation goals and allow public access the project are successful. However, finding funding is much more difficult than finding parcels that would be great to conserve and, or provide access to the public for recreation. Brooks notes, “there are a lot of unnamable or potential projects that we would love to see public access granted in perpetuity but our hands are tied because of funding or lack of money” (Brian Brooks Interview). If it cost 9 million dollars to protect and conserve 13,000 acres imagine the cost for trying to conserve 100,000 or 1 million acres. It becomes prohibitive to protect and grant access to large tracts of land in this manner.

D.F. Development Controversy

The final questions in the interviews address current land access issues within the state of Idaho; the first of these focused on the D.F. Development controversy. This controversy concerns the land closure, in 2016, of nearly 180,000 acres. This has been a lightning rod of

controversy, which continues to today, for recreationalists in Idaho. The controversy, in some ways, is just beginning.

Everyone interviewed had knowledge of the D.F. Development Controversy. Those working in counties where the controversy occurred or with groups representing recreational groups were more aware of the controversy. When asked about her awareness of the controversy, Breann Green working out of Salmon, Idaho notes, “just really briefly, I saw a headline but I do not have any good information on it” (Breann Green Interview). Katie Cox in North Idaho stresses, “I have only been in my position for four months. I only know a little bit about it. I know they bought large tracts of land in southern Idaho around 180000 acres and that used to be public access and now they have closed off roads and they are not allowing access through it” (Katie Cox Interview). Clearly, proximity and working with affected user groups had an impact on the awareness of the D.F. Development controversy. For the most part individuals working with land access issue in Idaho were very aware of the land closure controversy started by the land closures by D.F. Development in 2016 in Southern Idaho.

Brian Brooks with the Idaho Wildlife Federation describes the D.F. Development controversy as follows,

They have been moving across the west buying large tracts of land, they are now the largest landowner in Montana, and soon after becoming the largest landowner in Montana they became the largest political donor to the state legislature to influence laws that benefit the use of their property. Now they are doing this in Idaho. They are not the largest landowner in Idaho, that belongs to Simplot but they are getting close. They purchased nearly 200,000 acres in Idaho, infiltrated the Idaho legislature, paid for a team of lobbyists, passed a law [the new trespass law 2018] that directly benefits their use of their land, they now don't have to pay anybody to post no trespassing signs. They are bullying people off public roads that people have every right to use. Not only putting up gates and signs on those roads but patrolling the roads with armed guards. Now they are starting to buy property in Oregon. They are buying up their own little private kingdom in the West (Brian Brooks Interview)

The land closure has been extremely unpopular in Idaho and comes to the forefront of many Idahoans minds. Matt Lucia maintains the land closure “has created a mess, a big divide in the hunting and angling and recreationalist community who have been able to access these properties and are now shut out. I understand when you shut the public out from property that was previously accessible there is a lot of push back. It is a challenging situation and I do not see any easy solutions” (Matt Lucia Interview). A state governmental employee also describes how the controversy shocked many Idahoans who were used to recreating on the land for decades, even generations. He stresses,

It showed some people had some conflicts of beliefs all of a sudden. These were people that were hunters and fishermen probably relatively conservative in their political leanings. All of a sudden it impacted them, we started getting phone calls and emails as an agency saying, what are doing as an agency? How are you going to keep this land open? We explained everything they are doing is completely legal at this point. Some of the groups were kind of struggling because they were very pro private property rights but now they had an elk tag and could not hunt a piece of land they were used to accessing and hunting (State Employee Interview).

Overall, the controversy was an eye opener for recreationalists in the state of Idaho, citizens, land use agencies, non-profit groups and nearly everyone who loves Idaho and access to undeveloped land. A state governmental employee stressed,

It was a big eye opener for citizens, hunters and outdoor recreationalists in the State that these big, big chunks of property that we have taken for granted for generations as far as being open, can be closed down. I know from an agency standpoint after that happened that was where we started getting a big push for the Large Tracts program and more emphasis on getting involved in access. Because people all of a sudden saw it was not just a 40, 80, or 100 acres getting closed off, it was 100,000 acres of previously accessible land that got closed off. It upset a lot of people who had been hunting or fishing on that land for generations (State Employee Interview).

The closure of the land was highly controversial but the Wilks were within their legal rights as property owners to close access. Less conclusive is if they have the power to gate forest service roads running through their various parcels or property. Eric Grace maintains that the Wilks are well within their right to close down the land but states, “if roads have been built and maintained with public funds the access to roads should not be closed down” (Eric Grace Interview).

Rob Thornberry describes the controversy over the closure of forest service roads on D.F. Development property in the following way. Thornberry notes, “the US Forest Service, BLM, and other land management agencies need to modernize their public access and easement records”. Rob Thornberry stresses for many decades landowners have granted access with handshake deals but increasingly those deals are being closed off and or access and easements that allowed access are buried and or unknown by various government agencies and the public. Thornberry maintains the Wilks brothers as all private landowners have the right to close their land. However, what is less clear is what easements exist across landowners property to public property. He explains, “modernizing access agreements can help us get away from conflicts like the Wilks brothers. What I would like to see is the US Forest Service, BLM and other land management agencies work to update the easements across private property to public property” (Rob Thornberry Interview).

Brian Brooks with Idaho Wildlife Federation also says land access agencies need to address and update public easement records. He notes agencies working with land access issues,

need to take a fine-tooth comb and find out where and where not easements exist. It used to be if a road was built and maintained using public tax dollars and used by the public it fulfilled a prescriptive easement and the agreement for use by the public did not necessarily need to be written down into any sort of deed. The Wilks brothers have challenged that prescriptive easement. Land agencies need to look at the roads they have built, even those that have been using prescriptive or

long-standing easements and maybe get an actual easement on paper because it is easier to fight in court (Brian Brooks Interview).

All interviewed noted the Wilks were within their right to close access, but that if roads across their property had easements, those easements should remain. In addition, all interviewees noted that the controversy will remain in Idaho for the foreseeable future.

New Trespass Law

The final question for interviewees concerned Idaho's new trespass law. According to those interviewed, the new trespass law was almost as controversial as D.F. Development's decision to lock Idahoans out of lands they had accessed for generations. Not all interviewed were aware of the new law. Sportsmen groups were very aware because the new law directly affected them and their recreational activities. Those working for land trusts were not as aware of the controversial legislation recently passed. Breann Green, Eric Grace and Katie Cox all stated they did not know any details about the new trespass legislation passed in July of 2018 in Idaho.

Rob Thornberry maintains that decreasing posting requirements by the landowner ultimately can result in confusion for hunters, anglers and recreationalists. Thornberry stresses, "I think it is unfortunate that we took a step back from reasonable trespass laws. You are creating a situation where people are going to be confused by the law and more instances of carelessness where people can make a mistake crossing private property then there needs to be" (Rob Thornberry Interview). Matt Lucia echoes this sentiment noting that the new law essentially locks up land that was previously accessible as long as there were no trespassing signs posted. Lucia notes, "the trespass laws are a lot more rigid. I hate to see laws change that make it very difficult to access property that was formerly available. Before the law change you

could access private property if it was not posted. That has now changed” (Matt Lucia Interview).

A governmental employee with the state of Idaho spoke about the intentions of the new law and that the Idaho Property Coalition stressed the need to update and clarify outdated trespass laws in the state. The employee stresses,

the law was framed as a way to provide clarity to trespass in Idaho. It is a hard one. In some cases it made it more difficult for landowners. In some cases you had landowners who did not mind if people accessed their property. Now with the change in the law, there is this automatic restriction that you have to have written permission, in some cases it made it much more difficult to access property that landowners had previously not cared if the public accessed it. In other cases it provides additional clarity for the landowner. We still continue to get lots of questions on it [new trespass law], because people do not completely understand it, on the landowners side and on the sportsmen side (State Employee Interview).

Rob Thornberry notes that while recreation and tourism is one of the state’s biggest industry as far as revenue sportsmen were essentially left out of the drafting of the new trespass legislation. He maintains, “what I did not like about that, [new trespass law] they did it without consulting us (hunting and recreational groups) who are major players in the economy of the state, instead they crammed the new law down our throats without giving us any input into the process” (Rob Thornberry Interview). Brian Brooks with Idaho Wildlife Federation had the harshest critique of the new legislation. Brooks explained that the new law tips the scale of power in favor of large landowners over recreationalists. He stated,

I think it is a pile of shit. It is a bad law. We spearheaded the opposition. Private landowners, good people were getting water tanks shot, fence posts ripped out, we already have laws that make that illegal. The new trespass law significantly raised the penalties for property damage. It is hard to show up and testify against that [increased fines for trespass] component of the law. What we did object to is the change of language of the posting requirements by landowners, they made it very confusing and ambiguous. Also, it set up some dangerous precedents in

regards to court costs. The landowner can easily recoup courts costs in civil court from the defendant. Unless the individual who is being charged with trespass can show the lawsuit was brought without merit, they are responsible for those costs which could easily reach 20000 or 30000 dollars. People might not be willing to access land they are allowed to access because of this change in law and the threat of lawsuits and having to pay court costs. Also, the bill did not criminalize false posting of public land. The law tips the scales too much in favor of large landowners (Brian Brooks Interview).

Overall, the new trespass law clearly was extremely controversial even with some law enforcement agencies speaking out against its passage because they thought the new laws muddied the waters rather than providing clarification. Governor Otter refused to sign the new bill into law suggesting his lack of enthusiasm for the changes in legislation. However, Governor Otter also did not kill the bill. After 5 days of inaction, according to Idaho law, the bill becomes law. This is what happened with the new trespass bill.

Thoughts on Access Yes! and Large Tracts

Programs to expand the public's access to private land in Idaho already exist. Access Yes! and large tracts are working to expand access on private land in Idaho. These programs and expanding access follow freedom to roam principles by working with landowners to expand access and encourage responsible use by recreationalists. While not a specific question in the interview process, the programs came up in follow up questions throughout the interviews.

Idaho Fish and Game has been working diligently to expand access on private parcels using Access Yes! and Large Tracts Program. Idaho Fish and Game have also been working to sign agreements with large landowners mostly timber corporations to provide non-fee access to timberlands in Idaho. A state employee working with land access explained that the Large Tracts program seeks to put all agreements with many different corporations under one umbrella rather than needing a permit from each individual corporation. The employee states,

We got a million acres plus of corporate timberlands in the state, that we have always taken for granted that it is open to the public for recreation. We need to be proactive and start working with timber companies to make sure they do not feel they are being taken advantage of . . .with use comes costs, whether that is damage to roads, picking up trash, or just dealing with people. That was were Large Tracts came from. We had an increase in funding. We need to work with these large corporate landowners ahead of time to retain public access” (State Employee Interview).

Keeping public access open is key as well the agreements come with several other benefits. The state employee notes, “from the landowner standpoint it turns the public from a liability into an asset by being able to make some money from allowing access” (State Employee Interview). In addition, it also can decrease problems. It improves formal relationships between state agencies and private corporations. Also, when problems do occur the established relationship helps to address and rectify problem situations. Overall the state employee notes, “These parcels that are open to formal public access the problems (like trash dumping) go down” (State Employee Interview).

Access Yes! And Large Tracts have been well received by both the public and landowner. Overall everyone interviewed who was aware of Fish and Game’s Large Tracts and Access Yes! programs, using hunters fees to increase access on undeveloped private land were generally seen as positive. The state employee with Idaho notes that they have completed surveys with landowners participating with Access Yes! And generally they have also been overall positive (State Employee Interview). Breann Green with Lemhi Regional Land Trust also speaks highly of the Access Yes! She notes, “we work with Fish and Game on some Access Yes! to go on top of some of our conservation easements. A lot of people use Access Yes! around here. In general people use them [Access Yes!], people love them, they are well marked in Lemhi and Custer counties” (Breann Green Interview).

Rob Thornberry also notes the importance of programs like Access Yes! And Large Tracts. He stresses, “Access Yes! And Large Tracts are essential for the future of hunting and fishing, any program that works to assure access for future generations is critical” (Rob Thornberry Interview). Although Theodore Roosevelt Conservation Partnership was not working directly with Access Yes! The organization did work to secure funding to allow the program to increase its operating potential. Rob Thornberry explains,

I do not actively work with Access Yes! directly but TRCP works several layers above the Access Yes! program. Idaho Fish and Game runs a depredation program to fund private landowners for losses from animals, for example if elk eat a farmers haystack or hayfield on a heavy winter. Three years ago sportsmen and the legislature worked together to create a new 5 dollar fee increase on hunting and fishing licenses in the state of Idaho. (The fee goes into two different pots of money) One pot of money is for preventative maintenance of depredation the other pot is for public access. Buying and properly managing public access across private property. I [TRCP] and sportsman were part of the process to create the fee and now more money is going to access (Rob Thornberry Interview).

Brian Brooks stresses that mission of Access Yes! To increase access on private lands is overall good but he notes the program needs oversight. He maintains anytime money is involved oversight is needed to ensure the program is fair and operating fairly for all involved, the sportsmen paying the fee and the landowners being paid for access. Brooks notes, “I think it is generally good and it has opened access for recreation. It has rewarded landowners for providing access. However, there may be a lack of oversight and some of the property chosen might not necessarily be the best for hunting or fishing purposes. In general, the idea of creating more access is good” (Brian Brooks Interview). Brian Brooks notes that sportsmen and landowners both sit on the regional boards and choose the Access Yes! property. He concludes, some oversight is needed to ensure people are who are receiving money and compensation are not the same sitting on the

board choosing which land enters the Access Yes! Program. Brooks states, “we need to be careful anytime money is involved to ensure the program is not just working or benefiting a few (landowners) over the many (the individuals paying into the access fund)” (Brian Brooks Interview).

Many interviewees spoke of the increasing pressures that Idaho expanding population will have on land access issues. Matt Lucia notes, “I do not use Access Yes! property personal. I look for solitude when I got out hunting and fishing”. He stresses that access to land in Idaho is coming to the forefront because of the rapid growth the state is experiencing. Lucia maintains, “public access is increasingly becoming more and more important to people especially as Idaho is experiencing population growth and will continue as we have been discovered (Matt Lucia Interview)”. An employee with the state of Idaho also maintains Idaho demographics and population are changing rapidly noting, “Idaho is changing, more people are getting here” (State Employee Interview).

Overall Access Yes! and Large Tracts had overwhelming positive responses from interviewees. The attempts of the Fish and Game programs to increase access to undeveloped land in Idaho were valued and generally viewed as positive. Brian Brooks notes that even though the programs increases access it is not guaranteed access into the future. If ownership changes so can access, or landowners can decide to leave the programs at any time. Brooks notes when speaking about the fund used to fund Large Tracts, he notes “the problem with the new fund is that access is not permanent and we are paying for something we already got (access to large tracts of timberland owned by various corporations)” (Brian Brooks Interview).

Clearly, Idaho and land access issues will remain at the forefront of Idaho politics and public discussion with increased population pressures and recently enacted laws. Increased

access to undeveloped land was important to all who were interviewed. Voluntary incentive-based programs like Access Yes! And Large Tracts ran by Idaho Fish and Game were generally viewed as positive and good programs for increasing land access in Idaho.

Chapter 8: Summary and Future Research

Research Question 1:

What are the views of key role players in Idaho concerning access to undeveloped lands within the state?

Overall, in Idaho access to undeveloped lands were important and valued by all stakeholders in Idaho. Key stakeholders found freedom to roam policies unlikely to work in Idaho if policies would be universally applied across the state. Idahoans value and understanding of private property rights were cited as very important and therefore seen as running contrary to freedom to roam principles. Many interviewees stressed Idaho has a long history of land use conflicts and developing consensus on how land should be used and accessed is difficult to come by. Any solution or program to expand access needs to understand Idaho's unique political culture. Individual property rights are an important part of this culture. All interviews repeatedly stressed Idahoans value and find liberty in the right to exclude and the protections offered by private property rights.

However, all interviewed understood the importance of maintaining and increasing land access to undeveloped lands. Many cited freedom to roam and increasing land access as important in Idaho. Everyone interviewed hoped that access to undeveloped land would remain, if and when change in land ownership occurs, if access had been granted historically on the land. All stressed the need to work with landowners before the sale to hopefully put access and conservation easements on the property. Voluntary incentive-based programs were seen as acceptable and feasible way to increase access to private undeveloped land in Idaho. Ultimately, all interviewed noted that Idahoans ability to access undeveloped land, both public and private, were key drivers for the quality of life of residents of the state and also key economic drivers of the state's economy. Mechanisms to increase or maintain access on private land were found to

be important but less clear was how these mechanisms should work or what they could potentially look like in the state.

Research Question 2:

And, do they believe there is support for some middle point between private property and a freedom to roam policy within the state of Idaho?

Incentive based voluntary programs to work with landowners to increase land access in Idaho had the support of all interviewees. Access Yes! And Large Tracts were seen as important programs to maintain and increase land access on undeveloped private land in Idaho. While the philosophies of freedom to roam and the liberty offered by allowing access to land regardless of ownership was valued it was limited. Universal adoption of freedom to roam policies was seen as having the ability to cause blowback from the public and landowners. There is a lot of support for voluntary based incentive programs. How to fund and encourage landowners to participate is less clear. However, what remains clear is that all interviews thought landowners should be able to opt into a land access program rather than having something forced on them.

Freedom to roam ideals and increasing land access is universally supported if landowners and the public are given a choice of how to participate. The current Access Yes! And Large Tracts programs operates by using funding from hunting licenses. To truly expand the program additional funding sources are needed. Education of freedom to roam principles and education programs to expand responsible land use by recreationalists could go a long way to foster relationships to increase access on undeveloped land as well. Lastly, finding ways to bring stakeholder groups to the table to increase communication and foster mutual understanding is needed in Idaho. To truly maintain and increase access to undeveloped land in Idaho it will take concerted efforts from federal and state agencies working with land access issues, non-profit sectors, private landowners, and the public or recreationalists coming together to build

consensus. Without efforts to build consensus Idaho politics will remain controversial and a zero-sum game increasing the likelihood that more land is closed down. Crystal clear is the fact that with D.F. Development land closures, changes in trespassing laws and the ability to no longer access unposted land, is the fact that hundreds of thousands of acres that Idahoans could recreate on are no longer open. Consensus building and cooperation among the stakeholder groups will be key to reversing this alarming trend in land access issues in Idaho.

Discussion

Freedom to roam is a concept that has been around the world for thousands of years. It is a concept that was implemented early in the United States. Open range and freedom to roam were the norm for the first 150 years. However, overtime access to lands that have once allowed roaming are being slowly closed off in the United States. Many environmental writers and thinkers stress the importance of being a piece of an interconnected system that is nature. Access to nature and its wonder is key for human survival. Abbey, Muir and Leopold all stress the key role nature plays in the lives of humans. Leopold recognizes the importance of private property and the central role private landowners can play in conservation. He calls on all property owners to practice the land ethic and ensure the land is healthy and vibrant. He stresses the objective of the land ethic, “is to teach the student to see the land, to understand what he sees, and to enjoy what he understands” (Aldo Leopold, *Lessons in a Land Ethic*, 1). To see the land you must access it. Especially large tracts. While Leopold, Abbey, and Muir do not specifically mention freedom to roam you can find similarities and commonalities in their writings. Access and interacting with nature is a common theme that runs through all their writing. Freedom to roam aligns closely with their ideals.

Idahoans clearly value access to nature and undeveloped lands. Many live in the state because of the outdoor opportunities afforded by living in Idaho. The interviews with key

stakeholders in Idaho show several important factors in the state. When looking at formal exclusion vs social obligation or progressive property rights the interviews and research demonstrate formal exclusion is viewed as a very important right in Idaho. However, many interviewed also noted that incentive-based programs that expand land access are valued and needed. These programs align much more with progressive property rights. In the case of D.F. Development and the Wilks brothers all noted that it was a loss that this land would no longer be open to Idahoans to access, but closing access was within their rights as private property owners. Formal exclusion and private property rights are clearly valued by Idahoans but less clear is if formal exclusion should be the norm when it is used by out of state interest to buy vast chunks of land and close down lands formerly accessed by Idahoans for generations. Do Idahoans still support formal exclusion when they are locked out of lands they formally had access to? More research is needed to discover when Idahoans are more likely to support traditional formal exclusion rights vs progressive property rights. Are individuals willing to change their viewpoint from formal exclusion to a more progressive property model when they no longer can access land that they have been recreating on for generations?

Access Yes! and Large Tracts are programs run by Idaho Fish and Game to keep private lands accessible in the state. These programs are valued and viewed as needed. However, additional programs should also be explored. Nonprofits like land trusts also might have a role to play in addition to the state run programs. While mostly land trusts work individually and leave access decisions to individuals landowners, should these organizations consider ways to increase access? Katie Cox noted that small education parcels could be set up to allow access and freedom to roam to educate the public and show how freedom to roam concepts can work in Idaho. While the state is working with the various timber companies in the state through Large

Tracts should land trust be working and exploring adding conservation easements over top of these agreements. What is clear is Access Yes! And Large Tracts do not guarantee access into the future or protection of habitat for conservation. Perhaps these land trusts and other non-profit groups should focus on conserving key parcels of these millions of acres of timber company lands in Idaho.

Other formal mechanisms also need to be examined. Access Yes! is a relatively small program and its funding is tied to the sale of hunting licenses. This might be problematic if sale of these license decrease overtime. Also, abundantly clear is that conserving and saving land in perpetuity is very expensive and somewhat limited. Clagstone Meadows cost nearly 10 million dollars to conserve and grant access on 13,000 acres. Other funding mechanisms are needed to encourage and incentivize landowners to grant access. Perhaps a system could be set up using property taxes. Those landowners wanting to close access to large tracts of undeveloped land could be taxed at a higher rate while those landowners supporting the right to public access could be given a large reduction.

Idaho should also examine whether access that has been allowed for generations should continue even with the sale of the property. The mechanism for ensuring access continues would probably require the legislature to pass a law. Is this needed and something Idahoans would support? Support is likely to grow, the more out of state interest locks up lands formerly accessible by Idahoans. If large tracts are to be closed down to access should the landowner demonstrate why this closure is needed? Or in other words should the new landowners demonstrate why the closure is needed more than maintaining the public access component. On much of the private timber lands in Idaho access has been granted for generations. Do we really

want to close down this access that people have been recreating on for generations just because a new out of state owner wishes to do so?

To prevent future closures Idaho needs to explore ways to move to collaborative governance model. It is clear to increase land access on undeveloped land in Idaho various stakeholders need to find solutions that will work for all parties involved, landowners (large and small), non-profit groups, state and federal agencies, recreationalists, and ultimately everyone involved. If groups feel left out of the decision-making process controversy and strife will result. Collaborative governance involves the government, community and private sectors communicating with each other and working together to achieve more than any one sector could achieve on its own (Ansell & Gash 543). Ways to increase communication among all stakeholders in Idaho need to be explored. Future research should examine where collaborative governance models have been effective and how these models can be adopted to Idaho and implemented with an understanding of Idaho's unique political situation.

Also, educational programs that teach people how to use public and private land responsibly need to be implemented in the state. Leave no trace and responsible land use programs can go along ways to ease landowners fears of the public using and damaging their land. The liberty to access land comes with a responsibility to treat the land with respect and find ways to limit harmful impacts. A key tenet of freedom to roam principles operating in every country centers around respectful land use. Programs to teach responsible land use need to be funded and developed. Doing this could go a long way to find a balance between landowners concerns to protect their property and recreationalist desire to access land.

Overall this research has demonstrated that land use and access is a controversial topic and something that will continue well into the future in Idaho. This dissertation has shown that

people need to pay attention to their rights, and how they are defined or something you found to be a right today could be gone tomorrow. Property rights are fundamental when discussing liberty and rights. However, many more rights exist simply than the right to exclude. Lockean ideals and the right to exclude are important but so are the rights to access and see wild places. Idahoan's need to be cognizant of their rights and liberties. With the land closure by D.F. Development and no longer being able to access unposted private property Idahoans have lost access to hundreds of thousands of acres they could access a few short years ago. The new trespass law was clearly controversial and a reason Governor Otter chose not to sign the legislation.

This loss of access is eroding democratic principles. Is locking up large tracts of land really what is in the best interest of everyday Idahoans? How do Idahoans benefit by being closed off from generational hunting and fishing grounds? As noted, freedom to roam has been allowed and practiced historically in the United States. The only way to change the worrisome trend of loss of access in Idaho is through education. We need to educate the public about freedom to roam principles and progressive property rights and also being good stewards of the land they access. Landowners should have the right to limit access when it damages or destroys property. Education and programs that encourage responsible land use are needed and can go a long way to ensure landowners and the recreational public have a positive relationship.

Alarmingly landownership in the United States is skewed to the wealthy. In 1978 the wealthiest Americans, or the top 1 percent, owned 48 percent of the private land by acreage. The top 5 percent owned 75 percent of private land (Geisler 242). Many large tracts of land in the west are being purchased and access restricted. Is this trend really what we want to see continue or does something like freedom to roam and progressive property rights ensure a level playing

field between the haves and the have nots? Perhaps we need to look at something other than the right to exclude on large tracts of undeveloped land. Idahoans and Americans deserve to access the wild places in the country. Without a concerted effort by many different stakeholder groups more land will be lost and with it go ideas of equality and democracy.

Future Research

Clearly multiple conflicts over land access in Idaho have come to the forefront of Idaho politics in the last several years. The passage of new trespass laws in July 2018 in Idaho have been extremely contentious. In addition, the D.F. Development controversy and locking Idahoans out of lands historically accessed has been extremely controversial. However, all individuals working with land access and conservation in Idaho cite private property as an important value to Idahoans. The ethos and philosophical premise of freedom to roam and expanding access was valued by all interviewed but overall all interviewees stressed that private property rights are extremely important in the state. All interviewed stated they hoped there would be some way to work with future landowners to ensure public access was continued if public access was allowed historically. What is clear, is that there is no rule of law in Idaho to prevent large landowners from closing access to millions of acres of timberlands currently allowing access in Idaho. As Idaho continues to grow in population, most likely closure of accessible land will continue as changes in ownership occur. Hoping that individuals or corporations selling the land will put public easements on the land before sale seems short sighted and naive if maintaining access to undeveloped land is a priority by various governmental agencies and non-profit groups. Formal mechanisms need to be examined for how to maintain public access on land that has been historically accessed for generations.

From one perspective, individuals' access to undeveloped land is a liberty that maintains freedom. Every time limits are placed on where the public can travel liberty is lost. Freedom to

roam is a principle that historically was granted in the United States and Idaho. It can be found in practice in many countries of the world. Ultimately, in the United States, freedom to roam is being lost as much of the land that is privatized restricts the access or freedom to roam. While property rights reign supreme in Idaho for all interviewees, questions remain over the right to exclude vs progressive property rights. If forced to pick between private property rights and the right to exclude, or ensuring land access continues on large tracts of land, historically granting access in Idaho, what philosophy would Idahoans support? Future research needs to survey Idahoans to determine which tenets of liberty Idahoans find most important. Should stakeholders be exploring mechanisms to keep these lands accessible, especially when access has historically been granted or is the right to exclude paramount in regards to property rights in Idaho?

In addition, freedom to roam research and surveys need to be expanded beyond Idaho. Idaho and many western states are unique because the large amounts of accessible public lands. Therefore, freedom to roam principles might be better suited in states that do not have large tracts of public land to access. Future research should address states where large tracts of undeveloped public land are not immediately available. For instance, is freedom to roam viewed more positively in a state like Nebraska where 99 percent of land in the state is privately owned? Or back east where private ownership is also more concentrated.

Idaho's Fish and Game Access Yes! Program is actively providing private landowners economic benefits who voluntarily open access to their land for fishing, hunting and recreation. The program is an important middle point to increasing land access on undeveloped land in Idaho. Future research needs to explore how the program is working, landowner satisfaction, recreationalist satisfaction, and funding mechanisms. Funding is a limiting factor especially for granting land access in perpetuity. What are additional funding mechanism to support incentive

based voluntary programs to expand land access on private land? For example, could property taxes incentives increase additional public access on private land, if landowners granting access received benefits for allowing access, whereas those choosing to limit access were forced to pay more.

In conclusion, land access issues in Idaho will undoubtedly remain in the forefront of Idaho politics for decades and probably much longer. Idaho is a uniquely beautiful place and the reason many people live in Idaho and are moving to the state is because of the ability to access wild country. Liberty is found in the ability to access these incredible spaces. Freedom to roam and respectful land use can go a long way to ensure this access remains intact for future generations. To truly protect land access in Idaho it will involve a concerted effort by many stakeholder groups. Rob Thornberry with Theodore Roosevelt Conservation Partnership sums up the issue succinctly by stressing, “we have to stand together as recreationalists, frankly we have to stand together as public land users” to ensure land remains open to the public across the west (Rob Thornberry Interview). Ultimately, future generations rely on the work stakeholder groups undertake today to protect future generations liberty and rights to access undeveloped land tomorrow.

Appendix A. Freedom to Roam Interview Questions

Do you [or your members] utilize undeveloped lands within Idaho? If so, how (for recreation...)?

Are you familiar with Freedom to Roam? How do you define the concept of Freedom to Roam?

Do you believe this type of concept is important in the US today? Why or why not?

If large tracts of undeveloped land have previously been managed for public use, should open use continue if a change in ownership occurs? Why or why not?

Thinking about Idaho, do you think freedom to roam policies are . . .

Needed? Why or Why not?

Feasible? Why or Why not?

What are potential problems you see if Idaho and other states try to codify Freedom to Roam principles?

Do you know about the Wilks brothers and D.F. Development controversy in Idaho? [no: done; yes: Will you give a brief explanation and your opinion on the situation?]

Do you know about the new trespass laws and penalties in Idaho? [No: done; Yes: what is your opinion?

{ At the end you can tell the person being interviewed about the Wilks case and trespass law, if they don't know about them. }

Possible Follow up questions

Do you view expanding access on private lands as part of your mission of conservation? Why or why not?

Do you think expanding freedom to roam principles in Idaho legislatively is feasible in Idaho? Why or why not?

What are the biggest problems/obstacles you see with expanding land access on private land?

Do you think expanding freedom to roam principles in Idaho legislatively is feasible in Idaho? Why or why not?

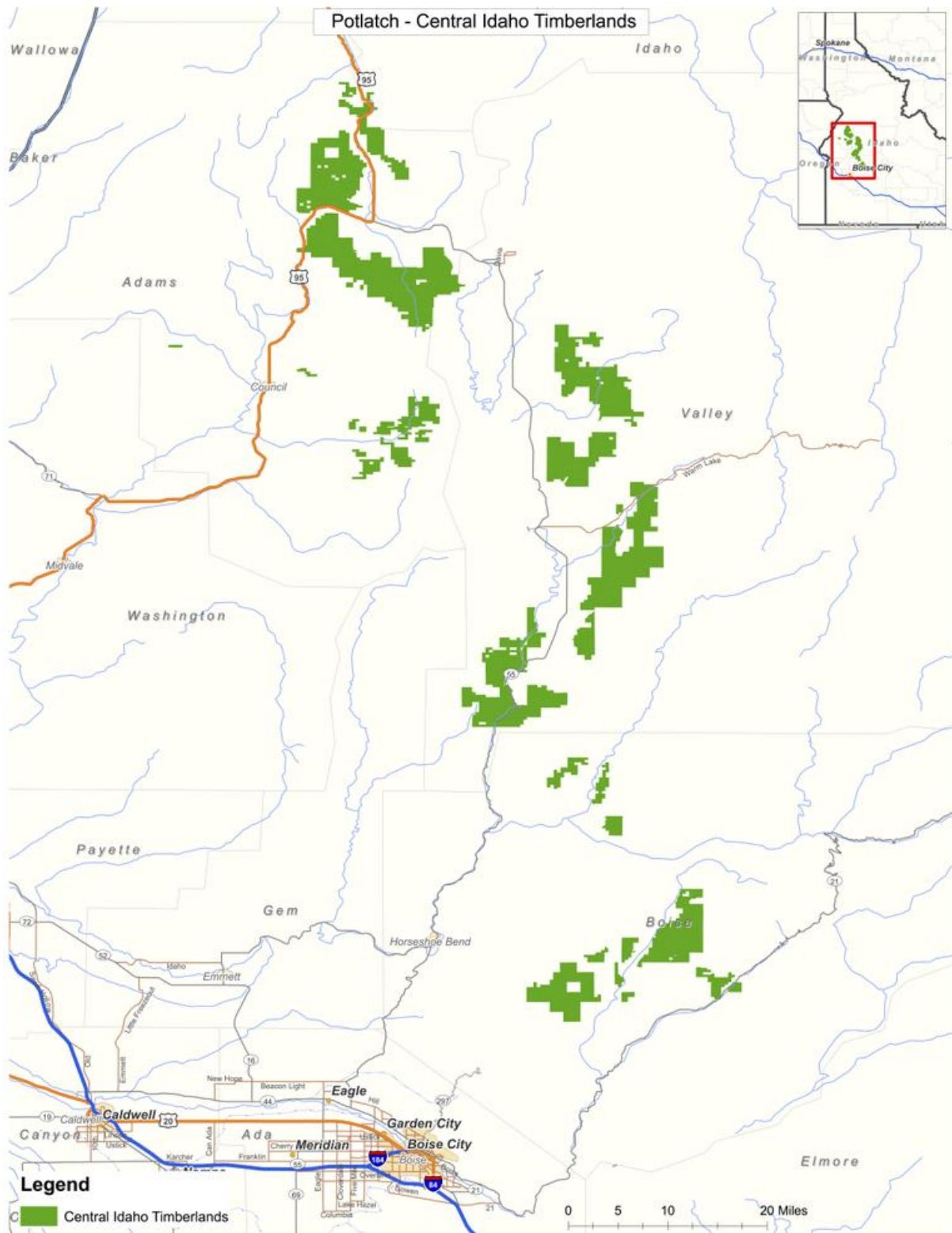
Are you familiar with Access Yes! And Large Tracts programs ran by Idaho Fish and Game? What is your opinion of the program and/or strengths/weaknesses you see?

Appendix B Golden Rules of Everyman's Right in Sweden

The 'golden rules' of allemansrätt, as described on the Swedish Environmental Protection Agency's website pages: 'What is the Right of Public Access' and 'The Right of Public Access – what is allowed?' (Adapted from SEPA 2010)

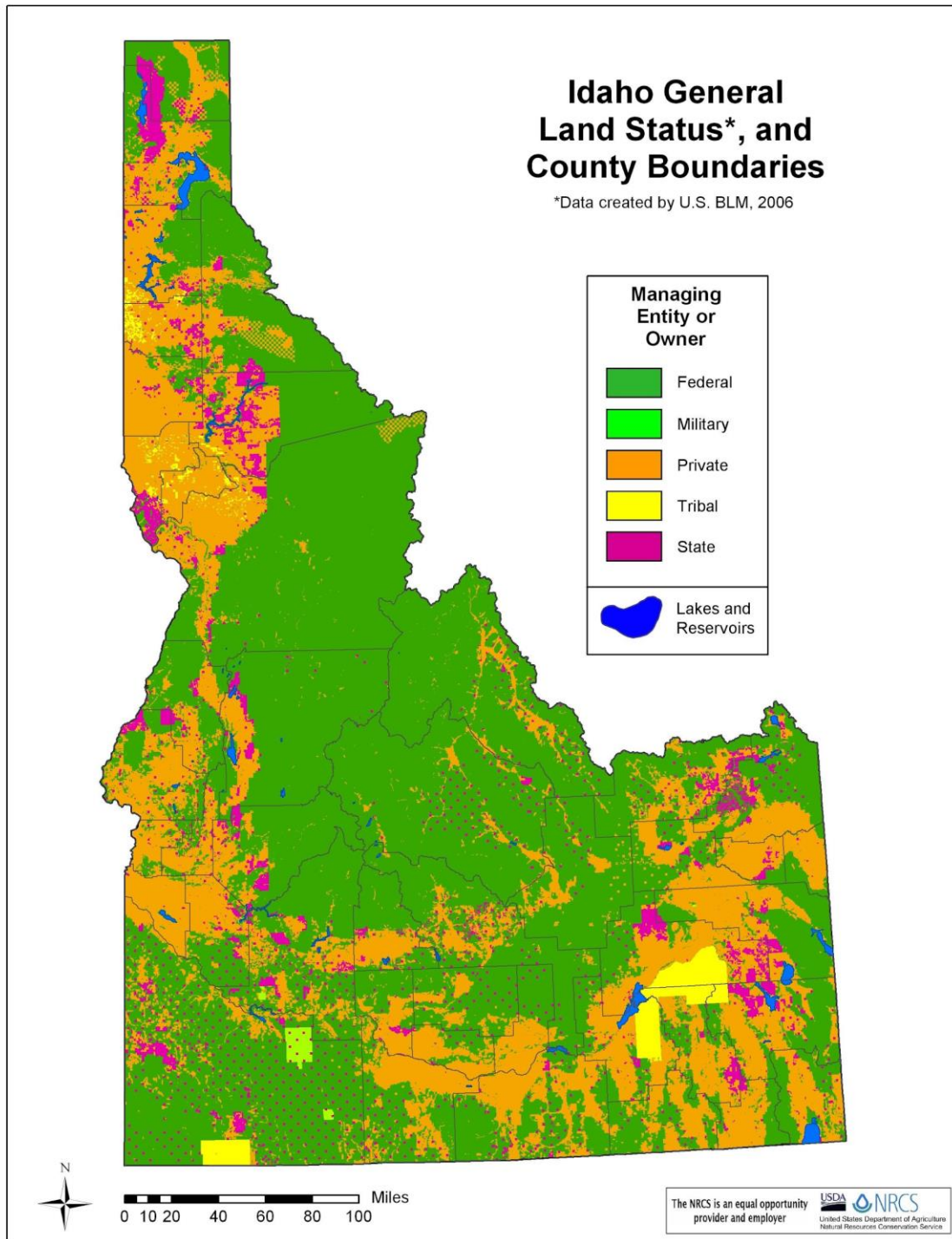
- The Right of Public Access is a unique right to roam freely in the countryside. But with the right come responsibilities – to take care of nature and wildlife and to show consideration for landowners and for other people enjoying the countryside. The Swedish EPA sums up the Right of Public Access in the phrase 'Don't disturb – Don't destroy.'
- The Right of Public Access makes everybody free to roam the Swedish countryside. But there are some things you must keep in mind when you are out walking, camping, climbing, picking flowers or doing something else in the countryside.
- You can walk or ski pretty much anywhere in the countryside. The exceptions are to ensure that you do not disturb and do not destroy.
- You may cycle across country and on private roads. However, be sure not to ride across the grounds of a house, on cultivated land or on ground that is easily damaged.
- You can ride freely in the countryside, as horse riding is included in the Right of Public Access. But choose your path carefully and avoid soft ground to prevent damage.
- The Right of Public Access does not cover hunting or fishing. However, it does affect them in important ways, since hunting and fishing are among Sweden's most popular leisure activities.
- You are free to pick flowers, berries and mushrooms in the countryside. But keep in mind that some plants are protected, meaning that they must not be picked.
- Dogs are of course welcome in the countryside. However, dog owners must observe strict rules in order to protect wildlife.
- You may light a fire in the country if conditions are safe. But while a campfire adds to the outdoor ambience, it is a cause of concern to landowners.
- You may pitch your tent for a night or two in the countryside as long as you don't disturb the landowner or cause damage to nature.
- The basic rule is that on weekdays you may stay for up to 24 hours in lay-bys and sign-posted parking areas along public roads. On weekends and public holidays, you may stay until the next weekday.
- The Right of Public Access applies both on land and water. You can swim, sail almost anywhere, moor your boat and spend a night or two on board.
- Landowners are not allowed to put up fences to keep people off land that is subject to the Right of Public Access.
- Private roads are most important for outdoor recreation and for our ability to actually make use of the Right of Public Access.
(Campion and Stephenson)

Appendix C - D.F. Development Lands in Idaho



The green areas are the former Potlatch lands in Central Idaho sold to the Wilks brothers.
POTLATCH CORP. IDAHO DEPARTMENT OF FISH AND GAME.

Appendix D. Idaho Land Distribution



United States Department of Agriculture. Natural Resources Conservation Service 1.

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