

**COMMUNITY TRAILS MEDIATION GUIDE, VOLUME TWO:  
“PLANNING REFERENCE FOR PREVENTING AND RESOLVING DISPUTES”  
GOLD HILL EDITION**



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**TABLE OF CONTENTS**

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Introduction

- Overview
- Origins and Case Example
- Use of Guide
- Community Trails

Underlying Interests of Landowners with Trails

The Legal Context of Trail Access

- The Mechanics of No Trespassing
- Trails and Property Values
- Liability Risk Management

Strategies for Local Trail Dispute Prevention and Resolution

- Existing Approaches to Land Conservation
- State Trail and Recreation Easement
- Private Land Access Permissions
  - Permission Granted Signs
  - Trail permissions to a Select Individual(s), Group(s) or Club(s).
  - Deed Restrictions or Mutual Covenants
- Financial Offsets for Potential Financial and Psychological Costs to Landowner
  - Conservation Easement For Trails
    - Federal Conservation Easement Program
    - Colorado State Income Tax Deduction
  - Fee for Access
  - Purchase and Bridge Financing by a Land Trust
  - Other Acquisition Options
  - Proposed County Property Tax Abatement for Trails Exchange
- Bypass and Trail Alternatives
  - Bypasses and the North Trail Bypass
  - Special Use Loop

Collaborating with Other Organizations

- Collaboration with State and Federal Agencies
  - Historic Certification
  - Collaborating with the Forest Service
    - ORV Impacts
    - The Gold Hill Case
    - Outreach to ORV Users
- Technical Assistance Team

Collaboration County Government

Overview

Tax Incentives and Site Plan Review

Trail Mapping

Trail Mile Transfers and Purchases

Case Example: Creating Equity in a Bargaining Situation

Opportunities in the North Trail Case

The North Trail Dispute and Gold Hill Mediation Process

Conflict Assessment

Initial Positions of the Principal Stakeholders

The West: Culture and Stereotypes

Overcoming Stereotypes

Perceptions of Locals Who Oppose Access

Table Two-A: Positions of Local Who Opposed Access

Table Two-B: Concerns of Local Who Opposed Access

Litigating Access to the North Trail

An Incentive to Negotiate

The Analysis

Table Two-C: Claims for North Trail, Stage/Freight Wagon Rd. & Chinamen's Ditch.

The Legal Precedence

Federal Law: RS2477 Public Way

Colorado Revised Statutes

Big Horn "Old Wagon Road" Case

Other Potential Actions

Protest Hike of the North Trail Day

Boulder County Site Plan Review

Tax Incentives Misplaced in the Case of the NT Property

Future Community Trail Research, Action and Funding

Research Directions

Funding

Conclusion

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Once upon a time America was small.  
And land and resources seemed endless.  
Small communities sprang up all over the land  
Including here.  
Much love, effort, living, kids happened.  
In some places the trails and memories of these people still exist  
Including here.  
It's so rare.  
We are just local inhabitants of history  
Leaving a song to the generations to come.  
I want them to walk free, with friends  
And in concert with the things which are wild  
And not possessed.

P.W. – Gold Hill, March 2003

## **INTRODUCTION**

### **Overview**

Volume Two of the *Trails Mediation Guide* provides a reference for planning rural development in order to prevent disputes over local historic wildland trails. It may also serve to resolve existing disputes by clarifying the role of local historic wildland trails in ecosystem stewardship and community.

This *Guide* presents a set of land and trail conservation tools to facilitate the exploration of options for resolution during a trails dispute. The premise is that a landowner will be more likely to keep a trail open for local use if potential impacts are minimized.

Local wildland trail systems can be shaped by anyone who owns property over which a particular segment of trail traverses. If a landowner chooses to close one part of a trail, that inaccessible segment effectively closes the whole trail for through passage.

There are broad benefits to private control of trail segments. A valuable form of control can be exercised if a landowner decides to allow only certain individuals (i.e., locals known to the landowner) and/or only certain types of non-nuisance uses. This type of control would result in closing a whole trail to certain types of high impact or non-secure uses, i.e., non-local use such as motorized off-road vehicles (ORVs) and dirt bikes that create noise pollution and high wear and tear on a trail. Or a landowner can implicitly reroute a trail segment to public or private land by obliging locals to vote with their feet as it were when a segment is closed.

This *Trails Mediation Guide* resulted from participatory action research during a dispute resolution in Gold Hill, a small mountain community in the Front Range of Colorado. Within the *Trails Mediation Guide*, specific reference is made to the Gold Hill case to illustrate a strategy or a recommendation. Site-specific details should readily translate into general concepts that can benefit groups involved in planning and dispute resolution in other states. Future research directions are presented at the end of this volume.

### **Use of the Guide**

This edition is prepared for Gold Hill residents and as a demonstration of participatory action research in support of an environmental dispute resolution process. A subsequent edition will serve the needs of the general public. The original version of the *Guide* was a working document that served to inform and to elicit knowledge from locals on local trail issues. That version was prepared for a two-day “Trails Mediation Workshop” held in Gold Hill in March 2003.

The *Guide* may be useful in resolving trail use issues in other wildland settings and even for individuals residing in suburban or urban settings. The *Guide* may be useful for mediators, community facilitators, land trusts, county open space and land use department, State trail programs and wildlife programs, Forest Service administrators and planners, and for staff of the Bureau of Land Management and the National Park Service.

The *Trails Mediation Guide* is divided into three stand-alone volumes. Each volume serves a particular purpose and can be understood without the need to read the other volumes. The first volume provides recommendations for an informal policy on historic wildland trails used by the community of Gold Hill in Colorado.

This volume, Volume Two, is a technical reference for preparing a local policy and for possible future trail dispute resolution efforts. The legal context of trail use is presented for landowners in Colorado. Trail easements and other conservation tools are presented. The opportunities to collaborate with government agencies in developing policies around local trails are also presented. Finally, the volume concludes with the potential strategies of activists for local access rights.

The third volume is also case-specific, but can be applied to understand ecosystem stewardship in other communities than Gold Hill. Volume Three details the historical and ecological attributes of Gold Hill as a foundation for encouraging ecosystem stewardship of threatened, yet restorable parts of an ecoregion, in this case, the Southern Rockies Ecoregion. Volume Three also

presents management policy and guidelines for general access trails. Such guidelines can serve as a potentially adaptable model for community stewardship of local access trails. This discussion in Volume Three expands the discussion in Volume One's section on trail policy recommendations.

### **Origin and Case Example**

The content of this *Guide* is the result of research and practice for a Master of Science in Resource Policy and Behavior from the School of Natural Resources and Environment at the University of Michigan, Ann Arbor. The thesis evaluates the use of participatory action research in resolving environmental disputes. Its title is:

ATTEMPTED MEDIATION OF A LOCAL, HISTORIC, WILDLAND TRAILS DISPUTE:  
SEARCHING FOR INCENTIVES AND OPTIONS WITH PARTICIPATORY ACTION RESEARCH

Environmental dispute resolution is a critical component of ecosystem preservation in that it administratively and procedurally recognizes the essential value of a communication link to local knowledge, expertise, and volunteer-ship. This thesis asserts that participatory action research (PAR) may enhance conventional environmental dispute resolution practices because PAR offers the opportunity for locals to empower themselves with knowledge, and pursue stable social outcomes despite disparity between stakeholders. Throughout the remainder of this volume the use of PAR in an environmental dispute resolution (EDR) effort will be referred to as the EDR/PAR intervention.

Gold Hill is an historic Colorado Front Range community and the site of the first gold strike in the Nebraska Territory in 1859. Trails meander to and from the townsite into the montane forest landscape. Some descriptive, although somewhat superficial and partially inaccurate, data regarding geography, climate and demographics can be found online at <http://www.city-data.com/city/Gold-Hill-Colorado.html>. Photos of Gold Hill may also be viewed at this site.

### **Community Trails**

Equitable and mutually beneficial shared access is central to preventing and resolving trail disputes. We share access to a common pool resource because what makes sense for the community makes sense for the individual in terms of wellbeing, security and overall quality of life. If it doesn't make sense, then disputes over common pool resources like trails can create tension of an enduring nature.

Subsequently, disruptions in place attachment have a profoundly negative effect on people in their daily lives. "Place attachments develop slowly but can be disrupted quickly and can create a long-term phase of dealing with the loss and re-creating attachments" (Brown and Perkins, 1992:284).

A key feature of any community's strength is an ability to stimulate and maintain activated engagement: a voice for everyone and a sense of being heard and of having one's views respected. A sense of community grows through reciprocity of exchange, and the open networks of communication and interaction to which it is attached.

"There is in fact no preexisting community that takes action; rather, for each episode of action an ad hoc body emerges or is formed." Community then is "dynamic and emergent in that it is continually being created and re-created, its parameters and relationships taking shape and changing shape through the action and interactions of people and organizations" (Walter, 1997:71).

At its height then, community spirit can carry on its shoulders a range of ingredients. These include "shared vision, sense of purpose and values, wholeness incorporating diversity, caring, trust, teamwork, respect and recognition, communication, participation, affirmation, links beyond the community, development of new members, conflict resolution, investment in community and community resources" (Gardner in Walter, 1997:73).

Community encourages people to find creative ways to celebrate the traditions that bind them, and to work hard at understanding and resolving tough issues that come up among interdependent people (Moore, 2001:75). The fact that we “occupy a variety of positions in relation to an issue or locality around which community is defined suggests that we will often have different interests, experiences, levels of power and perspectives” (Walter, 1997:71). “There is a need to explicitly acknowledge the multiple constituencies and interests that are engaged and are an integral part of a community” (Walter, 1997:70).

The social construction of a freely employed local access trail system requires consensus either explicit or implicitly - through tradition. If the community reaches consensus on this point, wildland trails around a community are the local footpaths that can be called community trail systems. Community trails would therefore be an effectively nurtured common pool resource. Enacting joint community stewardship of a community resource is an important stepping-stone and useful practice as we learn to care for broader scale common pool resources like forests, air and water.

“A thing is right when it tends to preserve integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.”

Aldo Leopold - *A Sand County Almanac*, 1949

#### **UNDERLYING INTERESTS OF LANDOWNERS WITH TRAILS**

Mediation involves going beyond positions to discover the underlying interests and incentives of individuals to resolve a dispute. A property owner may naturally want to close access when a trail poses too significant a challenge to their lifestyle expectations. Private property owners with trails may also be concerned about protecting the investment value of their property. Landowners tend to avoid risk and seek to minimize exposure to lawsuits that may be brought against them. A trail traversing their land can represent significant liability risk exposure. In addition, property owners may desire to experience their land without intrusions or encumbrances. They may also seek to avoid the nuisance factors associated with public access to trails on their land and may be particularly affected by high volume bicycle or motorized vehicle use.

In the case of Gold Hill, Trails Committee members researched why and how landowners with trails have allowed access to trail segments in the past. Based on the Trail Committee’s research (Appendix Two-B and Appendix Two-C), a landowner may be more likely to keep a trail open for local use if:

- The landowner is familiar with the trail users (familiarity versus anonymity, local versus non-local, friend versus stranger, neighbor versus non-community member).
- The trail users can converse with the landowner in neighborly way. High speed, group size and noise can detrimentally affect the comfort zone of a landowner and opportunities for a conversational interface (e.g. large mountain bike groups, dirt bikes, ATVs, etc.). These factors also undermine a landowner’s personal boundaries and a landowner’s sense of place.
- Use of a trail is stable and predictable in time and volume (e.g., weekend hike, morning walk by a consistent set of locals, etc.).
- Conditions of use adhere to traditional use standards as created by stable previous use patterns or local customs of trail use. Such customs exist in the Gold Hill area.

Local opinion and suggestions were gathered over the course of the preparation of this *Guide*. Local participants were either interviewed or attended the Trails Mediation Workshop. The following summarizes Appendix Two-A and Appendix Two-B on landowner concerns and presents local expectations for trails by recreational type:

- *Land Owner Concerns*: privacy, security, respect (neighborliness), county tax reduction, liability, and land values;

- *Stewardship Concerns*: fire risk, maintenance of trails, conservation, and weed management;
- *Community Concerns*: continued trail access, sense of neighborliness and community cohesion, water quality, quality of life; and,
- *Commercial Interests*: serving locals and recreational visitors in local restaurants, real estate transactions, entertainment and retail.

Trail User Concerns reflect preferences of use (on foot, on bikes, motorized vehicles, on horses, and with dogs) and aesthetics of the trail experience (e.g., preserving viewsapes). Mutual interests might be served if all parties come to perceive value in the local trail system and can learn to trust each other. A subset of mutual interests may include:

- Overcoming trail closure disputes at the least social and financial cost;
- Appreciation for the role of trails in social and ecological systems (where trails are transected by fencing, one also observes ecological fragmentation of the landscape);
- Broader interest in preserving local and long-distance trail systems in the human experience; and,
- Ensuring ecological stewardship through access and attachment to the landscape by local communities.

Volume Two of the *Guide* responds to these concerns by elucidating remedies for local landowners with trails. Volume One and the last sections of Volume Two respond more directly to the concerns of communities in which trail use has a significant amenity value in their daily lives and rituals. Volume Three responds to the broader goals of meeting mutual interests in ecosystem stewardship. Taken together, the three volumes of the *Trails Mediation Guide* provide a substantive foundation for making individual and community-wide choices about local trail systems.

## **THE LEGAL CONTEXT OF TRAIL ACCESS**

### **The Mechanics of No Trespassing**

If a landowner chooses to go down the oppositional path, a public access determination will be the pivotal requirement for reporting trespass (Boulder County Sheriff, pers. conv., 2/20/04). The Boulder County Sheriff's department responds to reports of trespass in the Gold Hill area without any fees to the complainant, i.e., landowner. They would likely charge third degree criminal trespass, which is a Class 1 petty offense in the Colorado Revised Statutes. It is a Class 3 misdemeanor if the premises have been classified as agricultural. The land surrounding the North Trail is designated agricultural for the purposes of ranching.

If there is a dispute as to the public versus private status of a trail, the criminal courts will defer judgment until a determination has been made in civil court. The Sheriff's office would then be less likely to respond to a report of trespass, and particularly to repeat reports on a trail in which the civil determination of access has not been made. "If the trail is disputed, we can not legally convict for trespass." For a trespass charge, "the District Attorney would have to show that the defendant did not have legal authority to be on the land."

The Sheriff's office gets six or so calls a year of this sort. "Sometimes they die down and other times they do not." Since Boulder County is a "modern art jigsaw puzzle" of mining claims, many overlapping, there are many disputes over asserting ownership and access rights (Boulder County Sheriff, pers. conv., 2/20/04). "People get passionate...It is best to proactively solve the dispute outside of the court process. We simply try to make sure that people don't hit each other or do violence to each other." (Boulder County Sheriff, pers. conv. 2/20/04).

In the case of the North Trail dispute, large dogs were involved. Having attack dogs or creating a dangerous situation is a gray area of the law (Environmental Attorney, workshop, 3/15/03). If some one were to get hurt on a disputed trail, an attorney would need to be consulted.

Transactional costs associated with enforcing no trespass reside in the uncertainty of the result of the engagement. "It is very expensive to sue trespassers. A landowner can't really keep

anyone off of land if they really want to use it. A landowner can only ask people to go away every time they see them” (trail runner and landowner with popular Gold Hill trail, 11/2002). The trail runner/landowner with trails described “no trespassing” signs as “a threatening way to keep people off one’s land.” For other landowners, it may not matter if it appears threatening or unpleasant as long as it works. The question remains then, what kind of social outcome does the posting of “no trespassing” signs create? Does it create a wise and stable outcome? Does it create enough of a perceived threat to keep non-locals off the land while, with consent of a landowner, allowing locals to pass? (See Chart 2.)

### **Trails and Property Values**

Few studies have been undertaken to address the question of property values. Generally, property values are greater in communities with trails. Differentiating public access from local access trails has not been made in these studies. If trails are not fundamentally differentiated between general public access and local access, then a discussion of value can be difficult. This section will rely on studies of general public access trails. Urban trails (i.e., greenways and Rails-to-Trails) do not always beneficially affect property values for adjacent properties. (Conservation Fund, et al., 1995)

There appears to exist a positive relationship between amenity values like trails and property values. At the same time, impacts on an individual property owner may be inequitably heavy when compared to the overall benefit for the community. A landowner’s perceived value of trails is dependent on whether the trails have or do not have a direct negative impact on quality of life for a resident property owner. A Boulder County attorney states that “it is hard to determine the market impact of a trail. Landowners have claimed that being next to a public access trail head is detrimental to property values.” (pers. conv., 3/03)

A local access trail easement across private property may increase property value, especially under conditions of community stewardship or increased land value due to a beautiful trail system in the area. “A survey by the American Association of Homebuilders concluded that new homebuyers want trails and natural areas above any other amenity.” (Wentworth, 2003) Local land prices are positively correlated with local per capita income and unique characteristics like landscape quality. Hence, local trails may be a community asset in terms of property values. Properties in landscapes that protect conservation and community increase in value as they hold a significant amenity value and attraction. Markets favor short-term profits for developers of prize building lots.

Property values overall in an area are more important to the market price of a particular property than whether a trail traverses the property. Those values depend on amenity values in an area. Trails are an important community-based amenity value. In addition, if trends continue and fossil fuels become more expensive, the trail access amenity may become more intertwined with the property value amenity. People will need to be able to get around more easily on foot, mountain bike or horseback.

It appears that a local access trail system would be a highly prized amenity in a wildland setting like Gold Hill. Individuals have left areas in which local trail systems were no longer intact in other parts of Boulder County. What effect would the loss of trails have on property values? The factors associated with increased recreational demand and falling prices for mid-range mountain real estate are difficult to disentangle. Mountain real estate has fallen in value relative to plains property and requires longer lead-time to sell.

An American Greenways Program report addressed issues of property values, as well as crime, vandalism, and trail design. The results were inconclusive. Research needs to be conducted to compare these results statistically, to identify and conduct other studies to expand the pool of cases evaluated. According to a Rails-to-Trails activist in Boston (pers. conv., 3/12/03), a key concern of “abutters” has been a pervasive fear of others – likely fed by the local media's predilection for violence rather than stories of social health – that seems to have crept into the American psyche to produce gated communities and other exclusionary practices. Gold Hill does not suffer from that

psychosis as far as this writer can tell. Still, non-local use can be a significant burden to an individual landowner.

The building blocks of this value (non-buildable lots) are, in a paradoxical circumstance, perceived as less valuable to individual landowners. This may be a result of the inequitable burden that falls on a private property owner forced to preserve a parcel due to exogenous factors, like in the case of Boulder County, its merger and land use policies. Remedies for the disproportionate burden placed on individuals for common pool resources need to be disentangled from discussions of preserving the common good. This disproportionate burden has been inappropriately intertwined with discussions of mitigating the environmental and social impacts of industrial production. The two cost burdens are very different. The latter results from profit seeking by corporations. The former is an unfair burden placed on individuals. They are not one in the same.

Property owners with trails should receive some form of compensation for any burden that might be placed upon them for having a segment of the local trail system on their land. For instance, if the North Trail closure was solely for property value reasons, then the Trails Committee might wish to think through ways in which to compensate the landowner for future expected returns. Such opportunities are discussed further on under “Strategies.” One such strategy might come in the form of a tax offset, which is not as stable an option as many others, but it may be a viable start to rebuilding sustainable customs of trail use along the Front Range. Such a tax offset could be offered by Boulder County just as agricultural offsets have been provided to property owners for their ranches.

### **Liability Risk Management**

The following information addresses some of the legal issues that may come into play during a trails dispute. Obviously, additional legal counsel should be sought for the particular circumstances. The following information was collected by the Trail Committee coordinator and by a Trail Runner and Landowner with Popular Trail for the use by the Gold Hill community.

The strictest standard of liability is that the landowner knew of a risk or should have known. Legal distinctions are made for trespassers, invitees and social guests and those you charge for use [licensees]. (Environmental Attorney, Workshop, 3/15/03) A specific Colorado statute (CRS 13-21-115) stipulates:

- “Trespasser” means a person who enters or remains on the land of another without the landowner’s consent;
- A trespasser may recover only for damages willfully or deliberately caused by a landowner;
- Children under the age of fourteen are accorded special protections under the doctrine of attractive nuisance;
- An “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner’s express or implied representation that the public is requested, expected, or intended to enter or remain;
- A higher standard of care [is required] for an invitee than a licensee and a higher standard of care [is required] for a licensee than a trespasser; and,
- [The] legal climate [should promote] promote private property rights and commercial enterprise and will foster the availability and affordability of insurance.

As state liability laws stand, the designation of invitee would benefit from further clarification with regard to insurance affordability. If the person is on a public trail, then no liability is conferred to the landowner. If the person is on a local access trail, then liability *is* conferred to the landowner.

If the plaintiff entered or remained upon such property with the consent of the landowner, but the entry was for the plaintiff’s own purposes and not the purposes of



the landowner [as in a local access trail], the plaintiff may recover only for damages caused by the landowner's deliberate failure to exercise reasonable care in the conduct of the landowner's active operations [e.g., cattle ranching] upon the property or by the landowner's failure to warn of dangers which are not ordinarily present on a property and of which the landowner actually knew [e.g., a prospect hole is common on properties around Gold Hill (Consider the deep pit on the "J" property outside the Northwestern edge of Gold Hill which the State Reclamation Board filled in 1992)].

"The posting of warning or no trespassing signs may reduce a property owner's liability toward those who cross the property....A property owner who posts 'no trespassing' and discourages public recreational use will still be required to exercise due care with respect to hikers crossing its property, whether or not the hiker is considered a trespasser." (L. Lacy, Factsheet for workshop, 3/15/03) For there to be any liability risk-prevention value to "no trespassing" signs, such signs must be conspicuously posted around the perimeter of the property

Since Gold Hill's Trails Workshop, the owners of a large parcel with trails have enacted the posting recommendation shown in the first version of the *Trails Mediation Guide*. However, the posting of "no trespassing" signs around the whole perimeter of one's property at 15-foot intervals is perhaps unaesthetic. And according to the trail runner/landowner (per her attorney), "no trespassing" signs will not protect a landowner from liability risk. The owner of the large parcel has indicated otherwise. So there exists some question here.

Some landowners opt out of using "no trespassing" signs for liability risk management. Permission granted signs serve the same effect. Landowners should check with their individual insurance company in order to be in adherence with their own specific posting requirements.

It would be useful for the Gold Hill Trails Committee or any other entity to prepare a chart by local insurer that specifically addresses coverage for trail use. Property insurers should also provide explicit coverage for this use. And at a policy level, we may wish to make some adjustments in insurance coverage that allow for the maintenance of social bonds despite social risks.

Trail recreation easements provide another mechanism for protecting against liability risk. Such an option is available in the State of Colorado and is presented in the section that follows on strategies for landowners.

## **STRATEGIES FOR LOCAL TRAIL DISPUTE PREVENTION AND RESOLUTION**

Landowners with trails may desire to preserve use by a local public, but do not have the information to address some concerns that prevent their willingness to allow access. In order to overcome gaps in understanding issues surrounding trail access, the Gold Hill Trails Committee conducted participatory action research. The research on conservation easements may be dated as in the past year (2005) some revisions to Federal provisions have been made. I have not incorporated those revision here. Please use the material provided as a guideline and then consult an attorney or land trust for further information.

### **Existing Approaches to Land Conservation**

The activities of land trusts and trail preservationists in the past might be well suited to meeting the needs of landowners with trails. Many of the options are "land protection tools" (public, private and non-profit) that can be adapted to address local historic wildland trails.

Experience has shown that where there is a choice of techniques which can be tailored to the specific circumstances of a family or landowner, their economic and [ecosystem] conservation objectives, and the nature of development pressures, there is the greatest potential for success. (Conservation Partners, 1995)

Specific research and techniques used for protection [of trails] include national trail history resource studies, mission resource management planning, locating historic trails, test excavations, aerial studies, interpreting historic trails, trail re-enactments, and certification agreements (“preservation by handshake”). (Payne, in Elkington, 1997, 37)

Before launching into the details of each option, it is useful to consider an important distinction regarding easements. Two types of easements can be used to preserve access to a local historic wildland trail in Colorado:

- Colorado’s recreational trail easement (CRS 33-41-101 et. seq.)
- Federal conservation easement for trails

A trail and recreation easement results from a specific Colorado statute that offsets liability risk for landowners. A federal trail easement applies to all conservation easements designated for a tax offset under IRS 170 H. A federal trail easement would likely be managed by a land trust. Conservation easements for trails are more frequent in the Eastern United States. One has not yet been recorded in Colorado (as of 2003). Details on conservation easements for trails are found under “Financial Offsets,” whereas a description of the Colorado state trail and recreation easement is found in the next section under the heading “Liability Risk Management.”

### **State Trail and Recreation Easement**

“Regardless of the signage [no trespassing}, the Colorado Recreational Use Statute (CRUS), section 33-41-101, *et seq.*, Colorado Revised Statutes, offers greater and more certain protections to landowners whose property is used by hikers, or who would like to make a trail across their property available for public use. The CRUS shields landowners who allow recreation to occur on their property from most liability for injuries which occur to persons using their land for recreation purposes. Moreover, a landowner who has entered into a lease or easement agreement with a public entity for recreational use of the landowner’s property can take advantage of the statutory caps on liability available to public entities under the Governmental Immunity Act. (Note: None of the protections of the CRUS are available to landowners who charge a fee for the use of their property, or who willfully or maliciously fail to guard against a known dangerous condition.)” (County Attorney, Factsheet for workshop, 3/15/03) Such easements can be conferred for specified terms (County Attorney, pers. conv., 2/12/03).

A State Trail Easement may benefit from a federal deduction in income taxes and a state tax credit. Both tax incentives are explained further on under Financial Benefits for Conservation Easements. To ensure the tax benefit, a Conservation Easement for Trails could be donated by the landowner in conjunction with the State Trail Easement. The conservation easement for trails would need to be permanent in order to avoid consequences associated with the tax credit. A conservation easement is not reversible. A State Trail Easement can be granted for a specific time period and hence is revocable. (County Attorney, pers. conv., 3/8/03)

A drawback to State Trail Easements is that once entered into with the County, the use might have to be solely for the general public. If it were entered into with a townsite like Gold Hill, the use could possibly be restricted to local use. General public use obfuscates the ecological and community purposes the easement agreement was intended to address. By minimizing impact, a landowner may be more likely to keep a trail open for local use. Perhaps, with time, the County Commissioners might see merit in preserving local trail systems as an asset for the county at large in ecological terms, recreational demand offset and cultural resource terms. More on this point is presented under the heading “Collaboration with County Government.”

A copy of a standard easement appears in the appendix and was prepared by the County Attorney for her own property along the Arkansas River where she and her husband allow access. The Colorado Recreational Use Statute was originally created to offset liability risk for ski resorts

throughout the state by conferring liability on public entities. Article 41 is entitled Recreational Areas and Ski Safety, Owners of Recreational Areas - Liability.

### **Private Land Access Permissions**

#### ***Permission Granted Signs***

“This is a way to regulate people coming on to your land in a friendly way. It has been constitutionally upheld in protecting property owners from being liable.” (Trail Runner/Landowner with popular Gold Hill trail, per legal counsel from her attorney) Her husband, who also owns land with local trails, has employed this approach on the Moccasin Trail with reported success in decreasing outsider and local mountain bike use. But again, if someone falls in a prospect hole, the landowner can still be sued. An individual landowner should verify that property insurance covers personal risk in such an event.

#### ***Trail Permissions to Select Individuals, Group(s) or Club(s).***

An agreement could potentially be entered into with a local non-profit, such as the Gold Hill Town Meeting, Inc., in which express permission for trail access is given to residents or members of a club. A license agreement could be prepared to support such permission arrangements legally (refer to “Liability Risk Management,” for details on liability risk protection associated with license agreements). Permission could also be granted in conjunction with a liability waiver.

The drawback to this approach is that it undermines local custom and potentially creates cliques or subgroups within the community that are accorded special privileges. A more inclusive approach could involve a set of jointly determined criteria that allows a person to be part of the trail social club on the basis of some tangible social exchange system. In any event, the process remains a bit arbitrary and artificial. It would have an aspect of commodification or measuring of personal value that undermines cohesiveness within a community.

#### ***Deed Restrictions or Mutual Covenants***

“If a landowner determines that a conservation easement is not an appropriate technique since the owner would prefer not to deal with government or a non-profit organization, a deed restriction or mutual covenant may be more acceptable. Mutual covenants are made between adjacent landowners restricting the use or development of properties.” They do not have to be in perpetuity either. (Conservation Partners, 1995, 2) For instance, a mutual covenant could be prepared that allowed the tenants of Morning Sun in Gold Hill access across a new landowner’s property in order to reach the North Trail segments on Forest Service land. The deed restriction could be adapted to allow local trail custom to persist without designating the North Trail for general public access. The liability burden could be shifted to locals using the trail through a liability waiver.

### **Financial Offsets for Potential Financial and Psychological Costs to Landowner**

A landowner may have a greater level of exposure on both financial and psychological preferences. Financial incentives can encourage a landowner to align with the preservation of a common resource like wildland trails. To offset potential costs, financial benefits can range from estate tax benefits, outright payment, or reduced income tax for a charitable contribution. A conservation easement for trails allows for significant tax benefits at both the federal and state level. Fees for use, outright purchase of the property or property tax abatements might all serve to support the prevention of trail disputes or provide the incentive to resolve them.

#### ***Conservation Easement for Trails***

##### ***Federal Conservation Easement Program***

The donor of a conservation easement benefits from a federal income tax deduction under the federal charitable contribution provisions of IRS code 170H. The deduction on the donor’s income tax is equal to the difference between the fair market value of their property and its subsequent

restricted value. (Conservation Partners, 1995, 2) A commercial real estate appraiser specializing in conservation easements generally makes this determination. Twenty of the 170 commercial appraisers in Colorado handle conservation easements (Conservation Easement Real Estate Appraiser, pers. conv., 3/2/04). Federal benefits allow for six years of income tax reductions at the allowable rate of thirty percent of the donor's adjusted gross income. A conservation easement is not reversible.

The federally recognized conservation easement can preserve land under a mix of values that includes biodiversity and scenic, agricultural or recreational value. Trails preservation comes under recreational value. Another value that seems to have been inadvertently left out of the mix is sociocultural value. The presumption of "social" meaning "socioeconomic" that has dominated the policy arena for some time could be an explanation for this oversight. Some environmentalists equated human resource preservation with wilderness degradation. It would also be important in the case of local wildland trails to distinguish general public access from local access.

A conservation easement places uniquely specified conditions on the use of a particular land parcel. "The easement is a recorded restriction in the property deed and therefore applies to all subsequent owners....A conservation easement is usually granted to a qualified nonprofit land trust or governmental entity that has the responsibility of monitoring and enforcing the terms of the easement." Development rights are usually limited, but the landowner continues to own, manage and have use of the land. (Conservation Partners, 1995, 2)

Such easements can also protect trail systems under the recreational or historic value provisions. Easements for trails are more frequently used in the Eastern United States (Administrator/Trust for Public Land, pers. conv., 4/11/03). In New England, preservation of the recreational value of trails (for hunting, among other uses) is more prevalent. In Colorado, a conservation easement was entered into for fishing access over a trail in conjunction with other conservation values. (Administrator/Conservation Resource Center, pers. conv., 3/5/04) A conservation easement for a trail may have been transferred to the Crested Butte Land Trust. (Administrator, Colorado Coalition of Land Trusts, pers. conv., 3/13/03)

No two easements are alike according to a Colorado-based commercial real estate appraiser with almost 1200 conservation easement entries in his database. (pers. conv., 3/2/04) A typical easement runs about 14 pages. Land trusts outline a flexible plan within an easement in which ecosystems are defined and conservation values are made clear. They generally outline a method for managing a habitat for the viability of a particular species or set of species. Local historic wildland trail use would generally not be an impediment to conservation values, and might actually be a boon. In any event, the managing entity will ensure that the property is monitored for easement compliance on at least an annual basis. (Administrator/Colorado Coalition of Land Trusts, pers. conv., 3/13/03)

The Gold Hill Town Meeting could also consider serving in a land trust capacity. A non-profit must be in existence for two years in order to hold an easement, which is the case for the Gold Hill Town Meeting, Inc., a 501(c)(3). A land trust entity would have ongoing administrative responsibilities and might tie in well with the concept of a Council of Stewards as presented in Volume Three of the *Trails Mediation Guide*. A tangential benefit of forming a local land trust would be the opportunity to obtain group liability insurance through umbrella land trusts. Gold Hill already owns a few parcels of land. Funding could come from a range of sources including fundraising with the community, membership, Great Outdoors Colorado, state trails grant program, donations from landowners, and other grant funding.

A land trust to serve Boulder mountain communities might be formed to support the Boulder County Open Space Department's capacity and to diversify tenure of open space lands in Boulder County. More on this under "Boulder County Parks and Open Space Conservation Paradox" in Volume One and "Collaboration with County Government" in this volume.

### *Colorado State Income Tax Deduction*

In addition to the federal tax benefit, a conservation easement for trails qualifies for a state tax credit. Colorado has the most aggressive tax credit program in the country. (Administrator/CCLT,

pers. conv., 3/13/03) The state tax credit provisions are especially beneficial in cash hungry, land rich households across Colorado. (Administrator/ CCLT, pers. conv., 3/13/03) The state provisions offer up to \$260,000 in straight value tax deductions on a donation worth \$500,000. The first \$100,000 of value receives a full credit and for the next \$400,000 of value a credit of 40% is allowed against state taxes owed for a period of up to 20 years. The balance of \$240,000 may then be claimed as a federal income tax deduction. (Conservation Easement Real Estate Appraiser, pers. conv., 3/2/04) An easement is conveyed in perpetuity and may not be reversed. In surplus years, credits are given directly in the form of cash payments. A surplus year occurs when state revenues exceed expenditures, which has not been the case since 2000.

If the state tax benefit is more than a party would likely pay in state taxes over 20 years, the donor may opt to sell the state tax credit. The Conservation Resource Center's Tax Credit Exchange in Boulder can buy and sell tax credits to the mutual benefit of both buyer and seller. They handled 155 transactions in 2005, which is approximately half of all tax credits traded in the state. (Conservation Resource Center, pers. conv., 3/5/04) Another agent in Fort Collins also brokers state tax credits in the range of 100 per year. The balance of fifty or sixty exchanges is traded among clients of specific attorneys or accountants. An easement through exchange generally provides 80 cents on the dollar to the donor. Brokers generally receive five to ten percent of the deal; the buyer of a tax credit generally will not pay more than 90 percent towards the tax credit in order for the deal to make sense. (Conservation Easement Real Estate Appraiser, pers. conv., 3/2/04)

An example of such a state tax credit exchange recently occurred for a property in Sunset. Sunset is the 1883 terminus of the Denver, Boulder and Western (DB&W) along what is commonly called the Switzerland Trail. (See Volume Three of the *Trails Mediation Guide* for an environmental history of Gold Hill.) The rail line was originally built by the Greeley, Salt Lake and Pacific (GSL&P) and the spur to Ward was named the Colorado and Northwestern (CNW). Recently, a Sunset homeowner sold his right to develop in exchange for a state tax credit; he subsequently traded that credit at a discount and received a cash bonus on his property. (Gold Hill property investor, pers. conv., (3/4/04). The only drawback here is that property taxes must still be paid.

The Gold Hill property investor stated that as an investor, he would let the property return to county management for failure to pay taxes, rather than hold on to the property and pay taxes. If an easement exists, it is in perpetuity, so it would appear that an investor has no reason to pay taxes when he has already received the benefits available from the property. This point is further addressed under Boulder County "Tax Incentives and Site Plan Review."

### ***Fee for Access***

Individuals could pay a fee for access on annual basis. Additional funding for the Town Meeting Trails Group to provide access for all locals could possibly be obtained through the Federal Trails Grants Program administered by the State. A fee for access creates a liability risk for the property owner in relation to the "licensee." According to the Colorado Recreational Use Statute, there is a higher standard of care for a licensee than a trespasser. For that reason, a fee for access is probably not a viable solution.

### ***Purchase and Bridge Financing by a Land Trust***

If a property owner doesn't seem to respond to any of these options and the land merits protection on ecological and cultural resource grounds, then land trusts are often available to assist in acquiring property. At the time of this research, there remained an option to buy the land across which the North Trail traversed, as nothing had yet been built. That is no longer the case, and the property sold for \$3,000,000.

### ***Other Acquisition Options***

Other options can be tailored to specific circumstances. They generally have characteristics that don't seem as applicable to landowners with trails who wish to retain their land. Still, it is useful

to know about creative ways to transfer ownership. For instance, Conservation Partners presents a set of conservation tools that might be applied to trail preservation. The details are not provided, but can be obtained in a document by contacting [www.conservationpartners.com](http://www.conservationpartners.com). Conservation Tools that could be adapted to support trail dispute resolution include:

- Cash purchase of the property would be impacted by capital gains taxes;
- A donation or gift of access could have tax benefits;
- Bargain sale;
- Installment purchase;
- Rolling option;
- Trade;
- Lease/option;
- Charitable remainder trust; and,
- Donation with reserved life estate.

### ***Proposed County Property Tax Abatement for Trails Exchange***

Tax abatements for trails could be an effective fiscal tool for encouraging preservation. Such incentives could be coupled with a conservation easement on a property. As noted above, a conservation easement requires that the property owner continue to pay property taxes. If a property owner refuses to pay taxes, the property reverts to the county. There is a cost to the county for monitoring land with an easement. That cost might exceed the value of property taxes, which might encourage the county government to offer full property tax offsets.

Preferential tax treatment can take three forms: adjustment of property valuation, lower mil levy rates and an outright discount on the basis of trail length. As it stands, landowners may not be able to afford to privately sustain open spaces, parks and nature preserves, particularly on inherited properties, due to heavy tax burdens and estate taxes.

The Boulder County Assessor's office offsets land value on the basis of conservation easements. The value of an easement is based on the level of restriction of use stipulated on the easement and the subsequent impact on market value. The appraisal value for a conservation easement is also reviewed. These appraisals are adjusted for tendencies to overstate or understate based on the purpose of the appraisal. An appraisal might be conducted for estate purposes or the purpose of a tax credit or deductions. For instance for a state tax credit, the value might be overstated. (Boulder County Assessor, pers. conv., 3/5/04)

Nevertheless, the tax abatement offered might not be enough for individuals with an investment focus. As an investor, the landowner might perceive such a parcel as a cash drain, which combined with having lost control over private land could be too much of a disincentive to participate in conservation easements. (Gold Hill Property Investor, 3/4/04) As a result, entering into a conservation easement with ongoing property taxes into perpetuity may not seem rational to a property owner. A property tax abatement can be used in combination with a conservation easement or a liability waiver or independently.

The premise that property value is diminished by a conservation easement supports the need for tax abatement. Perhaps though, this premise is inaccurate. For instance, having a local access trail easement across private property may instead increase its value, especially under conditions of community stewardship or increased land value due to a beautiful trail system in the area. In that case, County policy would not allow for the offset a landowner's tax burden.

Conversion from agricultural value alone to include ecological/community value could occur with little additional cost. The value of preservation left in the hands of capable landowners would be a significant county tax revenue savings in terms of materials and salaries. A reversal of the agricultural tax abatement for trail tax abatement could be a simple initial site-specific response for the North Trail. Counties cannot undertake [explicit] tax abatements for trails without the passage of legislation at the state level. (Boulder County Attorney Two, pers. conv., 3/03) A bill that allows for county tax abatements similar to those employed to protect agricultural land could be proposed and

possibly passed at the state level. Such a program could permit the maintenance of open space and trail access without recourse to full-on land acquisition or the potential ecological damage that mandated ranching encourages.

Conservation and recreation, in that order, are the driving forces for the increasing budgets of open space programs across the country. Sound fiscal policy should encourage alternative mechanisms for reaching the same goals. An analysis of the costs to administer a tax rebate program would be helpful. The criteria for selection and the application process would compare lost tax revenue dollars against the benefits in management savings. Encouraging community-based, collaborative ecosystem and trails management within a statewide framework of conservation management procedures should also be considered.

### **Bypass and Trail Alternatives**

#### ***Bypasses and the North Trails Bypass***

A simple solution might exist in a negotiated bypass of closed trails. Still, if alternative pathways do not offer the stable throughway [or travelway of initial alignments, then these routes may not solve disputes. People want to go where they would like and in the way that they would like; landscape architects are well familiar with miscalculated alignments and the braiding of pathways that results as people travel along the shortest navigable route.

Where the community supports such choices, a bypass agreement can be worked out with adjacent property owners. In the Gold Hill case, the North Trail bypass follows the alignment of an old stagecoach line. An advantage to the bypass is that it would allow for seasonal diversion from the leafy spurge area. The leafy spurge covers the meadows that spread over both Forest Service land and the North Trail closure property. The initial Trails Group suggestion is for seasonal use. The Forest Service prefers to avoid the creation of new trails. It is likely that the old stagecoach trail would be considered an RS2477 right of way.

#### ***Special Use Loop***

Trail closures can affect many different user groups, such as horse guides, mountain bike riders and ORV enthusiasts. One possible remedy would be to create loops specifically for these recreational groups, taking into account physical and noise impacts.

### **COLLABORATING WITH OTHER ORGANIZATIONS**

#### **Collaboration with State and Federal Agencies**

Preservation for historic reasons might dovetail well with meeting increasing recreational demand for public trail access systems. Although the State Division of Wildlife and the State Trails Program have not been mentioned, their activities align with the resolution of local wildland trail disputes.

#### ***Historic Certification***

Private landowners, historical societies, businesses, and state and local agencies may certify their qualifying historic resource with the National Park Service. (Elkinton, 1997)

In the context of local trails, perhaps an alternative historic certification program could be explored. Such a program might appeal to local landowners in combination with a set of self-motivated incentives ranging from a sense of doing the right thing, sound leadership, the respect of the community, and the sheer pleasure of rapport with trail passersby to security or some financial tax offset.

This system might promote general awareness and support local customs that prevent access disputes and acknowledge a well-known local trail in real estate transactions. Realtors could

potentially be required by state law to inform potential buyers about existing trails and their historic preservation value. The role of trails in preserving sociocultural attributes of the local community could come to the forefront.

### ***Collaborating with the Forest Service***

#### ***ORV Impacts***

As a result of participatory action research (explained in Volume One), this case study provides grounded research into the role of trails in maintaining amenity value in rural communities, in preserving ecosystems and in sustaining community viability. Results of the process include written guidance for the community in preventing and resolving future trail disputes; these results may be generalizable. PAR results could raise awareness about locally emergent issues like trail access around which national organizations could mobilize. The effect of private control over public/private trails could also remedy concerns over ORV use on public lands.

Previously trail use mostly occurred by locals/neighbors who were familiar to landowners and was an integral part of community social life. Similar tensions have emerged across the Front Range of Colorado. In order to understand the differing types of trails that exist on public lands or have private trail segments please refer to Appendix One-A, Glossary of Trail Terms in Volume One of the *Community Trails Mediation Guide*

Through the PAR component of this EDR process, the coordination of local issues aligns with national environmental efforts. First, it is possible to potentially control damage to public wildlands occasioned by ORV use. Local trail policies and private control of trail segments can have a regulatory effect on ORV use. In this case, PAR supports national initiatives to reduce the impacts of ORV use on public lands, by highlighting a potential alliance with locals. A critical finding of the PAR research in this case is that ORV use not only impacts ecological resources, but sociocultural ones as well. Legislative initiatives could go a long way to preventing community disintegration that has resulted from residential sprawl and aggressive recreational imperatives in open space and wildland areas across the Front Range of Colorado.

#### ***The Gold Hill Case***

Existing collaborative work occurs in Gold Hill with the Forest Service. Gold Hill community members have built relationships with the Forest Service that have been helpful in reducing infestations of leafy spurge and mistletoe. The Gold Hill Weed Committee already collaborates with the Forest Service in promoting non-chemical techniques for weed control. Locals could expand efforts around the use of goats or flea beetles for leafy spurge and the hand cleaning of mistletoe.

In Gold Hill, it would of great value to cooperate with the Forest Service to control the growing level of ORV use along the Switzerland Trail. In the Gold Hill case, this increase in ORV activity of a motorized nature has greatly impacted both the seller's agent and the new landowner who closed the North Trail. Threatened ORV use on the North Trail could have been a factor in the closure.

The Forest Service might be willing to declare the area off limits to off-road dirt bike or vehicle use. An agreement to resolve issues of trail damage and maximum decibel output by ORVs might overcome the nuisance factors occasioned by ORV use. Another option would be to establish hours of use for motorized and mechanized access. It remains unlikely, however, that these measures would suffice to open the North Trail closure segment to general public access. The question of threat and familiarity remains when strangers pass by on a private trail. Still, the local community's efforts to mitigate the impact of ORV use on nearby residents of the Switzerland Trail could encourage the new landowner to trust, respect and understand local trail users' interests.

A representative at the Forest Service also pointed out the existence of a rare quaking fen in the vicinity of the Switzerland Trail that merits special protection measures, especially in light of the area's role in boreal toad habitat. Environmental awareness activities could be supported around the



quaking fen and imperiled species like the boreal toad in the area of Gold Hill. The information could present an example of a local community making a difference for its environment.

Locals could also support and even create signage at the head of the Switzerland Trail and at Rocky Point Trail that could provide an environmental education opportunity for those ORV enthusiasts who seem prone to off-road vehicular landscape abuse. In the last fifteen years, the proximity to Boulder has drawn bicyclists to Gold Hill's previously uncharted trails. An increase in recreational demand by mountain bicyclists, Off Road Vehicle (ORV) and dirt bike enthusiasts and the growing number of new homes built in the surrounding montane forests has created tension between landowners and trail users.

### *Outreach to ORV Users*

Urban and suburban life can be very stressful. It would be useful to understand the sociological and psychological factors that drive ORV and snowmobile enthusiasts to recreate in the way they do. Perhaps the sense of freedom that high-speed travel through an unpopulated area brings is critical. Feeling free is such a fundamental human desire. Or perhaps people simply need to vent their frustrations. Still, venting that causes harm is a fundamental problem when it is addressed at the landscape. There exist opportunities for redirecting that drive for freedom and need to express oneself in a wildland setting.

A series of forums might be organized to allow ORV users to express themselves in a safe social space so that they can share their needs and have that need met by public land policy without affecting the amenity value of wildlands for others or ecologically. Environmentalists could be encouraged to show compassion and deeply listen. Much good could result from an ongoing collaboration.

At any forums that address recreational planning for public lands, locals of differing communities should be coordinated by wilderness non-governmental organizations (NGOs) to represent the interests of locals versus those who come from elsewhere – in other words, those that are local elsewhere. See the section under “Community Trails Stewardship” in Volume Three. Also in Volume Three the section on “Public Lands Management” highlights opportunities for local communities to collaborate with the Forest Service.

### ***A Technical Assistance Team***

A Technical Assistance Team (TAT) would be comprised of locals and experts from government agencies working together to resolve trail and conservation issues. Other members could be drawn from the State Division of Wildlife and environmental organizations. A TAT works “with landowners to perform the land planning, explore limited development options, and analyzes legal, tax planning and ranching options to assist ranching families in considering a wide range of alternatives for protecting agricultural land.” (Conservation Partners, 1995, 5) A TAT replicates the work of many environmental collaboration efforts like the Owl Mountain partnership on the other side of Rocky Mountain National Park. A technical assistance team could serve as a catalyst for locally rooted advisory support by working in a participatory manner and also by drawing upon outside assistance and resources, which has been its course thus far.

## **Collaboration with County Government**

### ***Overview***

The Boulder County Comprehensive Plan does not acknowledge or address the existence of local wildland trail systems, that is, the ones that the Plan claims have existed for years. In contemporary planning language, these trails are renegade trails that fall under the rubric “social trails.” This understandable oversight, due to the lack of research on these trails, fails to take into account the need to reach a policy-level clarification on the role of these trails, the ramifications of the disputes that occur over access and means by which these disputes could be resolved.

There are many reasons for which the County should encourage and rely on local community effort to preserve our rural and wildland resources. The abundant energy of many citizens to engage in group projects could be harnessed through special annual events. Citizens seek to preserve if shown the way to a culture of stewardship. The potential labor pool and connectivity to nature that could come from such support would be worthwhile to explore and invest in as a participatory research activity throughout the County. Locals can and do often act as stewards, willingly offering their time in caretaking.

Differentiating local use and general public use is an important factor in achieving stasis around local trail disputes. The County has already eliminated certain motorized ORV and mountain bike uses in order to prevent and resolve disputes. The next step would be to recognize the variance between general public access and local wildland access on trails that traverse both public and private land. In addition, County voters might support statutes that allow for the preservation of local historic trail use without general public access. Boulder County could consider how to prepare for conditions that would allow for the resolution of these disputes through code changes and outreach.

Finally, it is critical that Boulder County review its R&PPA proposal to the BLM in light of the finding of this PAR/EDR intervention (See Volume One, “The BLM and Boulder County’s Proposed R&PPA Development” and Appendix One-D, R&PPA Testimony to County Commissioners (2003)).

### ***Tax Incentives and Site Plan Review***

The ways in which the Gold Hill Trails Group and others could collaborate with Boulder County might occur in setting guidelines for site plan review or incorporating local wildland trails into the Boulder County Comprehensive Plan. The agencies that would be involved include the Boulder County Land Use Department and the Boulder County Parks and Open Space Program. There may be opportunities to tie development rights to the preservation of local access trails. This could occur in a myriad ways all previously described: tax abatements, conservation and state trail easements, or forming a Boulder Mountain Communities Land Trust. Another approach could center on trail mile transfers and purchases that are tied into development rights. A detailed review of the Boulder County Comprehensive Plan and the history of the County Parks and Open Space Department are presented in Volume Three of the *Trails Mediation Guide*.

### ***Trail Mapping***

To map local access historic wildland trails could impede the capacity of locals to preserve quality of life and connectivity to the landscape, because of an inadequate capacity to address outsider use. Still, during site plan review, landowners could be required to identify local trails, and locals could comment on trails affected by the proposed development. Existing local trails do not appear on the County Trails Map and for good cause: they traverse private land.

The County map is at a small scale which does not allow for identifying specific trails. (Boulder County, 2004) Not making clear the exact location of proposed alignments could be a way to ensure discretionary control over alignments and protect the possibility of creating trails while also avoiding the onslaught of disputes over rights-of-way that could ensue if they were identified. Showing them on a map would ensure their demise due to the likely influx of recreationalists.

As it is, mountain bike maps for the County are published with many little known trails, which may have in part occasioned some of the County trail closures (e.g., Skytrails, 2004). Again, environmental education and local community outreach may be useful with regards to informing mapmakers of the consequences of their maps. Local connection between people is very different than maps made for strangers to enter into previously uncharted territory. Consider the colonial legacy and the ongoing repercussions of ecotourism and extractive patterns of use whether solely for fun and pleasure or for profit.

## ***Trail Mile Transfers and Purchases***

Boulder County land use regulations for the Agricultural zone permit subdivisions using transfers of residential development rights from one parcel to another. There are eligibility criteria for the sending site (including desirability for open space preservation) and different criteria for the receiving site. If the transfer is approved, Boulder County is granted a conservation easement in perpetuity on the sending site(s). A major objective of the Transfer of Development Rights Program (TDR) is preserving open space. (Boulder County Parks and Open Space Department, memo, 2002)

At the county level, long-range planning should consider the preservation of local trail systems as part of the overall transportation plan or as part of ecosystem management efforts. In order to support the preservation of existing local trail systems, the County might consider allowing development on one parcel that doesn't entail a local trail closure in exchange for trail access in another area. The right to close a trail could be purchased from a pool of trail miles. In this way, agreements could be made with landowners or prospective buyers at the time of sale or at the time of the site plan review process. Mechanisms for ensuring the trade of local trail miles could include an approach similar to sending development rights to a receiving site TDR.

A pool of rights to close a trail could be determined and landowners could buy the right to close a trail, but would do so by maintaining a trail system elsewhere. Certain trails could not be closed on historic, ecologic, transportation or cultural grounds. These would likely be trails that have served historically as essential pathways. A property developer could still purchase land with fewer essential pathways if they would prefer to not have a trail on their property. Real estate agents could inform clients about local trails on a property as an asset in a rural community rather than as an impediment.

### **CASE EXAMPLE: CREATING EQUITY IN A BARGAINING SITUATION Opportunities in the North Trail Case**

There are a range of ways in which locals can attempt to level the playing field with a recalcitrant or disproportionately powerful stakeholder always seeking to do no harm to any one. Connecting to other groups or affecting state or county policy is one way to expand a base of support for a particular issue like dispute prevention on local trail systems.

This *Trails Mediation Guide* discusses opportunities for achieving policy level frameworks that might prevent trail disputes. In reaching policy level objectives, it is useful for locals to build public awareness, garner agency support and collaborate with recreational and environmental advocates and even ORV advocacy groups. Sportsman may also be a source of good potential for alliance making.

Trails organizations, environmental groups and possibly the International Mountain Bike Association (IMBA) might be willing to assist in ensuring access to the trails surrounding Gold Hill and as a precedent-setting case for the Colorado Front Range. Off road vehicle users may be looking for alliances with environmental groups as a way to perhaps legitimize their claims. Trails research organizations might pick up on the historical and cultural resource preservation issue. Researchers in community forestry might pick up on the political ecology debate.

A critical period of claims-making occurs when the land is closed to customary use. As discussed in Volume One, the Gold Hill Trails Committee attempted to understand the range of best alternatives to a negotiated agreement (BATNAs) of stakeholders in the case. The psychological and sociological incentives to negotiate disputes over trail access include avoiding disruptions to the functions of local trail use customs and creating stable outcomes.

The critical component of a sound strategy for a stable social and ecological outcome is ensuring relatively equitable bargaining power. So the discussion that follows is to elucidate the legal

framework that governs landscape access. In particular, the legal analysis of the North Trail dispute is presented, as this particular dispute was the origin of the EDR/PAR intervention. This discussion by no means advocates for a litigated outcome. This is not a recommended course of action as explained in Volume One under “Disadvantages of Litigating Access.”

### **The North Trail Dispute and Gold Hill Mediation Process**

In the specific dispute in Gold Hill over the closure of the North Trail, the new landowner controlled the use of the trail that ran through his property. Upon apparent provocation by a neighbor, he closed the trail. The Gold Hill North Trail case is also presented in Volume One of the *Community Trails Mediation Guide*. Please refer to that volume for additional background information.

Although those involved in the trails mediation process were not able to speak directly with this landowner, they were able to gain a sense of possible concerns that he may have had that prompted the closure of the North Trail. The Trails Committee attempted to delve beneath the landowner’s position as presented by the seller’s agent. Since few involved in the trails mediation process have had a chance to discuss matters with the owner of the closed trail section, it is difficult to ascertain his most critical underlying interests.

According to the seller’s agent on the property, the new landowner was concerned about dirt bike use on the trail. He also intended to build (and is now building) a home and sought privacy for this new home. A certain belligerence of demeanor by local trails users could have compounded these concerns. The new landowner received a significant county property tax break by applying and receiving an agricultural designation for the land. Although his position appeared oppositional to the community, the seller’s agent indicated that the landowner was also concerned about his public image.

Of special note, landowners may perceive a local access trail as an impact on land value. In the case of the North Trail, the seller’s agent did not mention this as a cause for closure. Still, since property value has been a concern for abutters on Rails-to-Trails projects, this volume previously addressed ways to remedy this concern.

By conducting research so as to understand the landowner’s concerns upfront, the Trails Committee has attempted to open up avenues for involvement in the trails mediation process. The Trails Committee researched concerns of other landowners with trails around Gold Hill.

Concerns of private property owners around Gold Hill include the preservation of personal prerogative associated with individual property rights (including residential development), the preservation of land value, the mitigation of liability and fire risk, the maintenance of trails, weed management, wildlife protection, respect for one’s personal property and oneself by trail users, personal security and the security of loved ones and the preservation of privacy on one’s land and around one’s home. Still, many of these landowners do not oppose access on their trails and support an attempt to mediate access to the trail in question.

### **Conflict Assessment**

#### ***Initial Positions of the Principal Stakeholders***

The landowner, like many landowners, believed he should be able to control the use of the trail that ran through his property. Upon provocation by dirt bike users and a local neighbor, he closed the trail. His position precluded continued use of the North Trail by the community. Based on what could be gathered of the situation without direct communication with the landowner, the landowner intended to build a home and wanted to ensure privacy. He claimed need to fence property for management of a leafy spurge infestation on the southern edge of the property.

Community members were attached to the landscape through which the trail ran and wanted to preserve their access to the trail, which was founded in long historical tradition. The potential that the closure of this section of trail might foretell future closures of other local trails elicited the involvement of the community. Locals were concerned about preserving their unique quality of life.

“Psychological bonds with home places are most often unconscious or taken for granted experiences of bodily orientation in the physical environs of one’s home as well as an intimate sense of embeddedness, belonging, comfort, at ease and security in this locale” (Brown and Perkins, 1992:282). At the outset of community involvement with this particular trail dispute, locals made these claims that in turn reflect their values:

- Living history lives in the memory of the community;
- Local want to be always free to walk through the landscape;
- Long established trails are a vital artery of access to landscape;
- New owner is unaware of local history;
- Land is not an abstract exchange value; and
- What is going on is beyond mere legalities, but deals more importantly with relationships in the community.

### ***The West: Culture and Stereotypes***

Trail disputes can also have aspects of identity-based issues in which some parties seek to be identified with nouveau ranching culture and others with environmental justice values. Locals seem to derive their values from differing cultural frameworks of affiliation with natural resources: (1) emulating indigenous cultural affiliations with the natural world; (2) intellectual, cosmopolitan experience of the natural world which can include a science-based appreciation for ecological processes; and (3) little direct consideration of these matters, but attachment to the landscape and ambiance of Gold Hill nevertheless.

The American West has been the scene of dispute over natural resource use since Spanish gold seekers appeared on the horizon, if not before. Tensions over resource use are tied to cultural identity. The trail dispute in Gold Hill is aggravated by a regional cultural clash. Tension exists between those who identify with the ethos of the old West of mining and ranching, and the New West’s non-resource dependent, environmentally sensitive, outdoor recreation lifestyle. The New West reflects the lifestyle values of immigrants from other parts of the United States and abroad whose livelihood is seldom dependent on mineral extraction, ranching or forestry. In the multi-cultural, post-modern world of the American West, making sense of these differences deeply affects individual choice and personal economic survival. The perceived best use of natural resources varies greatly between the divergent paradigms. This variation often aggravates conflict.

Trail disputes in and around Gold Hill are in part caused by urban recreational demand for wilderness along the Front Range. They are also caused by a sense of division between those who are longtime residents and those who are newcomers or “outsiders.” Urban ecotourists have begun in the last fifteen years to recreate in the forests around Gold Hill. Urban ecotourists recreate without necessarily developing attachment to place. In Gold Hill, urban ecotourists are very often strangers, “outsiders,” unfamiliar, anonymous people who whiz past a local landowner without even the chance pause for a greeting. It is observed that urban ecotourists recreate without understanding the local sense of prerogative, landscape ownership or stewardship incentives. In this light, the urban ecotourist is “New West” with a twist of anonymity.

The Old West perspective does not often engage in valuing community resources or common pool resources over those of individual rights. Patterns and prerogatives over land tenure also seem to fall along the lines of Old West in contrast to the New West. This prerogative of rights cannot be overcome with regulatory guidance until generations have lived peaceably with the new guidance. Now at the beginning of the twenty first century we observe the dismantling of regulation meant to protect people and the environment. The mechanisms for social and ecological justice must be internal.

### ***Overcoming Stereotypes***

Cultural stereotypes make for interesting reading and great stories of passion and conflict. These stories don’t however serve to resolve conflicts. Understanding the core interests no matter

the topical cultural overlay is essential in resolving a dispute. . Culture is a problem in the positioning and in creating the context of the dispute...but it has nothing to do with resolving it fundamentally The superficial characteristics of cultures vary; the culture-specific behaviors that support harmonious social relations and ecological sustainability also vary. But at the root, all people believe they are doing the right thing as they define it within themselves, and as they were taught in the particular circumstances of their lives. . Most people want to be, and believe they are being, ethical and responsible.

Sometimes other imperatives keep us from working out the difficult tensions that can occur with change. New ownership of the meadows occasioned a change that was not initially handled well. We can “typecast” one another to explain a conflict or a tension, but that typecasting seldom results in a sustainable social environment. Stereotyping falls back on a model of “them” and “us” and seldom moves into the realm of understanding underlying interests. Stereotyping uses cultural bias to explain incomprehensible behaviors or actions that hurt us. This reactionary approach does not serve to resolve dispute.

In any cultural framework, values form an interesting overlay to this dispute. How to integrate various value systems into a peaceful whole is a powerful question, not only in Gold Hill, but also in our culturally connected and diverse global economic and social relations. The dynamic of assisting the new landowners in becoming part of a community and its customs is a critical one. The set of options in Volume Two complement the existing customs of use in targeting emerging needs for new landowners in Gold Hill.

***Perceptions of Locals Who Oppose Access***

Table Two-A and Table Two-B below present the positions and concerns of those who supported New Landowner in not wishing to pursue dialogue on the North Trail at the time of the Trails Mediation Workshop. These opinions or viewpoints may have since changed.

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Table Two-A  
POSITIONS OF LOCALS WHO OPPOSED ACCESS

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*Interpersonal Relations*

- Need to not feel attacked if have differing opinion\*
- Not to be looked upon as a villain\*
- It’s a free country and people have private property rights
- Town is family folk...young old, like it was in the 50s\*

*Process\**

- Would like summary of workshop, but can not participate
- It’s not appropriate for me to come to workshop

*Trail Access is not a Legitimate Concern\**

- Other land is accessible by the public
- Other issues more important than trails like preserving school
- There is no negotiating
- No trespassing

\*Statement by Selling Agent or Landowners with Trails

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Table Two-B  
CONCERNS OF LOCALS WHO OPPOSED ACCESS

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TRAIL ACCESS

*Local Interests*

Prevent General Public Access  
Patrolling with guns and dogs is unacceptable

*Privacy\**

Once a house is built people will stop coming by.  
They would feel uncomfortable doing so.  
Sanctity of homes free of intrusive disturbance

*Avoid Disrespect for Landowners\**

Litter, damage, human waste, fire danger

LAND MANAGEMENT

*Conservation*

Conservation is more important than trail use  
Land restoration is important  
Ranching for wildlife is important  
Need to manage fields and forests that have not been maintained  
Would like to share conservation benefits

*Weeds*

Concerned about spread of leafy spurge by trail users

NO PERMISSION/NO TRESPASSING

*History of No Permission\**

Previous owner of Rumick (Romig) Ranch never allowed public access on North Trail

*Motorized Access\**

Too many dirt bikes on Switzerland Trail

*Dogs\**

I have dogs on my land

COMMUNITY

Sad about how things have come to be  
Would like way to interface with community without tension

\* Statement by Seller's Agent or Landowners with Trails

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**Litigating Access to the North Trail**

***An Incentive to Negotiate***

A rudimentary analysis of the legal case that could be made is provided below. It does not reflect expert legal opinion, but should provide a sense of what might be possible in terms of litigating the case. This information is meant to serve as an incentive to encourage dialogue for a stable outcome in the case of the North Trail. There are advantages and disadvantages to this approach.

This writer conducted the legal analysis and I am not a professional. Please use discretion in reviewing the presentation of the legal case. It is by no means full proof; the discussion only provides initial direction and requires review by professionals in the legal arena. The presentation is meant to elucidate the murky waters of legally protecting or preventing access to local trail systems.

Three cases could be made to allow legal, general public access to the North Trail. The North Trail's history is provided below to substantiate this claim. The North Trail transects private property between two public parcels and is a local historic wildland trail (See Appendix One-A, Glossary of Trail Terms in Volume One). When this segment of the North Trail was closed, a dispute arose that was brought to the attention of the entire Gold Hill community.

Litigation is a costly process, but may be a way to resolve the dispute over access to the North Trail. Funding initiatives and donations in kind could be a beneficial way for ensuring that this process is undertaken if necessary. What alliances could be forged to allow for the community to pursue litigation without financial risk and in the hope of eventually resolving the dispute through mediation?

Boulder County might be willing to engage in opening up the trail, but then it would be a public trail (County Attorney in 2002 per Morning Sun neighbor). Rather, perhaps a greater understanding of local trails could lead to Boulder County policy that recognizes these resources. Among the long list of positive attributes of local trails that are presented in Volume One, local trail systems can in particular offset recreational demand and support conservation values in a county like Boulder County in which both are strong core values held by the public.

For future consideration of a legal case, community members might want to seek out the legal team of Boulder mountain historian and environmental attorneys like the one who presented at the Trails Mediation Workshop. In particular, one Boulder mountain historian has served as an expert witness to reopen a road south of Ballarat in the area of the recent Jamestown fire. One particular environmental attorney who has advised local landowners with trails is the attorney in the case. This environmental attorney was the plaintiff's attorney in a case regarding the old wagon road on Big Horn. According to the Boulder mountain historian, affirmation of a road can occur with newspaper clippings, letters to and from, patents, old maps, journals, and anything that is dated pre-statehood (1876). Keep in mind that the case for litigating the "North Trail" is presented solely for educational reasons and as an incentive to negotiate.

### ***The Analysis***

The old stage road coincides with the North Trail on the western end of the North Trail. The Old Stage Road existed prior to the railroad grade of the Switzerland Trail. A case could be prepared relying on the findings in the Big Horn "Old Wagon Road" decision by the Colorado Supreme Court in 2000. The Old Wagon Road was the main road to Gold Hill until a less steep alternative was built in 1887. Recent reinterpretations of RS2477 have changed the way in which access is being handled on private and Forest Service Lands in former mining districts.

The case of the North Trail involves two highways (nineteenth century definition), an irrigation ditch and a legacy of historic and contemporary recreational use. Both the North Trail and the stage/freight road (See Exhibit B "Old Stage Road") could be argued as RS 2477 rights-of-way. RS2477 allows "a right-of-way for construction of highways over public lands not yet reserved for public uses."

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### Table Two-C

#### CLAIMS FOR NORTH TRAIL, STAGE/FREIGHT WAGON ROAD AND CHINAMAN'S DITCH

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The North Trail may be an old trail that pre-existed white settlement. This would follow from the use of Sunshine by the Aiken party to reach Gold Run Creek. The North Trail may have been an extension of the Sunshine Canyon trail that eventually led to Arapaho Pass. This is of course conjecture and cannot be substantiated other than by finding of arrowheads in large quantities at the property of a landowner near Mount Alto.



- 1859 Gold found in Gold Run Creek near present-day Gold Hill town site  
Gold Hill Mining District # 1 of Nebraska Territory.- approx. 1,750 residents
- 1860 Ward Mining District established
- 1860 The Chinamen's ditch (7 miles long) was built in 1860 and parallels the North Trail for water from upper left hand to Gold Run. Could they have found that gradient independently or had it also been the route of a trail that pre-existed the 1859 gold strike?

Note the town site of Gold Hill may have primary water rights to Left Hand Creek.

*To be explored.*

North Trail services Chinamen's Ditch and is a shortcut to Ward. The North Trail is also used to access unpatented and patented mining claims.

- 1860 Nebraska Territorial Assembly in Golden authorizes roads
- 1863 Gold mining slump
- 1865 Civil War ends
- 1866 RS 2477 public right of way authorized over Federal lands.
- 1872 Mining Act and Tellurium Boom
- 1873 Mr. Wentworth builds hotel in Gold Hill for tourist lodging.  
Many suffering from tuberculosis settle along the Front Range.  
Isabella Bird travels the area from Estes Park to Evergreen.

The North Trail is likely used by tourists and locals to hike and hunt. It continues to be used to access unpatented and patented mining claims.

- 1876 Colorado becomes a state
- 1883 Railroad to Sunset. Stage/freight wagon road built from Sunset to Ward. Tourists and freight travel Sunset to Mount Alto, through the Consultant to China property and around the north side of two buttes north of the NT closure property affording a view of Long's Peak.

Freight Wagon/Stage Road from Sunset to Sawmill traverses NT closure property.

**TWO ROADS AND CHINAMEN'S DITCH PRE-EXIST ENTRY OF NT CLOSURE PROPERTY INTO PRIVATE OWNERSHIP AS A HOMESTEAD; THESE ROADS WERE CREATED WHILE THE LAND WAS IN THE PUBLIC DOMAIN.**

- 1884 Rumick Ranch established.

Historically, ranches were open and people could traverse them (Mountain trail historian, pers. conv.).

The North Trail was probably used to access Gold Hill by the people at either Rumick Ranch or the Anderson Ranch.

- 1894 Railroad to Sunset washed out due to flood

**THE TWO ROADS AND CHINAMEN'S DITCH PRE-EXIST PUBLIC FOREST DESIGNATION.**

- 1897 Medicine Bow Reserve established including Gold Hill forests.
- 1898 Railroad rebuilt to Sunset plus Ward spur (cut near Gold Hill Station)
- 1902 Stage and Freight Wagon Road shows on USGS Map
- 1902 North Trail shows on currently closed property on Ward-Sunset Mining Area Map  
Mining Claim shows on NT Closure Property on Ward-Sunset Map  
Structure shows on NT Closure property. Property along Stage/Freight Road on Ward-Sunset Map

Rumick Ranch road shows on NT Closure property. Property from Stage Coach Road towards the west on Ward-Sunset Mining Map

#### THE TWO ROADS HAVE NOT BEEN ABANDONED.

Two roads continue to show on maps after railroad to Ward closes. No alternate roads exist to access the forest service land on the north side of the New Landowner or Seller's Agent's property. There exists a structure on the North Trail closure land at the junction of the North Trail and the Stage/Freight road. People likely walk from Gold Hill Station over the North Trail to access the Forest Service land north of the Ranch. There exists a patented mining claim on North Trail closure property.

- 1910 Colorado National Forest established  
The Double M dude ranch, now Colorado Mountain Ranch, prospered.
- 1916 Walter's Bros. Stage Auto Stage Line comes into service.
- 1919 Switzerland Trail to Glacier Lake, Eldora and the Ward spur was not rebuilt.
- 1920 End of mining and Gold Hill sets out to "reproduce a cycle of prosperity and growth based on its natural resources and tourism" (Courtney et al, 1999, 24).
- 1920s-1950s Bluebirds of the Holiday House Association arrive and stay in Gold Hill
- 1926 Stage and Freight Wagon Road shows as 'Trail' on Drumm's Wall Map. Henry Drumm was the Boulder County Surveyor. Orig. copyright 1914. H. Drumm mapped the county from 1904 to 1926.

#### THERE IS A PUBLIC WAY AS OF 1921 OVER THE North Trail CLOSURE PROPERTY PER CRS 43-1-202

Stage and freight road continues to show on maps after creation of the National Forest System; the road has not been abandoned. The North Trail used by tourists, summer residents & locals to hike or ride to & from Gold Hill. Locals can speak to this.

#### ADVERSE POSSESSION EXISTS ON the NORTH TRAIL TRANSECT OVER CLOSUREPROPERTY, ON STAGE COACH/FREIGHT WAGON ROAD AND ALONG CHINAMAN'S DITCH PER CRS 43-2-201.

- 1960-pres. Number of permanent residents in Gold Hill grows.
- 1978 Potato Gulch Portion of Stage & Freight Wagon Road shows on USGS map as an unimproved dirt road.
- 2004 Stage and Freight road shows on the ground and in aerial photos.  
North Trail shows on the ground, in aerial photos and on Sky Terrain Map of Boulder Trails  
Chinamen's Ditch shows on the ground and in aerial photos.

- Stage/freight wagon road used by locals and in annual GH school fieldtrip.
- NT Closure Property proposed driveway runs on stage/freight road, which is a public road likely authorized by the Territorial Assembly.
- North Trail used by locals to hike or bike or horseback to and from Gold Hill; this needs further research.
- Chinamen's ditch used by locals for cross-country skiing and could be legitimate source of water to address climate change and water needs on the ridge.

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#### ***The Legal Precedence***

In the case of the closures of the North Trail, the plaintiffs (members of Gold Hill Community) would likely argue for RS 2477 right-of-ways, rather than prescriptive use. Prescriptive

use is not as straightforward to demonstrate and resides in the common law right to use a trail if you have done so for over 20 years. Both scenarios are presented below for the purposes of fully developing a legal strategy in this case. Exhibit B in the Appendix provides a map showing the details of location around the area of the North Trail closure.

*Federal Law: RS2477 Public Way*

“A federal law passed in 1866, commonly referred to as R.S. 2477, granted the ‘right of way for the construction of highways over public lands, not reserved for public uses...’ If the road existed... when the land it crosses was unreserved public domain, the road is a public road. Thus, if a road or trail existed prior to withdrawal of the land from the public domain by virtue of a mining claim or homestead, it may still be a public way. In Colorado, use by a single miner is considered sufficient to create an R.S. 2477 public road” (County Attorney, Factsheet for Workshop, 3/15/03).

In order for RS2477 to apply, you must show that the road pre-existed private ownership (“Catalyst”(Morning Sun Resident) per County Attorney). The caveat is that the road must never have been abandoned. (County Attorney, pers. conv., 2/03). An example of RS2477 case law is provided below in the Big Horn Old Wagon Road Case. From review of that case in February 2004, I have learned that abandonment must be demonstrated and the burden of proof falls upon the property owner claiming to prevent access. Routes cannot be abandoned through non-use. In addition, the energy imperatives of the current Bush Administration make this easier to argue, even on designated Roadless areas. (Environmental Attorney, Workshop, 3/15/03).

***Colorado Revised Statutes***

Common law provisions state that if access exists to a thoroughfare for at least 20 years then it becomes a defacto public thoroughfare and cannot be legally closed off. It would be a civil court that decides (Boulder County Sheriff, pers. conv. 2/20/04). Attorney clarifications on these points include:

*43-1-202 Colorado Revised Statutes*

“All roads and highways which are, on May 4, 1921, by law open to public traffic shall be public highways.”

Prescriptive Use

Section 43-2-201(1)(c), Colorado Revised Statutes, provides that a trail or road that has been used adversely without interruption or objection on the part of a landowner for twenty consecutive years becomes a public way (County Attorney, Factsheet, 3/15/03).

Adverse possession requires that the public use the road, with the actual or implied knowledge of the landowner, without permission, openly and continuously for a period of twenty years.

Prescriptive rights exist to use a trail if you know it is private and have used it for over 16 [errata 20] years (Environmental Attorney, Workshop, 3/15/03).

Colorado Law requires that demonstrating use allow for all uses. Such a mandate therefore entails free and open access to all publics without any restrictions. A mixed public could be allowed access “for all public purposes.” (Environmental Attorney Two, 3/13/03)

Permissive use does not argue for public access

Where land is vacant, unenclosed and unoccupied, the presumption is that the use is permissive (County Attorney, Factsheet, 3/15/03).

Permissive use is either when the property owner gives permission or when people use the trail on some land and the property owner is absent.

*Water rights and the ditch*

Chinamen's ditch legal right to use as ditch, but not road or trail (Environmental Attorney, Workshop, 3/15/03).

*Big Horn "Old Wagon Road" Case*

(Party One v Party Two, 97 CV1319, Div. 2, Boulder District Court.)

As a point of reference for arguing the case of access to the North Trail, I have provided the details of the Big Horn "Old Wagon Road" case. The plaintiff claimed the "Old Wagon Road" as public highway because it was a public road before it was removed from public domain. He also claimed that the public has adversely used the road for the prescriptive time period under CRS 43-2-201. Forrest Jones, of Sunshine, spoke in an oral history before his passing of the road going up over the top of Big Horn to the "north from the present picnic park" in his recollections (1983,40). Initially, Judge Bailin decided on Sept. 2, 1999 that the road was abandoned after becoming an RS2477 road. Her court also further found that the thoroughfare did not become a public road by virtue of adverse possession.

The Colorado Supreme Court reversed this decision when it stated: "The [District Court] judgment that the ... road is not public and quieting title in the portion of the road traversing Parker's property is reversed." The old wagon road over Big Horn was to remain public because it was an RS 2477 highway and had continued to be used by a part of the public even if on foot and even if solely for recreational purposes.

Following is the case law given to support the Colorado Supreme Court decision.

*RS 2477 is affirmed*

"Neither work nor government action is required to constitute acceptance of an R.S. 2477 road."

*Abandonment is not supported by the record.*

"Because the road was established through public use, we need not address the abandonment of a road created through public prescriptive use. The burden of asserting abandonment is on the party asserting abandonment. Abandonment of a public road requires proof of intent to abandon and proof of nonuse. " "An analysis of not non-use factor focuses on public acts alone." "A road blocked to public use since 1960 indicated nonuse in 1994." And even with the nonuse of a former road for 30 years, the court did not agree with the finding that such clearly demonstrated intent to abandon it"

The old wagon road on Big Horn continued to be used to access mining claims after the shelf road was built. Once a road is established as a public road, it may used for all uses allowed to the public under the laws of the state, e.g. mining access in no less legitimate than a thoroughfare between Boulder and Ward. Purpose of RS 2477 was to provide access rights to land claims of miners, settlers and local governments. A right of access is necessary to satisfactory and beneficial use of the land.

Colorado has adopted a broader definition of what constitutes a "road" or "highway"...depending on the context a footpath may be considered a highway...and under

RS2477, this includes roads created by the passage of wagons. “Where the vacation of a highway will cause special injury to an adjoining owner he is entitled to compensation. The availability of substitute access.... has usually been a relevant, if not critical, factor in the determination of an intent to abandon. Reasonable use is part of the bundle of sticks of mineral claim property rights, including unpatented claims. RS 2477 was created to promote access, development and settlement of otherwise remote areas”

*Nonuse could not be affirmed.*

“Old Wagon Road continues to be used for recreational purposes. Recreational use dated back to at least the 1920s and continues through the present. “Further the record shows that Party Two’s several attempts to block the public from the use of the road were generally ineffective. Indeed, the record contains ample evidence to the effect that pedestrian and vehicular traffic on the road has not abated, and that both the property owners and the general public continue to use the road.” “Even occasional use of a public road for access purposes, in the absence of an alternative road, precludes a finding of abandonment.” In one case there was no finding of abandonment despite non-use for 20 years.

“There can be no abandonment by nonuse so long as any portion of the public continues to use the road as a highway. Even when an alternate road has been constructed, if an earlier built road retains some use, it is not considered abandoned. No finding of abandonment despite public’s lack of maintenance, relative lack of use, and construction of substitute road. Public road may not be deemed abandoned because of a substantial reduction in the number of people who continue to make use of it. To support a finding of abandonment, use of a public road must be “practically impossible.”

### ***Other Potential Actions***

#### ***Local community hike of the “North Trail Bypass”***

This could be accomplished as fun day in which the landowner acquiesces and supports local use on that day. It could be a great community builder. This could happen on the first Saturday of June, which is National Trails Day.

The Tour de Rump has not been happening for several years; this was a mountain bike rally that ended at Hansen’s Pond. It unfortunately included non-locals, which may have in the end lead to its demise. These non-locals may have shared the location of local trails with other non-locals. Still, it might be fun to recreate the Tour de Rump on the Bypass as well with only locals of course.

#### ***Boulder County Site Plan Review***

The Boulder County Land Use department seems to have failed to address specific and unique factors associated with the closure property that included the “North Trail.” The site plan review process requires the identification of wildlife habitats and migration routes. The ecological assessment that was presented was not made available at the hearing. In addition, normally site plan review requires that all pedestrian paths be shown and historical resources must be inventoried. This was not the case.

“Although these land use and zoning regulations do not preserve large tracts of open space, they do help preserve the rural character of unincorporated Boulder County.”  
(Boulder County Parks and Open Space Department, memo, 2002)

The Commissioner’s approval in 2003 overlooks an inherent conflict of interest by relying on a property owner’s own ecological or cultural inventory of a site. Based on a recent review of the County Land Use Department’s Site Plan Review documents, the following were not identified:

- 1) A natural drainage that serves as both wildlife habitat and migration route

- a. North facing gulch and drainage connecting wetland to second order stream that could support greenback cutthroat trout.
  - b. Elk corridor
  - c. Significant plant ecosystems of aquatic habitat
  - d. Potential habitat of the Boreal Toad, (sighted at Gold Lake same elevation 2 miles north) and other imperiled species including mottled dusky wing. The Gulch and meadows are likely home to many other species of designated of special concern by the State of Colorado (See Gold Hill Tracking List in Volume Three)
- 2) The archaeological and historical resources on the site
- a. Identification of the “stage coach road” on the property
  - b. The “North Trail” was not identified as an existing right of way.

In addition, no recommendations were made regarding the type and size and location of fencing on the property in an attempt to be sensitive to both human and wildlife habitat. A case can be made regarding the failure of Boulder County Land Use to adhere to the site plan review process on these points: elk migratory routes, wetland habitat for a state listed species (the Boreal Toad), existing roadways, two significant drainage ways and a ditch.

Signs of a migratory elk corridor exist down the unnamed gulch near the “North Trail” bypass. The elk likely used the meadow and its ponds. Elk signs (tracks and scat) also exist over in the meadow area of Spring Gulch on the north side of Left Hand Creek. The presence of Boreal Toad habitats above Spring Gulch at the Gold Lake Spa; the location of the ponds in the meadows does not preclude Boreal Toad.

The potential role of the wetland area in replenishing underground water supply for Gold Hill was not made clear. The rare quaking fen found less than a mile away is fed by groundwater that percolates up from the water table. The water table is fed by rainfall on the surrounding slopes which include the wetland meadows plateau on which ranching is proposed to resume. The ground water will be further contaminated by this ranching operation and especially so if herbicides, hormonal injections and antibiotics are employed on the property.

Point Two above relates to an appraisal of the location and width of all existing and proposed roadways, pedestrian paths, and road rights of way evaluated systematically as historically and culturally significant. Historic maps and the way these trails show on the land are evidence of their existence. This information is presented in detail above under the section on “Litigating Access.”

In addition, it could be argued that rather than an incongruent 10,000-foot residence, it could be preferable ecologically and socioculturally to have friendly cluster development on one end of the closure property that includes the “North Trail” section. Four building lots exist on the property. The size of the proposed house is the equivalent of 8 times the 1200 square foot size of a historic Gold Hill house with a contemporary addition. Historic homes in Gold Hill were around 600 square feet on the large end. Preserving the right-of-way over the “North Trail” may have partially offset the encumbrance of development on the four lots. Is there any guarantee that the other three lots won’t be sold as buildable lots?

Additional information regarding collaborating with Boulder County can be found in Volume Three of the Trails Booklet under the section of the same name.

### ***Tax Incentives Misplaced in the Case of the “North Trail” Property***

The landowner claims that the property is a ranch, although no cattle currently or ever in his tenure have grazed upon the land. With this designation, county property taxes are a mere seven hundred dollars annually for a property that sold for two to three million dollars in 2000. For both the ranching operation and to contain the leafy spurge infestation (due to previous ranching practices), the landowner has fenced the property along its southern and northern edge.

The land was designated agricultural ranch land following the purchase, and the property is assessed at \$7 per acre or \$1008. Productivity levels on ranch land in the mountains have been very

low for the last ten years ago or so (County Assessor, pers. conv., 3/5/03). The discount offered reducing property valued at 2 million to \$1000 is equivalent to paying one dollar for every two thousand dollars of value. That is a virtual elimination of tax burden.

The consequences of this action could encourage cattle ranching in a pristine meadow that is suitable habitat for the boreal toad. The Boreal toad suffers from fungus and is steadily declining. The species is on the Federal candidate species list. Boreal toads have been found two miles north at the same elevation at Gold Lake. Even without the Boreal Toad habitat, this rare meadow wetland area will be significantly impacted by cattle grazing, and it borders on two gulches, which are in excellent ecological condition and serve as important migratory corridors. Would it not be preferable to offer the same tax benefits for ecological preservation, community stewardship and community viability?

Almost all of unincorporated Boulder County is zoned Agricultural or Forestry. The Forestry zone permits a residential density of one unit per 35 acres. The Agricultural zone permits one unit per 35 acres as a use by right or subdivisions of up to one unit per 17.5 acres on a minimum of 320 acres, providing the development is clustered on 15-25% of the land and an agricultural conservation easement is granted to Boulder County on the remaining 75-85%.

(Boulder County Parks and Open Space Department, memo, 2002)

Offsetting property taxes are an important incentive toward preserving open space or historic ranching and farming activities on lands. In land rich, cash poor farming, or ranching of the past, holding on to land was very difficult due to increasing property taxes. Increasing property taxes in areas of housing development placed a financial burden on these farming families that often lured them out of their livelihood for the ease of selling to high priced developers.

The equivalent of a full tax offset on the 144 acres of land value has been provided by Boulder County for the purposes of ranching. Ranching is not the livelihood of the landowner in this case. It would be a hobby. This is particularly troubling in light of the fact that ranching:

- Has not been in place on the property for decades;
- Was the source of the intrusion of leafy spurge on the property;
- Will likely occasion environmental degradation on a ridge that serves as the headwaters of two second order streams: Four Mile Creek and Left Hand Creek; and,
- Fencing has impeded a well-established elk corridor coming up from Left Hand Creek.

The rural character of Boulder County will not be preserved with a 10,000 square foot house sitting on a butte over a lovely meadow formerly used for elk habitat and local use of the "North Trail. All in all, cattle ranching activity encouraged by a tax abatement will likely occasion negative impacts on both the community and the ecological systems. A horse ranch may be an entirely different matter.

## **FUTURE COMMUNITY TRAIL RESEARCH, ACTION AND FUNDING**

### **Research Directions**

An essential and first order stream of research is to verify the merit of distinguishing local historic wildland trails from general public access trails. In a first approach, it would be useful to confirm whether the perception of a difference exists outside the Gold Hill study area. A survey could be conducted among property owners and government entities to determine the level of distinction that does exist in the experience and minds of a range of observers. Diagrams and Tables found in Volume One are a foundation for understanding, but merit refinement. An overview of the mid-range theory is found in these appendices:

- Appendix One-A. Glossary of Trail Terms
- Appendix One-B. Functions of Trail Customs
- Appendix One-C. Understanding Trail Access by Locals

Trails disputes are complex. More research is needed to understand local trail access and how to resolve disputes over access. Further participatory action research and comparative case analysis can confirm and generalize these results.

Further study is needed to establish a database on trail closure disputes: causes, impacts, and quantity. The county-level Land Use, Open Space and Long Range Planning Department in conjunction with the Open Space Department may wish to undertake this research.

County land use departments could also serve as a clearinghouse for mediating local wildland trail disputes in order to increase the success of such processes and simply to restore harmonious use in rural settings. What factors are essential to reaching wise and stable outcomes? An outreach program on local trails and their role might be beneficial in terms of exploring the early results of this line of research, increasing awareness levels and opening up discussion.

Of particular interest would be the identification of “sense of community” as described in the Boulder County Comprehensive Plan as an amenity value of trails (see also “The Role of Trails in Community Life” in Volume One). Rails-to-Trails are America’s new front porch according to one advocate, (Rails-to-Trails Massachusetts, pers. conv., 3/12/03) Could we also conclude that local historic wildland trails are similar to a front porch and serve as a complementary natural communication interface? Also, how do abutters of a local wildland trail experience the movement of outsiders versus insiders across their land?

The sociocultural impacts of trail loss in a wildland setting merit evaluation. In terms of large-scale changes that might affect the environment, legislation exists to evaluate impact. In terms of incremental losses attributable in this case to loss of local wildland trails due to private property owner closure, the obligation to measure impact does not of course exist. Still, it is noteworthy to observe that sociocultural impacts are seldom assessed.

The advent of motorized and mechanized off-road vehicles has altered the pattern of use on local wildland trails. The impact of this shift needs to be evaluated in other case settings than the one in Gold Hill. Exploratory research with recreation and wilderness non-government organizations (NGOS) would benefit from the discovery of whether there is value in using private trail segments to create controls over recreational use to protect wilderness.

The National Environmental Protection Act (NEPA) stipulates that an impact assessment must be completed prior to undertaking a project that might affect sociocultural or environmental resources. NEPA has been implemented to measure environmental impacts with little regard to social impacts. This failure to evaluate sociocultural impacts has been ineffective in protecting environmental resources since the two sets of consequences are intertwined. The failure to measure sociocultural impacts has also undermined quality of life by failing to qualify “progress.”

Future research could also include the costs of administering programs of tax abatement for trails in addition to abatements for properties with agricultural property designations. The impact of local wildland trail systems on property values needs further study. Local trail systems could be inventoried for study—without public distribution of the exact location of trails—in order to establish a target ratio for protection. Trails would be identified by historic attributes, habitat type, community proximity and elevation.

In the case of Boulder County, the county could also enhance the site plan review process to include migratory corridors and potential endangered species habitat and tracking. Site plan review should include local trails and migratory corridors. Both of these seemed to have been overlooked on the North Trail closure.

In understanding the conservation value of a local trail system, benefits of local monitoring and stewardship could be compared to impacts of local wildland trail use by type of use. Local wildland trails may or may not be an essential component of community-based ecosystem stewardship, but this merits further evaluation.



## **Funding**

Another important research direction is identifying potential funding sources for local historic wildland trails research. Local wildland trails as a phenomenon and the disputes that surround them are poorly understood.

As with most chicken and egg effects, research requires funding, but funding is not likely to be available prior to establishing the merit of the research. The participatory action research conducted to create the *Trails Mediation Guide* did not receive funding. This is due in part to a failure to identify funding resources until the project was well underway. One local person was attempting to find sources of funding, but had to return to other priorities prior to reaching completion.

In the future, funding could potentially come from the American Greenways Project. The Conservation Fund may also be a source of funding because of its broad spectrum of interest. In Colorado, the Colorado State Trail Program has a funding cycle through Great Outdoors-Colorado (GOCO). GOCO offers funding from lottery proceeds. Other federal, state, and county agencies may also be a resource.

Local landowners with trails and other members of the community could form trail groups that fund research. Such groups could also potentially self-fund trail research and the stewardship activities of local trails groups.

A wide range of organizations attempt to protect wilderness. Some others also address recreational demand. These organizations may not have funding, but could team with locals to secure funding. One such organization to consider in the Colorado is the Rocky Mountain Recreation Initiative. Its director was the former director of the Southern Rockies Ecosystem Project.

## **CONCLUSION**

The process the residents of Gold Hill went through in their attempt to preserve a local historic wildland trail can serve as a model for other communities that want to prevent disputes over access rights to trails that connect neighbors to each other and to the natural lands that surround them. In this age of anonymity, with such an emphasis placed on personal property, it might seem unrealistic to imagine residents, even of a small mountain town, sitting down to negotiate passage over wild terrain, through meadows and forests. By using the *Trails Mediation Guide* as a reference, individuals and groups across the country may be able to discover new ways to live in harmony with each other and with the land under their stewardship.