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This Land Is Your Land, This Land Is My Land: Allowing Third Party Standing to Address Environmental Harms on the Federal Public Lands

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This Land Is Your Land, This Land Is My Land: Allowing Third Party Standing to Address Environmental Harms on the Federal Public Lands

Daniel Pulver*

In Wilderness Society v. Kane County, the Tenth Circuit held that The Wilderness Society, a nonprofit focused on preserving wilderness, did not have standing to sue the county for infringing on the federal government’s property rights. The county asserted a right of way over the Grand Staircase Escalante National Monument and opened up that land to off-road vehicles in conflict with the Monument’s management plan. The Tenth Circuit held that The Wilderness Society had run afoul of the prudential standing prohibition on third party standing because it was suing to enforce the federal government’s property rights rather than its own. The issue of when an environmental organization has standing to represent the government’s rights on public land deserves a deeper analysis than the court’s brief summary. This Note will investigate the argument that The Wilderness Society and other environmental organizations can actually satisfy the requirements of third party standing to sue on the federal government’s behalf for violations on the public land resulting in environmental harms. These requirements include a genuine hindrance to the right-holder bringing suit and a close relationship between the right-holder and the party bringing suit. The Note will consider these requirements in the context of Revised Statute 2477 claims and through violations of oil and gas leases and grazing permits on the federal public land. The Note will argue that, although courts may not find third party standing in all such situations, the issue deserves a thorough analysis when it is implicated.

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INTRODUCTION

The United States government owns nearly 30 percent of the land area of
the United States, totaling almost 650 million acres, such that management
of government land can have widespread environmental impacts.1 The
government manages these lands for a variety of different uses, including
grazing, resource extraction, energy production, and motorized and non-
motorized recreation.2 The Bureau of Land Management (BLM) manages
much of this land,3 and does so under its “multiple use” management scheme.4

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Multiple use management is defined as “management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people. . . .”\(^5\) However, uses can sometimes be mutually exclusive in a specific area of the federal land. One classic example of competing uses is the ongoing conflict between off-road vehicle (ORV) users who enjoy the thrill of driving fast and rough through the landscape and hikers, and backpackers who enjoy the seclusion and tranquility of the wilderness. These uses create tension when they are allowed in the same area of federal land.

This conflict has been litigated in the courts in dozens of cases,\(^6\) most recently in the case of *Wilderness Society v. Kane County (Kane County)*.\(^7\) In *Kane County*, The Wilderness Society (TWS), a nonprofit focused on preserving wilderness, sued the county for infringing on the federal government’s property rights by asserting a Revised Statute 2477 (“R.S. 2477”) right of way over the Grand Staircase-Escalante National Monument.\(^8\) Congress passed R.S. 2477 in 1866, granting “right[s] of way for the construction of highways over public lands.”\(^9\) Although Congress originally intended these rights of way to facilitate transportation in the western states,\(^10\) states and counties alike now often claim them in order to open up protected federal lands to ORVs.\(^11\) Kane County used an alleged right-of-way to assert control over the Monument and open up that land to ORVs in opposition to the BLM’s management plan for the Monument.\(^12\) The Tenth Circuit held that TWS had run afoul of the prudential standing prohibition on third-party standing because it was suing to enforce the federal government’s property rights rather than its own.\(^13\) The court compared the federal government to a private landowner in whose land other parties have no protected interest.\(^14\)

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5. 43 U.S.C. § 1702(c).

6. E.g., Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004); Kane Cnty. v. United States, 597 F.3d 1129 (10th Cir. 2010); Kane Cnty. v. Salazar, 562 F.3d 1077 (10th Cir. 2009); San Juan Cnty. v. United States, 503 F.3d 1163 (10th Cir. 2007) (en banc); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125 (10th Cir. 2006); S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735 (10th Cir. 2005); Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991); Sierra Club v. Hodel, 848 F.2d 1068, 1101 (10th Cir. 1988), overruled by Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992).

7. Wilderness Soc’y v. Kane Cnty., 632 F.3d 1162 (10th Cir. 2011) (en banc).

8. Id.


11. See, e.g., *Kane Cnty.*, 632 F.3d at 1166.

12. Id.

13. Id. at 1171–72.

14. Id. at 1171.
Although TWS may wish the federal government to prevail in the dispute and preserve the wilderness against ORVs, the court held TWS has no right to sue on the government’s behalf.\textsuperscript{15}

Although the court’s ultimate decision may be correct, the court dismissed the claim as violating the prohibition on third-party standing with only a summary investigation and analysis of the doctrine.\textsuperscript{16} The issue of when an environmental organization has standing to represent the government’s rights on public land is complex and deserves deeper analysis. This Note argues that the court’s simple analogy between the federal government and private landowners is flawed because the federal government is inherently unlike other land owners. The government, as a representative of the people, holds land on behalf of the public; therefore, the public has an interest in the government’s land. The Court has previously allowed third-party standing when the litigant can show a genuine obstacle or hindrance to the right-holder’s ability to protect its own interest in court and a close relationship between the right-holder and the plaintiff.\textsuperscript{17} This Note uses the context of an environmental organization suing to enforce federal property rights to explore what obstacles the government may face in enforcing its own rights when it suffers an environmental harm and when certain parties may have a close relationship with the federal government. The Note focuses on lands managed by the BLM because these lands are managed for multiple uses and thus are the subject of more land conflicts than those managed primarily for a single use.\textsuperscript{18} This Note concludes by arguing that the court should have more thoroughly analyzed whether the federal government had a genuine obstacle to protecting its interests on public land and whether TWS has a close relationship with the government in this context that would enable third-party standing.

One major obstacle to the federal government asserting its property rights is the systematic political underrepresentation of conservation interests on the federal public land.\textsuperscript{19} The BLM allows many different uses on the public land according to the land management statutes set out by Congress.\textsuperscript{20} However, many of these uses are promoted by concentrated, wealthy interests who have a strong influence in political and governmental decision making.\textsuperscript{21} With direct

\begin{itemize}
\item \textsuperscript{15} See id.
\item \textsuperscript{16} See id. at 1170–72.
\item \textsuperscript{17} Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).
\item \textsuperscript{18} See, e.g., National Park Service Organic Act, 16 U.S.C. § 1 (2006) (describing the purpose of parkland as “to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations”).
\item \textsuperscript{19} See generally JOSÉPH L. SAX, DEFENDING THE ENVIRONMENT (1971).
\item \textsuperscript{20} See 43 U.S.C. § 1701(a)(7), (8), (12) (2006).
interests at stake and the money to aggressively lobby for them, these interests are able to shape what laws Congress passes and how the governing agency implements them. On the other hand, the public’s interest in environmental stewardship and conservation on the federal land is diffuse, and those who might be interested are difficult to organize. Although individuals may care deeply about conservation on federal land, the lack of a direct financial stake in conservation and the difficulty of organizing a broad and diffuse citizenry ensures that environmental interests are systematically underrepresented in the political system. These political outcomes are predicted and explained in depth through the doctrine of Public Choice Theory.

Another possible barrier to the government effectively litigating on its own behalf is the its lack of resources and personnel to effectively patrol and protect the vast expanses of the federal public land. Through management of its lands, the federal government enters into thousands of contracts, permits, leases, and agreements involving public lands. These contracts are issued for grazing, mining, oil and gas leasing, and various types of concessions and tourism enterprises. The government sets environmental quality controls in many of these agreements but does not always have the resources, manpower, and political will to monitor compliance for all these individual permits. This means that there are thousands of undetected and unprosecuted violations of leases, permits and contracts on the federal land that go undetected and unprosecuted.

This Note argues that, because of the close relationship between the government and its citizens, the obstacles of systematic environmental underrepresentation, and the inadequate oversight of the federal public lands, courts should allow third-party standing for citizens suing to enforce the federal government’s property rights on the federal public land, at least in the context of environmental harms. In the face of continued inaction on the part of the legislative push, pro-environmental groups spent a record $23.2 million on federal lobby efforts, more than twice their average for the last decade. Environment: Lobbying, 2009, OPENSECRETS.ORG, http://www.opensecrets.org/industries/lobbying.php?cycle=2009&ind=Q11 (last visited Apr. 15, 2012).


23. Id.

24. Id.


courts, Congress has the authority to waive prudential standing requirements\textsuperscript{27} and should consider doing so for parties suing to enforce the government’s rights on the public land to prevent environmental harms.

Allowing third-party standing in this context would allow private parties to sue to defend public land from a number of threats. Although not exhaustive, this Note focuses on two potential scenarios. First, as in \textit{Kane County}, private parties like TWS could sue to uphold federal property rights against R.S. 2477 claims, which constitute an ongoing and contentious issue. Second, private citizens could sue to enforce violations of terms regarding environmental protection in lease agreements, grazing permits, resource extraction agreements, and other permits and contracts that the government makes pursuant to its property rights on the federal public land. This would help ensure that permit and lease holders comply more fully with the environmental standards contained in their individual agreements. It would also authorize an army of private investigators, working to uproot unpermitted exploitation of the public domain. This proposal opens up a potentially powerful avenue for protection of environmental interests on federal public lands.

Finally, allowing TWS and other third parties to sue to enforce public rights on the public land would not open the floodgates to private litigation in an area where the government should bring suit. The hurdles for third-party standing, coupled with the barriers of the Article III standing requirements of injury, causation, and redressability, would allow only suits by parties with a direct stake in the outcome.

This Note begins with a short background of the federal public land and R.S. 2477 rights of way and a brief description of \textit{Kane County}. Next, the Note examines the ‘genuine hindrance’ and ‘close relationship’ requirements of third-party standing and how they may apply to environmental organizations suing to enforce the government’s property rights on the federal public land. The Note explores two situations where this issue might be raised: in R.S. 2477 claims like the one in \textit{Kane County}, and in violations of permit regulations dealing with environmental compliance on the public land. Finally, the Note examines how the courts could implement third-party standing in these cases and the possible effects of allowing these suits.

1. \textbf{BACKGROUND: THE PUBLIC LANDS AND THE PRUDENTIAL STANDING PROHIBITION ON THIRD PARTY STANDING}

In order to understand why certain groups may have a claim to third party standing on the federal public land, it is important to have a background of public land and some history of one of the main challenges to federal property rights on the federal public land—R.S. 2477 rights of way.

\textsuperscript{27} Warth v. Seldin, 422 U.S. 490, 501 (1975).
A. The Public Lands

The federal government owns almost one third of the land in the United States, with its authority over the federal public land originating in the Property Clause of the Constitution. The Property Clause states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Congress has exercised its authority by passing a multitude of statutes dictating how lands in federal ownership may be reserved, managed, used, or preserved. Many of these statutes also create administrative agencies and set broad mandates about how to manage the public lands; the majority of these public lands fall under the authority of the United States Forest Service (USFS) and BLM. Many of these statutes attempted to balance competing, often incompatible resource interests under the banner of ‘Multiple Use-Sustained Yield.’ These interests include energy development, livestock grazing, recreation, timber harvesting, and protection of natural, cultural, and historical resources. Despite the intent to facilitate these uses, extractive industries like mining and oil and gas exploration maintain a dominant

29. U.S. Const. art. IV, § 3, cl. 2.
30. Id.
32. Glicksman & Coggins, supra note 28, at 1–2. This Note will focus on the BLM lands, although the analysis is just as applicable to USFS Lands. The USFS has authority to administer National Forest lands “for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528 (2006). The USFS also issues special use permits for activities such as agriculture, recreation, and mining, provided the agency considers the public interest in making the decisions. Special Uses—About the Program, U.S. FOREST SERVICE, http://www.fs.fed.us/speciauses/special_about.shtml (last modified May 8, 2008). The USFS also shares authority with the BLM over mining operations on National Forest lands, see 16 U.S.C. § 472 (2006), and regulates grazing through a permit system, see 16 U.S.C. §§ 580k–580l (2006).
33. E.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. §1701(a)(7) (2006) (providing for “management . . . on the basis of multiple use and sustained yield unless otherwise specified by law”); Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 529 (“The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom.”); id. § 531(a) (“‘Multiple use’ means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.”); id. § 531(b) (“‘Sustained yield of the several products and services’ means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.”).
presence on the public lands managed by BLM and the Forest Service. Out of approximately 440 million acres managed by the Forest Service and BLM,\textsuperscript{15} federal coal leases alone cover 800,000 acres, and approximately 270 million acres are devoted partially or primarily to livestock grazing.\textsuperscript{36}

In 1976, Congress created new organic acts for the BLM and the USFS, which shifted emphasis away from commodity production and toward the protection of environmental values.\textsuperscript{37} Under the Federal Land Policy and Management Act (FLPMA), the BLM must “protect the quality of . . . environmental, air and atmospheric, [and] water resource . . . values” on public lands.\textsuperscript{38} The multiple-use mandate of FLPMA differs from MUSYA because FLPMA also requires the BLM to prevent “impairment of the productivity of the land and the quality of the environment,”\textsuperscript{39} and to “weigh long-term benefits to the public against short-term benefits.”\textsuperscript{40}

To shape the contours of these broad multiple-use mandates, the BLM has promulgated regulations for permitting specific activities, including grazing,\textsuperscript{41} forestry,\textsuperscript{42} and oil and gas drilling.\textsuperscript{43} The BLM and other federal land management agencies must also make permitting decisions in accordance with resource specific statutes including the Taylor Grazing Act,\textsuperscript{44} the Public Rangelands Improvement Act,\textsuperscript{45} the General Mining Law of 1872,\textsuperscript{46} and the Multiple Surface Use Act of 1955.\textsuperscript{47}

\section*{B. R.S. 2477 Rights of Way}

One conflict that arises on the federal land in the course of balancing multiple uses stems from the push by several states and counties in the southwest to open federal land within their jurisdiction to ORVs by claiming R.S. 2477 rights of way. R.S. 2477 granted “a right of way for the construction of highways over public lands, not reserved for public uses.”\textsuperscript{48} The Act facilitates expansion of settlements in the western United States by developing

\begin{thebibliography}{99}


\bibitem{footnote36} GLICKSMAN & COGGINS, \textit{supra} note 28, at 9–10.


\bibitem{footnote39} \textit{Id.} § 1702(c).

\bibitem{footnote40} \textit{Id.} § 1712(c)(8).

\bibitem{footnote41} 43 C.F.R. §§ 4100.0-1 to 4610.5 (2011).

\bibitem{footnote42} \textit{Id.} §§ 5003.1–5511.5.

\bibitem{footnote43} \textit{Id.} §§ 3100.0-3 to 3192.18.

\bibitem{footnote44} 43 U.S.C. § 315.

\bibitem{footnote45} \textit{Id.} §§ 1901–08.


\bibitem{footnote47} \textit{Id.} §§ 611–15.

a system of roadways.\textsuperscript{49} Establishing a right of way across federal land did not require administrative formality. Rather, “acts . . . sufficient to manifest an intent to accept the congressional offer” were sufficient to gain a right of way.\textsuperscript{50} Although FLPLMA repealed the Act in 1976, previously established rights of way were grandfathered in,\textsuperscript{51} and are now being used by states and counties to challenge federal control and property rights over federal public land.\textsuperscript{52}

Grants under R.S. 2477 are only for highway construction; therefore, the definition of “construction” and “highway” are crucial to R.S. 2477 litigation.\textsuperscript{53} Proponents of an expansive definition claim R.S. 2477 rights of way for areas that are something less than full roads, such as cleared paths, vehicle tracks, or dry washes.\textsuperscript{54} Opponents of R.S. 2477 argue for a narrower interpretation to restrict recognition of these claims.\textsuperscript{55}

Under the common law of easements, the use of the underlying land is subordinate to the R.S. 2477 rights of way easements.\textsuperscript{56} These rights of way do not grant title to the road or grant fee simple to the easement-holder; instead, they grant specific use rights.\textsuperscript{57} The scope of the right of way is limited to the original use for which the right of way was granted, but may be improved by what is “reasonable and necessary” to accommodate the original use.\textsuperscript{58} In this case, it was improved to facilitate transportation in the western United States.\textsuperscript{59}

State and local governments often use these rights of way to open up protected federal lands to ORVs.\textsuperscript{60}

Conservationists and federal land managers worry that vehicle use in inappropriate locations can permanently scar the land, destroy solitude, impair wilderness, endanger archeological and natural features, and

\begin{footnotes}
\footnote{50. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 754 (10th Cir. 2005).}
\footnote{51. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, §701(a), 90 Stat. 2743, 2786 (“Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use authorization existing on the date of approval of this Act.”).}
\footnote{52. See e.g., Bader, supra note 10, at 488 (noting that, as of 1994, “Alaska is currently asserting its R.S. 2477 interests”); WILDERNESS SOC’Y, R.S. 2477: THE CONTROVERSIAL THREAT THAT COULD CARVE HIGHWAYS AND FORCE OFF-ROAD VEHICLES INTO NATIONAL PARKS, BUREAU OF LAND MANAGEMENT LANDS, NATIONAL FORESTS AND WILDLIFE REFUGES 60, available at http://wilderness.org/files/RS-2477-CBB-09.pdf (noting claims by the state of Alaska and two California counties).}
\footnote{54. S. Utah Wilderness Alliance, 425 F.3d at 742.}
\footnote{55. Suthers, supra note 53, at 114.}
\footnote{56. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (2000).}
\footnote{57. S. Utah Wilderness Alliance, 425 F.3d at 747.}
\footnote{58. See e.g. id. at 746; Sierra Club v. Lujan, 949 F.2d 362, 369 (10th Cir. 1991).}
\footnote{59. Bader, supra note 10, at 486–87.}
\footnote{60. See WILDERNESS SOC’Y, supra note 52, at 60.}
\end{footnotes}
generally make it difficult or impossible for land managers to carry out their statutory duties to protect the land from “unnecessary or undue degradation.”

The concern is that too loose an interpretation of R.S. 2477 will conjure into existence rights of way where none existed before, turning every path, vehicle track, or dry wash in southern Utah into a potential route for cars, jeeps, or ORVs. Counties, on the other hand, assert that R.S. 2477 rights of way are major components of transportation systems of western states.

To claim an R.S. 2477 right of way, a party must bring suit under the Quiet Title Act and challenge the United States’ title to real property. Outside of the courts, BLM may make informal, non-binding, administrative determinations about R.S. 2477 claims for its own land-use planning and management purposes, although it does not have the authority to make binding determinations on the validity of R.S. 2477 right-of-way claims. In 2005, BLM issued an instruction memorandum establishing procedures for all states and counties to negotiate agreements with the Department of the Interior to ease the recognition of RS 2477 rights-of-way. However, as of February 2009, the BLM will not process or review any claims under R.S. 2477 pending further review and direction from the Secretary of the Interior.

II. WILDERNESS SOCIETY V. KANE COUNTY, UTAH

The latest case in the ongoing R.S. 2477 battle between states, localities, and the federal government began in 2003, when Kane County requested BLM to “remove its road signs closing certain routes [to off road vehicles (ORVs)] in

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61. S. Utah Wilderness Alliance, 425 F.3d at 742 (citing Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, §302(b), 90 Stat. 2743, 2762–63; 43 U.S.C. § 1732(b)). BLM allows nearly uncontrolled ORV use in areas that have known but unrecorded archeological resources, putting these resources at risk of vandalism and unintentional damage. ORVs can cause damage to fragile desert soils, streams, vegetation, and wildlife. Impacts include churning of soils, distribution of non-native invasive plants, and increased erosion and runoff, which put rare plant, wildlife, and fish species at risk.

62. S. Utah Wilderness Alliance, 425 F.3d at 742.

63. Id. at 742.


the Grand Staircase Escalante National Monument."\(^{68}\) The Monument’s ‘land-management plan closed off a number of routes to off-road vehicles, but stated that it would respect valid R.S. 2477 rights of way.\(^{69}\) After the county suggested “temporary solutions” to no avail, Kane County removed BLM signs prohibiting ORVs and put up its own signs allowing ORV use.\(^{70}\) In 2005, Kane County passed an ordinance invoking its R.S. 2477 rights and opening up county roads, including those within the National Monument, to ORVs.\(^{71}\) Kane County later rescinded the ordinance and removed its signs after the start of litigation.\(^{72}\)

In 2005, TWS brought suit to declare the ordinance and the county’s signs on federal land unconstitutional and obtain an injunction against similar future action.\(^{73}\) The district court granted TWS’s motion for summary judgment and enjoined the county from similar actions, reasoning that the County’s signage and ordinance violated the Supremacy Clause of the Constitution.\(^{74}\) Kane County appealed to a panel from the Tenth Circuit that affirmed the district court’s decision for similar reasoning.\(^{75}\) The Tenth Circuit then granted rehearing en banc and reversed, holding that TWS lacked prudential standing.\(^{76}\)

The en banc court focused on the prudential barrier against asserting the legal rights of others.\(^{77}\) The court held that TWS asserted the property rights of the government, and did not assert a valid right to relief of its own.\(^{78}\) The court found that the Supremacy Clause did not give TWS a cause of action, and neither did its conservation interests.\(^{79}\) Instead, the court interpreted TWS’s goal as enforcing the superiority of the federal government’s property claim in the disputed rights of way.\(^{80}\) The court then made an analogy to a property dispute between two landowners, one of whom is tidy and the other messy.\(^{81}\) An adjacent neighbor may wish that the tidy landowner prevails, and the neighbor may be affected by the outcome; however, the neighbor does not have standing to sue in defense of the tidy neighbor’s property rights.\(^{82}\) So too, the court reasoned, TWS may wish that the federal government prevails in the property dispute, but it has no defensible right of its own.\(^{83}\) After finding no “countervailing considerations” that outweigh the judiciary’s typical usual

68.  *Kane Cnty.*, 632 F.3d at 1166.
69.  *Id.*
70.  *Id.*
71.  *Id.*
72.  *Id.*
73.  *Id.* at 1167.
74.  *Id.* at 1167–68.
75.  *Id.* at 1165.
76.  *Id.*
77.  *Id.* at 1170–71.
78.  *Id.* at 1170.
79.  *Id.* at 1171–72.
80.  *Id.* at 1171.
81.  *Id.*
82.  *Id.*
83.  *Id.*
disinclination to exercise its power in third-party-rights litigation, the court vacated the district court’s summary judgment and remanded the case.84

III. THE PRUDENTIAL STANDING PROHIBITION ON THIRD PARTY STANDING

Although the court in Kane County gave the doctrine of third-party standing only passing analysis, the Supreme Court has considered the issue of allowing third parties to sue in lieu of the rights holder in a number of situations. Standing is a preliminary jurisdictional requirement applied to every claim in federal court, in essence asking whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.85 The purpose of standing requirements is to limit the role of the judiciary.86 Federal courts may exercise power only “in the last resort, and as a necessity.”87 The doctrine of standing has constitutional and prudential prongs.88 Constitutional standing limits arise from the Article III “‘cases and controversies’” justiciability requirement.89 To have standing, a party must meet three requirements.90 First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent . . . .”91 Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”92 Finally, the court must likely be able to redress the injury “by a favorable decision.”93

Apart from these minimum constitutional mandates, the Supreme Court has recognized prudential standing requirements, which are judicially imposed limits on who may sue.94 Like their constitutional counterparts, prudential requirements are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”95 One of these prudential standing limitations is that the plaintiff must generally assert its own legal rights and interests, and cannot rest a claim for relief on the legal rights or interests of third parties.96

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84. Id. at 1172, 1174.
86. See Allen v. Wright, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).
87. Id.
89. U.S. Const. art. III, § 2.
90. Lujan, 504 U.S. at 560.
91. Id. (internal quotations and citations omitted).
93. Id. (quoting Simon, 426 U.S. at 38, 43).
95. Id. at 498.
96. Id. at 499.
There are two main justifications for the prudential bar against third-party standing. First, the courts should not adjudicate such rights unnecessarily, and it may be that, in fact, the actual holders of those rights do not wish to assert them or that the outcome of the litigation will not truly affect their enjoyment of their.97 Second, parties themselves will usually be the best proponents of their own rights.98 Our judicial system is based in part on effective advocacy, and courts prefer to interpret legal rights only when the most effective advocates of those rights are before them. The holders of the rights may also prefer to litigate the issue themselves, as they will be bound by the courts’ decisions under the doctrine of stare decisis either way.99

Like any general rule, however, the courts should not apply the prohibition against third-party standing where its underlying justifications are absent. The Court has not treated this prohibition as absolute, recognizing that there may be circumstances where it is “necessary to grant a third party standing to a party to assert the rights of another.”100 A party seeking third-party standing must make two additional showings.101 There must be some “hindrance” to the possessor’s ability to protect his own interests” and the party claiming standing must have a “close relationship” with the right holder.102 Essentially, the court asks if the right holder is in a position to effectively represent their rights, and if they are not, examines whether the third party can serve as an effective substitute.

A. Genuine Hindrance

If there is some genuine obstacle to a party asserting its rights, then the court will be more willing to allow a proxy to take their place.103 The standard for what suffices as a genuine obstacle varies from case to case, ranging from “difficult if not impossible” to bring suit,104 to merely a low “likelihood and ability of the third parties . . . to assert their own rights.”105 In Powers v. Ohio, the Court found a hindrance based on the fact that an excluded juror was unlikely to bring suit because of the difficulties of proof and the large cost of, and very low incentive for, litigation.106 This practical approach considered the likelihood of a right holder bringing suit is a far cry from requiring an absolute bar against a third party asserting its own rights. The difference between the

98. Id.
99. Id. at 114.
101. Id.
102. Id. (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)) (internal quotation marks omitted).
104. Barrows v. Jackson, 346 U.S. 249, 257 (1953). The white homeowner in the case was sued for breaching a racially restrictive covenant (of the kind declared unconstitutional in Shelley v. Kraemer, 334 U.S. 1 (1948)) when the homeowner sold the house to a black family. Id. at 251–52. Because the black family was not a party to the contract or the suit, it was unable to assert its own rights. Id. at 257.
106. Id.
“likelihood” test and the absolute bar test illustrates how loosely and inconsistently the courts have interpreted this prong over the years.  

B. Close Relationship

If there is a genuine hindrance to the rights holder asserting his or her rights, the court will investigate whether there is a “close relationship” between the rights holder and the third party. When considering the closeness of the relationship between the litigant and the rights holder, the Court considers whether their interests are aligned. The Court will find a close relationship if the litigant’s own interests are linked to the third party’s rights, so that the litigant has a personal stake in the matter. The third party must be nearly as effective an advocate as the rights holder would be. In essence, before the court grants a plaintiff third-party standing, the court reassures itself that the plaintiff has a strong interest in the third party’s rights and that the plaintiff will be an effective representative of those rights.

The Court has found a variety of different relationships to be sufficient to satisfy this requirement, articulating different standards for what constituted a “close relationship.” In these cases, the Court has emphasized that the rights of the third parties were “likely to be diluted or adversely affected” if they could not be asserted in such a case. Outside of this rationale, however, the Court does not seem to follow any strict or consistent guidelines for when a plaintiff had shown a sufficiently close relationship with the third party to warrant standing. The holding in many of these cases appears to be more outcome oriented, rather than a product of consistent judicial reasoning.

Congress also has the power to bypass bars to prudential standing through legislation, either expressly or by clear implication. “Of course, Article III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.” As long as the plaintiff satisfies the injury requirement, “persons

110. Singleton, 428 U.S. at 115.
111. See Wallace, supra note 107, at 1384–89.
113. See Wallace, supra note 107, at 1383–89; see also Barrows, 346 U.S. at 254–58 (holding that white land sellers have standing to litigate the constitutional rights of potential black purchasers).
114. See Wallace, supra note 107, at 1389. However, the author argues that the Court’s ruling in Kowalski, as it applies to suits brought in federal courts by abortion providers and abortion-performing doctors who assert the interests of their patients, corrects this weakness in the Court’s doctrine. Id.
to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights and interests of others . . . .” 117

IV. THE CASE FOR THIRD-PARTY STANDING FOR PRIVATE PARTIES TO SUE ON BEHALF OF THE GOVERNMENT WHEN IT SUFFERS ENVIRONMENTAL HARMs ON THE FEDERAL PUBLIC LAND

This Note argues that the Tenth Circuit erred in dismissing TWS for lack of standing without conducting a thorough analysis. There are genuine obstacles to the federal government enforcing its property rights on the federal public land in the face of environmental harms. Two such obstacles are a systematic underrepresentation of environmental interests on the public land, and the under-resourcing and under-staffing of federal land management agencies. Secondly, TWS and other similarly situated groups may have a close relationship with the federal government, at least as applied to environmental harms on the federal public land.

A. Hindrances to the Federal Government Bringing Suit: Environmental Interests Are Systematically Underrepresented on the Federal Public Land

For TWS to gain third party standing, there must be a genuine obstacle or hindrance to the government asserting its own rights. Although there is no legal obstacle to the government asserting its rights in most cases, there are two plausible structural and systemic stumbling blocks that prevent the federal government from bringing suit to enforce property challenges on the federal public land that result in environmental harms. The first is that the political structure of decision making on the federal lands systematically under-represents environmental and preservation interests.

Because the federal government manages public land with an eye to the interests of the people, it is bound to give effect to the large array of diverse uses, all within the broad ambit of “multiple use.” However, some interests are so effectively organized, centralized, and monetized that they command a disproportionate amount of representation in the political system. 118 Resource extractors and to a lesser extent motorized vehicle users represent a small, highly interested section of the general population that realize concentrated benefits from land use. 119 With direct interests at stake and the money to aggressively lobby for them, these interests are able to shape what laws Congress passes and how the governing agency implements them. 120

On the other hand, the public’s interest in environmental stewardship and conservation management choices on the federal land is diffuse and difficult to organize. 121 Although individuals may care deeply about conservation on

117. Id.
118. Blumm, supra note 22, at 407.
119. See id.
120. Id. at 418.
121. Id.
federal land, the lack of a direct financial stake in conservation and the
difficulty of organizing a broad and diffuse citizenry ensures that
environmental interests are systematically underrepresented in the political
system.122 Because of this imbalance, federal land management regimes that
require multiple uses will systematically under-represent environmental
interests. In his seminal article, Professor Michael Blumm explains this
discrepancy using the doctrine of Public Choice Theory.123

“‘Public [C]hoice’ [T]heory predicts that small, well-organized special
interest groups will exert a disproportionate influence on policymaking” and
implementation.124 In the framework of public choice theory, “legislators are
self-serving individuals whose chief interest is not the fostering of the public’s
interests, but rather of their own reelection,” turning the legislature into “a
playground for special interests.”125 “Consequently, the general public interest
is inevitably and persistently sacrificed due to the power of organized special
interests [that] attempt to obtain economic benefits for themselves through
government” policies that bestow disproportionate benefits on them.126 “Since
any single person’s efforts will inevitably produce small effects, a self-
interested and rational person in a democracy will choose to do nothing and
instead take a ‘free ride’ on the efforts of others.”127 Because of this, “organizing
large numbers of individuals seeking broadly dispersed public goods [is]
extremely difficult, and . . . political activity [is] dominated by small
special interest groups.”128

Statutes that call for management of the land for multiple uses, including
resource extraction, recreation, and conservation govern the vast majority of
federal land, including the lands administered by the USFS and BLM.129
Multiple-use management purportedly allows simultaneous production of
compatible resources through sound land use planning.130 While this language
seems to strike a balance, in reality it contains few hard standards and leaves
land-management agencies vulnerable to pressure from local commodity
interest groups.131

122. Id.
123. See generally id.
124. Id. at 407. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE:
A CRITICAL INTRODUCTION 12–37 (1991); Daniel A. Farber, Democracy and Disgust: Reflections on
Public Choice, 65 CHI.-KENT L. REV. 161 (1989); Jerry L. Mashaw, The Economics of Politics and the
125. Blumm, supra note 22, at 416 (citing FARBER & FRICKEY, supra note 124, at 12–37).
126. Id. at 417 (citing FARBER & FRICKEY, supra note 124, at 34).
127. Id. at 418.
128. Id. (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE
THEORY OF GROUPS 13–16, 126–29 (1965)).
and Management Act of 1976, 43 U.S.C. § 1701(a)(7) (2006); GLICKSMAN & COGGINS, supra note 28,
at 1–2, 190.
130. See Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 531(a); Federal Land Policy and
131. See Blumm, supra note 22, at 419, 421, 426–27.
This political asymmetry is likely to inhibit aggressive government enforcement of property rights dealing with environmental protection on federal public land. If the government systematically under-represents environmental interests because of a fundamental imbalance of power, there will be times when the government should be enforcing its rights against environmental harms but is essentially unable to do so.

The public choice theory issues may not be a relevant or convincing hindrance to the government in every case. There may be certain contexts when courts find that environmental interests are sufficiently served and there is no hindrance to the government bringing suit. Oftentimes, environmental organizations can effectively convince the government and the general public to make pro-environmental choices on the federal public land. For example, in *Kane County*, the federal government was at least negotiating to make Kane County rescind its R.S. 2477 claims in an effort to protect the federal public land from environmental harm.132 However, other conservation-minded parties trying to bring third-party suits may have a strong argument that the disproportionate influence of extractive use interests presents a genuine hindrance to the government enforcing its property rights on the federal public land.


A second possible hindrance to the government enforcing its own property rights stems from the first. For the same reasons that environmental interests are systematically underrepresented, the same interests may be systematically under-enforced. Political asymmetries might cause the federal government to declare strong environmental policies but then fail to adequately enforce them.133 Enforcement of permits may often get pushed to a lower priority in the face of political pressures to increase turn-around time for issuing permits or performing other tasks.134 There are many different actors on the federal land, and the government has thousands of contracts with these actors, from grazing permits to leasing and royalty agreements for mining and oil and gas drilling.135 These agreements call for payment of royalties and compliance with

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132. See Wilderness Soc’y v. Kane Cnty., 632 F.3d 1162, 1176 (10th Cir. 2011) (en banc).
environmental conditions and safety regulations. Two examples, cattle grazing and oil and gas leasing, demonstrate how the government does not effectively monitor and enforce the terms of existing agreements for use of the federal land.

1. Cattle Grazing

The BLM supervises livestock grazing on 157 million of the 245 million acres of public lands it manages. Cattle grazing on the federal public land is managed and conditioned through permits. The Taylor Grazing Act of 1934 authorizes the Secretary of the Interior to create grazing districts on public lands and to issue permits so as to “preserve the land and its resources from destruction or unnecessary injury.” Under FLPMA and the Taylor Grazing Act, BLM has the authority to issue permits specifying the number of animals to be grazed, and may reexamine conditions on the range and adjust the amount or other aspects of grazing use. The terms and conditions for grazing on BLM-managed lands, such as stipulations on forage use and season of use, are set forth in the permits and leases issued by the BLM to public land ranchers. The BLM administers nearly eighteen thousand permits and leases held by ranchers who graze their livestock, mostly cattle and sheep, at least part of the year on more than twenty-one thousand allotments under BLM management.

The BLM manages livestock grazing to maintain public land health using rangeland health standards and guidelines, which the BLM developed in accordance with FLPMA and the Public Rangelands Improvement Act of 1978. These standards describe specific conditions needed for public land health, such as the presence of stream bank vegetation and adequate canopy and ground cover. These standards are achieved through specific techniques laid out in BLM guidelines, such as seed dissemination and periodic rest or deferment from grazing in specific allotments during critical growth periods. These standards, as well as the amount of grazing allowed per district, are outlined in the individual permits granted to ranchers. Any United States

136. To achieve desired conditions, BLM uses rangeland health standards and guidelines. Standards describe specific conditions needed for public land health, such as the presence of streambank vegetation and adequate canopy and ground cover. Guidelines are the management techniques designed to achieve or maintain healthy public lands, as defined by the standards. These techniques include such methods as seed dissemination and periodic rest or deferment from grazing in specific allotments during critical growth periods. Grazing Fact Sheet, supra note 135.

137. Id.


139. Id. § 1752(e) (Federal Land Policy and Management Act); 43 U.S.C. § 315 (Taylor Grazing Act).

140. Grazing Fact Sheet, supra note 135.

141. Id.


143. Grazing Fact Sheet, supra note 135.

144. Id.

145. Id.
citizen or licensed business can apply for a BLM grazing permit or lease as long as they buy or control nearby private property (known as “base property”), or acquire property with the capability to serve as base property and then apply to the BLM to transfer the preference for grazing privileges from an existing base property to the acquired property.146

The General Accounting Office (GAO) has compiled a report that finds that the BLM does not have the resources to adequately enforce the grazing permits it issues.147 In one study, the GAO found that the BLM rarely or never visited many rangeland allotments.148 In a recent report, the BLM had monitored only 12,500 allotments of 21,300, leaving almost half of all allotments unmonitored.149 The BLM has no systematic approach for detecting grazing trespass.150 Also, although the BLM has substantial authority to penalize violators, it has been decidedly lenient in assessing penalties when it does find violations.151 Therefore, ranchers have little incentive to comply with permit limitations.

2. Oil and Gas Leases

Oil and gas leases are another use of the federal land requiring a permit. In 2011, there were 49,173 individual leases spanning 38,463,410 acres of federal public land.152 These leases grant the lessee the right to “explore, drill for, extract, remove, and dispose of oil and gas deposits” that may be found in the leased lands.153 “The lease itself is a form of contract, the provisions of which can be used for environmental protection and other societal goals.”154 The BLM grants the leases on the condition that the lessee will obtain BLM approval before conducting any surface-disturbing activities.155 BLM approval requires protection of cultural resources, endangered species, riparian and wetland areas, erosion control, and other stipulations based on the

146. Id.
147. E.g., GAO, RANGELAND, supra note 26.
148. Id. at 3.
150. GAO, RANGELAND, supra note 26, at 4.
151. Id. at 5–8.
The BLM issued minerals management regulations designed to “promote [mine] operating practices which will avoid, minimize or correct damage to the environment [including] land, water and air.”157 Additionally, developers of mineral resources on the public lands must “take such action as may be needed to minimize or prevent adverse impact upon plants, fish, and wildlife, including threatened or endangered species, and their habitat which may be affected by the operations.”158

BLM performs thousands of inspections each year on oil and gas leases. In 2011, “BLM inspectors made more than 33,200 inspections of lease sites.”159 “In the past four years . . . the number of inspections has risen more than [40] percent, with environmental inspections rising from [twelve thousand] to [almost twenty thousand].”160 However, it is unclear whether this increase in inspections is sufficient to completely enforce the terms of each of the fifty-thousand-plus permits. BLM’s ability to meet its environmental mitigation responsibilities for oil and gas development has been reduced by a dramatic increase in oil and gas operations on federal lands in the past decade.161 Nationwide, the total number of drilling permits approved by BLM more than tripled from 1999 to 2004.162 BLM officials in five out of the eight field offices that GAO visited explained that, as a result of the increases in drilling permit workloads, staff had to devote increased time to processing drilling permits, leaving less time for mitigation activities such as environmental inspections and idle-well reviews.163 The most significant impact of the policies to “expedite and manage oil and gas development was the increased emphasis that some of these policies placed on processing permits, which in turn resulted in shifting staff responsibilities away from” environmental and cultural mitigation activities.164

Because there is so much federal land and so many actors using it in different ways subject to different permits and agreements, the federal government could not possibly completely enforce its property rights. Furthermore, an increase in workloads of already beleaguered staff means that officials will have even less time to monitor permitees’ environmental compliance.

This hurdle may also apply to R.S. 2477 claims that go unreported. For the same reasons that land management agencies fail to detect permit violations, they may also overlook counties that are clandestinely opening federal land to

156. Id. at 9–10.
158. Id. § 3802.3-2(e).
160. Id.
161. GAO, OIL AND GAS, supra note 26 at 17.
162. Id.
163. Id. at 14–15, 17 n.28, 22–24, 31–32.
164. Id. at cover page 2 (“What GAO Found”).
ORVs. The same requirements of time and manpower apply to discovering hidden ORV sites, as they do to monitoring permit holders on the federal land. However, when states and counties make a political statement by conspicuously asserting an R.S. 2477 claim, the federal government may not need to expend very many resources in order find out about it. Therefore, this hindrance may not always apply.

Courts addressing the issue of third-party standing for those asserting the government’s rights may plausibly find it difficult to believe that there are real hindrances to the federal government bringing suit when it wants. The federal government is vast, sophisticated, and relatively well funded compared to other parties who have very concrete barriers to filing suit. In prior cases, barriers such as financial inability or a lack of sophistication were sufficient to show a hindrance; however, there is a strong argument that political and systemic barriers are just as effective deterrents in keeping the government out of court. The environmental interests of the public are systematically underrepresented and their enforcement is understaffed and underfunded. These are hindrances as real as lack of money or lack of sophistication, and allowing these suits fits snugly into the existing paradigm of exceptions to the third-party standing doctrine.


Although the Supreme Court has never considered whether the relationship between the federal government and its citizens constitutes a “‘close relationship’” for the purpose of third-party standing, 165 there is a strong case to be made for it in the context of an environmental organization suing to enforce property rights on the federal public land in the face of environmental harms.

The federal government manages the public land for the benefit of the public. This sentiment is reflected in numerous organic acts and other federal directions for management of the federal public lands. One early example is the letter the Roosevelt administration sent to Gifford Pinchot, Chief Forester in the Bureau of Forestry, in 1905 concerning the management of the reserves and expressing the philosophy of federal public land agencies throughout most of the twentieth century. 166 The letter stated that “[i]n the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies.” 167 Likewise, the National

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165. Westlaw and Lexis searches for the search string “third party standing’ and ‘government’ or ‘united states’” of the digest and headnotes yielded no relevant caselaw. Neither did a similar search under WestlawNext.


167. Id.
Park Service Organic Act of 1916 states that the park system should be “preserved and managed for the benefit and inspiration of all the people of the United States.”

The flurry of environmental legislation in the 1960s and ‘70s expressed the same sentiment. The Wilderness Act of 1964 “establish[ed] a National Wilderness Preservation System for the permanent good of the whole people.” Most importantly, FLPMA set up a multiple-use system of managing the public lands, defined as “management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people.”

Therefore, every American has a statutory interest in the management of the federal public land and the government has a self-imposed obligation to manage the land for the best use of the people, as laid out in various statutes passed by their elected representatives. Although it may be a stretch to argue that this gives all citizens the requisite close relationship (for third-party standing) with the government, it at least creates one with citizens and organizations that have a demonstrated interest in use of the federal public lands, either for use or preservation.

This relationship is comparable to, and arguably closer than, other connections that the Supreme Court has previously considered sufficient to grant third-party standing. As previously mentioned, the Court has granted third party-standing to dubious relationships such as vendor/vendee, advocate/right-holder, and defendant/prospective juror. The relationship between the general public and the United States government is similar to the relationship of social advocate and right holder that the Court has already accepted as sufficiently close for third-party standing in Eisenstadt v. Baird.

More importantly, the relationship between the U.S. government and those who use or have an interest in protecting the public land satisfies the core principles of a close relationship laid out by the Court. In Kane County, for example, TWS and other similar parties had an interest in conservation that was directly linked to the federal government enforcing its rights. If the government fails to enforce its property rights against Kane County’s threatened ORV use, TWS and other parties interested in conservation and non-motorized recreation on the federal land will suffer as a result.

Additionally, the interests of third parties may not always line up with the government’s interests. Environmental organizations like TWS often have a single agenda, namely the advancement of environmental interests on the

172. See 405 U.S. at 445.
federal public land. Conversely, the government has to balance many competing interests, including resource extraction, recreation, grazing, and environmental protection. Therefore, environmental organizations will not always be in the perfect position to represent the government’s interests in court.

When deciding whether the interests of the government and third parties align, the courts should carefully determine what the interests of the government truly are. These interests may be gleaned from relevant statutes, land management plans, and even the environmental protection terms of the relevant permits under which suits are brought. Arguably, the more specific the document, the better an indicator it will be of what rights and interests the government wants to protect on that specific piece of land. It would be hard to argue that the government did not want to protect its environmental rights if it included them as terms of a use permit.

In cases involving R.S. 2477 claims, this confluence of interests might be harder to show. In those situations, the government has to consider its relationship with the local government and local constituents when deciding whether to litigate against them. The government may choose a course of negotiation that balances its environmental interests and political interests in a way that an environmental organization may not. Although the courts have not grappled with a “‘close’ relationship” in these contexts before, it seems well within the boundaries of the doctrine as articulated infra.

Considering the close relationship between environmental organizations and the federal government, the political underrepresentation of the public’s environmental interests, and the government’s inability and disinclination to monitor and enforce agreements on countless acres of land, the courts should allow this exception to the third-party standing doctrine.

V. IN THE FACE OF CONTINUED INACTION BY THE COURTS, CONGRESS SHOULD CONSIDER EXPLICITLY ALLOWING THIRD-PARTY STANDING FOR CITIZENS TO ENFORCE PROPERTY RIGHTS AGAINST ENVIRONMENTAL HARMs ON THE FEDERAL PUBLIC LAND

The simplest way to allow private citizens to sue to enforce the federal government’s property rights on federal public land is for the courts to recognize that these types of suits satisfy the exceptions to third-party standing. However, courts would still have to address a number of procedural and substantive questions about how far the right extends and how it is to be exercised. Courts may find that conservation-minded organizations suing to protect the property rights of the federal government on the federal public land is different from other third-party standing cases because the third party is the federal government and may be entitled to notice and the possibility of intervention. These questions may be too much for courts to decide without congressional action. Courts may be reluctant to invent procedures wholly on their own; therefore the courts may decide to wait for a sign from Congress about how to proceed on this issue.
If judicial action is not forthcoming, Congress has the authority to waive prudential standing requirements and has done so in a number of circumstances, including in myriad citizen suit provisions in environmental laws.\textsuperscript{174} Congress could do this by either amending FLPMA to include a citizen suit provision like those in the Clean Air Act\textsuperscript{175} or the Clean Water Act,\textsuperscript{176} or by expanding the False Claims Act\textsuperscript{177} to allow third parties to bring suit to defend against violations of agreements on federal land. Any of these actions would be an effective solution to the third-party standing problem of precluding private parties from enforcing federal property rights on the federal public land.

The Clean Water Act and the Clean Air Act have citizen suit provisions that allow citizens to sue private parties for violations of the statutes and subsequent regulations.\textsuperscript{178} FLPMA imposes duties only on the federal government, not private actors,\textsuperscript{179} so the addition of a citizen suit provision would have to specifically target violations of permits made pursuant to the government’s powers under FLPMA, rather than for violations of the statute itself. The idea of adding a citizen suit provision to FLPMA has received some attention from scholars, although it has yet to be adopted.\textsuperscript{180}

Another way for Congress to allow for citizen suits is to expand the False Claims Act to include ongoing violations of environmental regulations by permit holders on federal land. The False Claims Act imposes liability on persons and companies who seek to defraud the government by knowingly submitting to the government a false or fraudulent claim.\textsuperscript{181} False Claims Act cases are often brought for environmental noncompliance, but because of the language of the statute they are restricted to times when parties that are contracting with the government submit claims along with certification that they have complied with environmental regulations, when in fact they have not.\textsuperscript{182} The law does not extend to complying with grazing permits or meeting the environmental compliance requirements of a lease that are not “claims” within the definition of the Act, except in situations when the holder seeks to renew the lease or permit and must make representations about compliance.\textsuperscript{183}

The False Claims Act therefore covers some aspects of environmental violations on the public land, but it does not fully allow the interested public to

\textsuperscript{174} E.g., Clean Water Act (CWA), 33 U.S.C. § 1365 (2006); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (2006); Clean Air Act (CAA), id. § 7604.

\textsuperscript{175} 42 U.S.C. § 7604.

\textsuperscript{176} 33 U.S.C. § 1365.


\textsuperscript{183} Id. at 587.
enforce the conditions of the thousands of permits and leases the government is a party to. Congress could act to make continued, unreported violations of permits and leases on the government land subject to citizen suit similar to the False Claims Act or other environmental citizen suit provisions. The False Claims Act has indeed been amended to expand its scope and strength a number of times since its passage, twice very recently.184 This shows that Congress seems to believe in the power and effectiveness of the Act.

VI. LETTING PARTIES LIKE TWS SUE WILL NOT “OPEN THE FLOODGATES”

Allowing third-party standing for private citizens would not result in a flood of litigants unhappy about any given decision that happens on the federal public land. First, it is important to remember that this change would not introduce private citizens into any decision-making processes on the public land; it would only help to better enforce federal property and contracts rights on the federal public land.

Second, plaintiffs alleging environmental harms would still need to show they have Article III standing.185 It is unclear whether courts would recognize the public’s interest in federal land as sufficient to show “concrete and particularized” injury.186 If it was sufficient, then any private citizen could sue for a violation, even if they could not show injury to their personal rights. This is similar to the scheme set up in the False Claims Act.187 If the interest in public land was not enough of show injury, then plaintiffs would also have to show separate personal injury to their interests, as well as causation and redressability, as TWS did in Kane County.

Showing concrete and particularized injury has often been easier for a plaintiff with an economic interest than for a plaintiff seeking environmental protection.188 It is relatively straightforward to prove standing for a decision on the federal lands that harms an interest of a rancher or an oil company, as there is a direct financial injury to a specific plaintiff. It is less easy to show concrete and particularized injury to an interest in having a place to go for solitude, or an interest in conservation in general, even if the particular plaintiff has never been to the specific site in question.189 These standing requirements provide

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186. Id. at 560.


adequate assurance against a flood of upset and unhappy citizens and interest
groups bringing suit.

CONCLUSION

In conclusion, the court in Kane County should have given thoughtful
consideration to the possibility of granting third-party standing to private
citizens suing to enforce the government’s property rights on the federal public
land for environmental harms. These harms stemming from property rights
could apply at least in the R.S. 2477 claims and claims for violations of
contracts made pursuant to federal property rights. Courts should also consider
whether there are genuine obstacles to the government protecting its property
rights, especially in terms of violations of environmental protection terms in
contracts made pursuant to these property rights. The examples explored above
provide two possible hindrances to the government protecting its own rights in
the environmental context. First, the public’s environmental interest in these
lands is systematically underserved and dominated by concentrated interest
groups, as illustrated by public choice theory. Second, the federal government
lacks the resource and manpower required to police the entire federal public
land, as illustrated by the lack of enforcement in oil and gas leases and grazing
permits. Courts should also consider whether there exists a close relationship
between the federal government and its citizens in the context of the federal
lands, because the federal government holds lands for the benefit of all
Americans, and organizations with a stake in the federal lands would be
effective proxies for the federal government.

In the absence of judicial action, Congress should consider waiving the
prudential standing requirement for private parties to sue in similar
circumstances, either through an expansion of the False Claims Act or through
addition of a citizen suit provision. Neither of these actions would ‘open the
floodgates’ to environmental litigation, mostly because plaintiffs would still
have to show Article III standing. Instead, it would tip the balance of interest
representation slightly more in favor of environmental compliance. Private
enforcement is an effective tool to supplement agency enforcement and
empower underrepresented citizens.\textsuperscript{190} It is also an effective safeguard against
government agencies subject to capture by well-resourced special interest
groups. Yet, some have suggested that private enforcement results in over-
enforcement of laws and thus forces agencies to overcompensate by
implementing weaker regulatory regimes.\textsuperscript{191}

\textsuperscript{190} Matthew D. Zinn, \textit{Policing Environmental Regulatory Enforcement: Cooperation, Capture,

\textsuperscript{191} Elizabeth Rae Potts, Comment, \textit{A Proposal for an Alternative to the Private Enforcement of
Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in
Courts may not find a close relationship with the federal government in every case. Likewise, courts may not find that the hindrances explored above are enough to overcome the prohibition on third-party standing, or that they do not apply in every case of environmental harm. Nevertheless, such claims for third-party standing deserve to be examined by the courts on their merits, rather than being summarily dismissed as they were in *Kane County*. Otherwise, the court system is missing an opportunity to effectuate the rights of the federal government.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org.

Responses to articles may be viewed at our website, http://www.boalt.org/elq.