



PUBLIC LANDS SUMMIT

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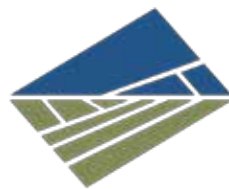
**PUBLIC
LANDS
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May 13th, 2016
Las Vegas, Nevada

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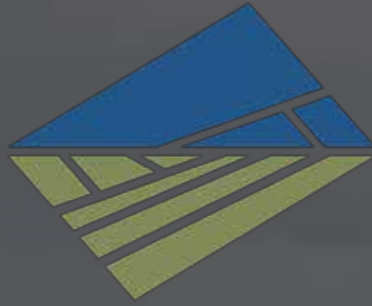
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Community and Media Engagement

Resources for Effectively Communicating Your Message with Leaders, Media and Those Around You

Courtesy of:
JDA Frontline



Community Engagement Opportunities

What Is Community Engagement?

Community engagement is “the process of working collaboratively with and through groups of people affiliated by geographic proximity, special interest or similar situations to address issues affecting the well-being of those people.” It “involves partnerships and coalitions that help mobilize resources and influence systems, change relationships among partners, and serve as a catalyst for changing policies, programs and practices.”

Why Is Community Engagement Important?

Community engagement increases your program’s influence and ability to achieve the change you desire. It broadens your base of support and can put you in touch with important contacts to leverage resources and get specialized expertise. That kind of support not only makes a program more effective but also improves its prospects for sustainability.

Principles of Community Engagement

Before Starting a Community Engagement Effort

1. Be clear about the purposes or goals of the engagement effort and the populations and/or communities you want to engage.

Those wishing to engage the community need to be able to communicate to that community why its participation is

worthwhile.

2. Become knowledgeable about the community’s culture, economic conditions, social networks, political and power structures, norms and values, demographic trends, history, and experience with efforts by outside groups to engage it in various programs. Learn about the community’s perceptions of those initiating the engagement activities.

It is important to learn as much about the community as possible, through both qualitative and quantitative methods from as many sources as feasible.

For Engagement to Occur, it is necessary to:

3. Go to the community, establish relationships, build trust, work with the formal and informal leadership, and seek commitment from community organizations and leaders to create processes for mobilizing the community.

Engagement is based on community support. Positive change is more likely to occur when community members are an integral part of a program’s development and implementation.

Remember and accept that collective self-determination is the responsibility and right of all people in a community. No external entity should assume it can bestow on a community the power to act in its own self-interest.

Just because an individual, institution or organization introduces itself into the community does not mean that it is

automatically becomes part of the community.

For Engagement to Succeed:

5. Partnering with the community is necessary to create change

The American Heritage Dictionary defines partnership as “a relationship between individuals or groups that is characterized by mutual cooperation and

responsibility, as for the achievement of a specified goal.”

6. All aspects of community engagement must recognize and respect the diversity of the community. Awareness of the various cultures of a community and other factors affecting diversity must be paramount in planning, designing, and implementing approaches to engaging a community.

Diversity may be related to economic, educational, employment, or health status as well as differences in culture, language, race, ethnicity, age, gender, mobility, literacy, or personal interests.

7. Community engagement can only be sustained by identifying and mobilizing community assets and strengths and by developing the community’s capacity and resources to make decisions and take action.

Community members and institutions should be viewed as resources to bring about change and take action.

8. Organizations that wish to engage a community as well as individuals seeking to effect change must be prepared to release control of actions or interventions to the community and be flexible enough to meet its changing needs.

Engaging the community is ultimately about facilitating community-driven action.

9. Community collaboration requires long-term commitment by the engaging organization and its partners. Community participation and mobilization need nurturing over the long term.

Where Can I Get Involved?

Communities provide many opportunities to get involved and engage others. Below is an initial sampling for your consideration:

- City Council
- Civic organizations
- School boards
- Churches
- Advisory committees
- Planning boards
- Museum boards
- Service organizations

- Volunteer organizations and boards
- Boys and girls clubs
- Park commissions

Working with the Media

Newspapers

- Know the rules
 - On the record: everything you say can be printed and attributed to you
 - Background: everything you say can be printed but not to you by name (keep in mind, they can describe your position – i.e. “... said a businessman working with the company.”)
 - Off the record: the information is to be kept between you and the reporter only
- It is always best to speak as though you are “on the record” even if you’re told otherwise.
- The reporter can choose what they include so stick to your message and pivot back to it constantly.
- Take the time to educate the reporter on the issue to provide context.

Television Interviews

- Allow the interviewer to finish their question and avoid interrupting.
- TV stories are short – often less than 60 seconds so keep your answers concise
- and on message.
- Always assume the microphone is on and the cameras are rolling even if the
- interview hasn’t started or has finished.
- Offer to provide the reporter visuals that prove your point or enhance the story.

Talk Radio

- Always try to use a landline if possible.
- While the format is longer than TV, hosts often move quickly so answer questions fully but concisely.
- If you’re the subject of an interview (as opposed to calling in as a “caller”), establish the length of the interview and whether you will take caller questions in advance.
- Encourage the audience to visit supportive websites or attend events.

General Tips

- Know the facts. If you are unsure, don’t guess. Simply tell the reporter/host you’ll get back with them.
- Respond in a timely manner. Reporters always have a deadline.
- Anticipate questions. Find out what the reporter wants to talk about and call them back later if necessary.

- Avoid hostility. Stay composed and don't overreact to questions or assertions you feel are unfair.
- Never let a misstatement stand alone. If the premise of the question is wrong, correct it and move on with your answer.

How to Construct a "Letter to the Editor"

An effective "Letter to the Editor" (LTE) can shape the debate on a particular issue and influence public opinion and legislators alike. To craft an LTE that is likely to both be accepted by a publication and resonate with the intended audience, consider the following tips on timing, content, engagement and placement.

Timing

- Placing an LTE at the right time is key to its publication and effectiveness. A letter for/against a piece of legislation is most effective if published when legislators are considering the issue. A letter written in response to an article or opinion piece is most likely to get published.

Content

- Know your word limit because brevity is crucial in an LTE. Many publications offer 250 words or less for a letter. If the piece is too long, a paper could remove an important point to keep the word count low.
- Get straight to the point by beginning with an attention-grabbing sentence. Focus on what is important, avoid broad generalizations and stick to facts you can back up.
- Conclude with a call to action that encourages your audience to engage. This can be writing to a particular legislator, or elected official.

Engagement

- Connect with your audience. A newspaper's main audience is dedicated to issue that matter to them and their region. Connect with your readers by offering brief statistics on the impact the issue would have on the community. If possible, also consider relating the issue to a member of the community.

Placement

- Follow a publication's instructions for submitting an LTE. Instructions for the top 100 newspapers can be found at <http://www.ccmc.org/node/16179>. If your paper is not listed, visit the website to find contact information and guidelines for submitting (usually in the letters section).

Policy Maker Engagement Opportunities

Online tools, such as Web sites, e-mail, Web logs, and instant messaging, have given citizens the ability to learn,

discuss, and organize more quickly and easily and in greater numbers than previously possible. These tools are also being used by advocacy organizations, such as associations and interest groups, to engage citizens in policy debates and to generate action on key legislation. They are enabling citizens – especially a growing grassroots community – to be more aggressive in their efforts to organize and to lobby Congress. As a result, more people are sending more messages to Congress than ever before.

Guidance for Communicating with Policy Makers

1. Get personal – Personalized or individualized messages to Congress have more influence on the decision-making process of Members of Congress than do identical form messages.
2. Use your voice – Many congressional staff doubt the legitimacy of identical form communications, and want to know whether communications are sent with constituents' knowledge and consent. Include personal stories.
3. Provide details – Congressional staff are seeking particular information to help them better understand, process, and respond to constituent communications. Be concise, direct and persuasive, and clearly state your position.

Implications for Engaging Policy Makers

1. Quality is more persuasive than quantity. Thoughtful, personalized constituent messages generally have more influence than a large number of identical form messages. Grassroots campaigns should consider placing greater emphasis on generating messages of higher quality and reducing form communications.
2. Grassroots organizations should develop a better understanding of Congress. The quality and impact of constituent communications would increase if organizations generating mass mail campaigns better understood Congress and the legislative process and adapted their efforts to the way congressional offices operate.
3. There is a difference between being noticed and having an impact. Bad grassroots practices may get noticed on Capitol Hill, but they tend not to be effective in influencing the opinions of Members of Congress, and sometimes damage the relationship between congressional offices and grassroots organizations.

How to Write an Email Blast

Email is often the most cost-effective way for an organization to disseminate a message to its primary or desired audience. An email blast is a great way to share good news or requests for action to large audiences. Here are some tips for constructing a successful email blast.

Know your audience – An email blast that resonates with the entire audience is crucial, and therefore building a list and crafting a message should go hand in hand.

For instance, communicating with new customers often requires a different tone than an email to stakeholders.

Know your purpose – It is important to know why you're sending the email blast and what you want your recipients to do as a result of reading it. Tell a story your audience can relate to and will want to act on.

Keep it brief – Be as concise and consistent as possible. If there is a call to action, it should be "above the fold" or towards the beginning of the email. A compelling subject line is the best way to capture the attention of your audience and increase an email's success.

Consider timing – Avoid sending emails on Fridays and after hours. Also consider the time zones of recipients and how long it's been since they've last heard from you. Creating a sense of urgency by sending an email when the call to action is needed immediately.

Email is social – Provide your recipients with ways to engage directly from your email. Whether it's as simple as asking them to follow you on social media or providing them with the tools to share your message with their networks, you never want to miss an opportunity to grow your reach when sending an email.

Subject Lines Matter – The first thing any email recipient sees is your subject line. It should speak to the purpose of your email and give your recipients a reason to open the message.

Best practices exist for a reason – Almost every reputable mass email program will have best practices for their customers. Be sure to look at the information they have to ensure that your emails won't be caught by spam filters or dismissed out of hand as unimportant.

Engaging Effectively Using Social Media

Social media is one of the most crucial ways to share information quickly and impact the debate. The most popular social media networks today are: Facebook, Twitter and LinkedIn. The following are some suggestions for those looking to more effectively use social media.

- Decide which social media platform(s) to use. As a beginner to social media you want to consider which platforms are right for you and concentrate your efforts on those networks. Don't try to be on every social media platform just because it's out there.
- Write a good description about yourself or your group. Shorter is always better, but be sure to capture the most important details like: What is your background or expertise? What are you proud of? What are you hoping to accomplish?
- Share interesting content such as text, images and videos. When we talk about publishing content we always say that 'content is king' and this especially true in social media. The best content captures your audience's attention and keeps it, including:
 - Articles/Stories/Pages related to your issue.
 - Interesting statistics about your issue
 - Research studies
 - Images and Videos
 - Hashtags (#) can make your content more searchable so don't forget to use hashtags in the networks that support it (Twitter).

Post many times per day but don't overdo it.

- Facebook personal page – As many times as you want
- Facebook business page – No more than 1-2 times per day and no more than 7 times per week.
- Twitter – The more you tweet the more exposure you get.
- Don't forget to follow back. Every day you should create the habit of viewing the people who are already following you and decide who to follow back. If you don't do this on a regular basis then most likely some will un-follow you and this is why you may sometimes notice a decrease in the number of followers.
- Follow the rules and be patient. Social media networks have rules to keep spammers away. For example there is a limit on twitter on the number of people you can follow per day; Facebook has its own rules etc.

Try to spend your time in creating a great social media profile that will stand over time and why not become one of the authoritative profiles in your niche.

Outline of a Game Plan to Influence Agency Outcomes

Contact: Brian Steed
Chief of Staff Congressman Chris Stewart (Utah-02)
brian.steed@mail.house.gov
323 Cannon House Office Building
Washington DC 20515
202-225-8069



Problem: Based on the current configuration of land ownership in the west, we are forced to deal with the federal agencies more than we would otherwise like. How do we get federal agencies to understand and be responsive to our needs?

Solution: 1) Engage with your federally elected officials and encourage them to do their jobs; 2) use the existing law in your favor.

What follows below is a general outline for this engagement.

I. Get your elected federal officials involved

A. Your federal elected officials represent you. There are many ways that we can be involved on your behalf. These include:

1. Engaging with agencies on your behalf on individual cases. They refer to this as case work and it is one of their primary functions. It may involve:
 - a. Meeting with agency personnel, including but not limited to agency heads
 - b. Sending personal letters to agency personnel
 - c. Advocating on your behalf to those agencies regarding your case.
2. Sending delegation letters and inquiries regarding agency actions and proposed regulations
3. Sending broader congressional letters regarding agency actions or proposed regulations.

- a. Multi-State letters
 - b. Western Congressional Caucus
 - c. Bi-partisan letters.
4. We can use the appropriations process to mandate agency behavior
 - a. Directed Spending
 - b. Appropriation Riders
5. We can get agency answers on the record.
 - a. Asking pointed questions during hearings to get answers on the congressional record.
 - b. Asking for official responses in writing from agency personnel.
 - c. Sometimes, we can even subpoena agency personnel when agencies are uncooperative.
6. Congressional oversight
 - a. Holding Congressional Hearing
 - b. Using subpoena power to get agency documents.
7. We can evangelize to our colleagues
8. We can legislate changes in the law mandating different agency behavior.

B. How do you get your federal elected officials interested?

1. Develop a positive relationship with your Congressional Representatives and their staff. A letter is not enough. Yelling at them is not enough. Get to know them.
2. Use your local elected officials as conduits for information. We rely on local elected officials as a

bellwether of the district. Their advocacy is meaningful.

3. Engage with like-minded individuals or trade associations.

4. Use NACO and other organizations

5. Call and write repeatedly. Be persistent.

II. Use the existing law to your favor

A. Utilize the discretion of your local agency officials. Try to develop a positive relationship with your local agency officials. It may go a long way to avoiding adverse agency actions.

B. Coordination in FLPMA and other favorable legislative language

Section 201 of the Federal Land Policy and Management Act [43 U.S.C. 1720] COORDINATION WITH STATE AND LOCAL GOVERNMENTS

“At least sixty days prior to offering for sale or otherwise conveying public lands under this Act, the Secretary shall notify the Governor of the State within which such lands are located and the head of the governing body of any

political subdivision of the State having zoning or other land use regulatory jurisdiction in the geographical area within which such lands are located, in order to afford the appropriate body the opportunity to zone or otherwise regulate, or change or amend existing zoning or other regulations concerning the use of such lands prior to such conveyance. The Secretary shall also promptly notify such public officials of the issuance of the patent or other document of conveyance for such lands.”

C. Use the Property Clause of the U.S. Constitution to our favor

D. Using judicial relief to make that agencies are following their own rules.

a. Federal Advisory Committee Act

b. Freedom of Information Act

c. National Environmental Protection Act

d. Others

The Value of Doing Your Own Monitoring

Courtesy of:
Chris Black, Rancher



MEMORANDUM OF UNDERSTANDING BETWEEN IDAHO STATE DEPARTMENT OF AGRICULTURE AND IDAHO BUREAU OF LAND MANAGEMENT FOR THE COLLECTION AND USE OF PHOTO MONITORING DATA IN RANGELAND HEALTH ASSESSMENTS

Parties

This Memorandum of Understanding [MOU] is made and entered into by and between the Idaho State Department of Agriculture [ISDA], whose address is 2270 Old Penitentiary Road, P.O. Box 7249, Boise, Idaho 83707 and the Idaho Bureau of Land Management [BLM], whose address is 1387 S. Vinnell Way, Boise, Idaho 83709. (The above parties are hereafter collectively referred to as the “Parties”).

Introduction

43 CFR 4100 defines monitoring as “the periodic observation and orderly collection of data to evaluate (1) effects of management actions and (2) effectiveness of actions in meeting management objectives.” Idaho’s Standards for Rangeland Health and Guidelines for Livestock Grazing Management define monitoring as “the orderly collection, analysis, and interpretation of resource data and information to evaluate progress toward meeting Standards for Rangeland Health and/or management objectives.”

Mutual Benefits and Interests:

The Parties agree that:

A. Repeated photographs taken at permanent locations are an effective and efficient method for monitoring. Repeat photographs of landscape locations and/or photo plots can

provide basic documentation of range trend. The parties will benefit by realizing an increase in frequency of photo monitoring at established sites, as well as an increase in the number of allotments/acres being monitored with photos.

B. Photo points are especially well adapted for use by permittees who are interested in monitoring their allotments. Photo points require minimal equipment, and are easy to set up and retake.

C. They can encourage participation by external groups or permittees by providing assistance such as formal or informal training, duplication of photographs, or copies of photo cards and other necessary forms.

D. They have a mutual interest in the BLM’s photo monitoring process, photo encompassed by the Photo Monitoring Program.

E. They have a mutual interest in retaining an economically viable livestock industry by ensuring healthy rangelands through proper grazing management.

F. Natural resources will benefit by management practices implemented as a result of the information obtained through this cooperative effort.

G. The Parties will benefit from having additional knowledge of the condition or status of the:

- (i) Resources,
- (ii) Open space, and
- (iii) Resource uses.

Local Land Use Plans

Karen Budd-Falen,
Budd-Falen Law Offices, LLC.
main@buddfalen.com
P.O. Box 346 Cheyenne, WY 82003
(307)632-5105



Federal agencies and departments are mandated by various federal statutes to engage local governments in federal decision-making processes related to federal plans, policies and programs that will impact the local land use, management of natural resources, the citizens and the local tax base.

Federal Statutes Mandating Local Government Participation:

- National Environmental Policy Act (NEPA)
- National Forest Management Act
- (NFMA)
- Federal Land Policy and Management Act (FLPMA)
- The Governor's Consistency Review Process

NEPA applies to "every major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C).

Levels of Local Government Participation under NEPA

A. Cooperating Agency Status: 40 C.F.R. § 1508.5

1. Applies to locally elected bodies such as a conservation district board of supervisors or a county commission.
2. Local government must possess "special expertise" defined as "the authority granted to a local governing body by state statute."

B. NEPA "consistency review:" 40 C.F.R. § 1506.2(d)

1. If the local government has a "local land use plan," the federal agency is mandated to: "discuss any

inconsistency of a proposed [federal] action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the [environmental impact] statement should describe the extent to which the [federal] agency would reconcile its proposed action with the [local government] plan or law."

2. In other words, NEPA consistency review requires:

- a. The local government adopt a local land use or resource plan.
- b. Where an inconsistency exists between a federal decision and a state or local government plan, the federal agency must attempt to reconcile the difference or explain why the agency cannot reconcile the difference between the federal decision and the local plan.
- c. Copies of comments or plans by state or local governments must accompany an EIS or EA through the review process. 42 U.S.C. § 4332(C).

C. Federal Land Policy and Management Act "FLPMA"

1. FLPMA, which governs the BLM, provides requirements for "coordination" and "consistency" with local land use plans.
2. FLPMA "coordination"
 - a. The BLM must stay apprised of local land use plans.
 - b. The BLM must assure that local land use plans

germane to the development of BLM land use plans are given consideration.

- c. The BLM must assist in resolving inconsistencies between local government and BLM land use plans.
- d. The BLM must provide for the meaningful involvement of local governments in the development of BLM land use programs. This includes early notification of proposed decisions that may impact non-federal lands.

3. FLPMA Consistency

- a. FLPMA requires BLM land use plans to be consistent with local land use plans; if not the BLM owes an explanation of how achieving consistency would have resulted in violation of federal law.
- b. FLMPA requires the BLM to provide a Governor's consistency review as part of the planning process.

D. National Forest Management Act "NFMA"

- 1. Forest Service must provide opportunities for coordination of its efforts with similar planning efforts and provide early opportunity for other governmental agency participation in forest planning efforts.

Why Would A Local Government Prepare a Local Land Use or Resource Plan?

To ensure the LOCAL economic well being, culture and customs, and natural resource health are considered in federal decisions.

Local Land Use or Resource Plan

- A. Local government "land use plans" are plans, policies, descriptions and local data that guide local participation in federal agency decision making processes.
- B. Local governments do not have jurisdiction over the federal government and cannot require federal agencies to take specific action that violates federal law.

Land Use Plan Template

- 1. District or County Background and History
 - a. This section includes a description containing factual information on the history, economy, "custom and culture," importance and uses of the federal or public land from the local perspective, water needs and uses, soils and other natural features and the economic, cultural and natural resource values that are important to the local constituents.
- 2. Local Data
 - a. This section should contain local data including :
 - i. Historical journals
 - ii. Economic information
 - iii. Tax base information
 - iv. Land Status maps (i.e. ACEC, WSAs)
 - v. Road and trail maps

- vi. Water rights information
- vii. Descriptions of water storage or conveyances
- viii. Water quality monitoring data
- ix. Grazing administration
- x. Mineral location
- xi. Wildlife habitat
- xii. Special Status Species
- xiii. Threatened and endangered species and proposed or final critical habitats
- xiv. Soils and vegetation types
- xv. Riparian
- xvi. Recreation
- xvii. Noxious weeds and invasive species
- xviii. Any other data

3. Local Policy Statements or Desired Future Conditions

- a. This section should include a list of policy statements describing what the local government wants (i.e., desired future condition) or does not want to happen during federal decision-making.
- b. These policies should pertain to resources that the local government anticipates may be affected by future federal agency planning.
- c. These policies should also be supported by the data in the data section.
- d. These policies cannot violate federal laws, although they can and should influence the implementation of federal laws.

4. Analysis, Alternatives and Mitigation

- a. This section should include an analysis of both the negative and positive influences on the local citizens, environment and economy that can happen to the "local desired future conditions" because of action by the federal government.
- b. This section should also contain general policies or mitigation for negative impacts from federal agency actions.

5. Final Local Land Use Plan Requirements

- a. A local land use plan does not create any new legal authority for a local government to "take over" the federal agencies. Nor are federal agencies simply required to comply with a local land use plan if it requires violation of federal law.
- b. Under the Consistency Review requirements, if a federal agency cannot reconcile its decision with a local land use plan, the federal agency is required to provide a rational explanation to the public and local government.
- c. A local land use plan has to be adopted by the local government pursuant to applicable state statutes.

Rulemaking Petitions

Karen Budd-Falen,
Budd-Falen Law Offices, LLC.
main@buddfalen.com
P.O. Box 346 Cheyenne, WY 82003
(307)632-5105



The Administrative Procedures Act (“APA”) sets forth the requirement allowing local governments, for-profit and nonprofit organizations and individuals to petition any federal agency for rulemaking on any subject regulated by federal statutes. 5 U.S.C. § 553(e). Importantly, the federal agencies are mandated to respond to such petitions. While the petitioner is not guaranteed that the federal agency will take the substantive action requested, if the agency fails to respond to the petition, federal district court litigation can be filed.

While there is no form for a rulemaking petition under the APA, there are some guidelines. These are:

1. The petition for rulemaking should specify that it is being filed under the rulemaking provisions under the APA, 5 U.S.C. § 553(e).
2. The petition for rulemaking cannot request a rulemaking that directly violates Congressional statute. For example, a petition for a rulemaking would not be valid if it requested to eliminate a previously Congressionally-designated wilderness, although a petition could request rulemaking regarding how a wilderness is managed in line with the Congressional statute. Additionally, a petition for rulemaking which requires grazing be eliminated on BLM lands would not be valid, although a petition could request repeal of the regulatory requirement that allows radical environmentalists to have standing to challenge

the simplest of BLM authorizations.

3. The petition for rulemaking should include a justification or reason (including any scientific, economic, or cultural data) for the requested action. While a petition would not be rejected if it simply requested a result and did not include a rationale for the request, clearly a petition with scientific, economic, legal or other rationale is more likely to be favorably considered.

In my opinion, filing petitions for rulemaking is a severely under used tool in the attempt to get some regulatory relief for landowners, rural counties and local businesses. By my count, based upon the Center for Biological Diversity website, the Center has filed over 60 petitions for rulemaking from 2011 to the present. These petitions dealt with issues such as the length of trains, livestock grazing fees on federal lands, suction dredge mining practices, ship speed limits, global warming, water quality criteria, wildlife services, sport hunting bans, roadless rules, Cook inlet beluga whales, noise, oil and gas decisions under NEPA and other topics. The failure of the federal government to respond to many of these petitions has resulted in litigation pursuant to the APA and many of these petitions for rulemaking have resulted in proposed rulemaking. There is no reason that local governments, businesses, trade groups and others cannot take advantage of the ability to file rulemaking petitions.

A Brief History of Public Land Law and Policy: How Did We Get Here?

James R. Rasband
J. Reuben Clark Law School
Brigham Young University



The materials below provide a brief history of public land law and policy. I draw heavily from my own textbook on this subject. See JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* (2d ed. 2009).

I. THE AMERICAN REVOLUTION

With the Revolution and the Declaration of Independence, each of the colonies and their citizens gained sovereignty over the natural resources that had been possessed and controlled by Crown and Parliament. Once vested with that sovereignty, the people set about allocating ownership and regulatory power over their land and resources amongst themselves and the state and federal governments. The powers given by the people to the federal government are enumerated in the United States Constitution.

For the federal government to act with respect to any subject, it must point to some enumerated power in the federal constitution. It does not have general power. It has only enumerated power. States, by contrast, have “police power,” which is the power to legislate on any subject not otherwise prohibited by the state constitution or pre-empted by the federal government by virtue of authority that the people gave to the federal government in the Constitution.

The courts are charged with deciding the meaning of the Constitution and thus boundaries of federal power. Following the creation of our nation and the ratification of the Constitution, as questions arose about lands acquired from Indian tribes and European nations, about formation of new states, about continued federal ownership of land and resources within those new states, and about the authority of new federal agencies to manage that land, it fell to the courts to decide what distribution of ownership and authority had been intended, or was permissible, under the Constitution.

II. ACQUISITION OF THE PUBLIC LANDS

The seminal questions of public land law—whose public lands and who has sovereignty over those lands?—are ones that have bedeviled our country from the time that Great Britain, by means of generous charters and land grants to various proprietors, created the original thirteen colonies. Some of the grants were particularly large. Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia were given the land between parallels of latitude extending “from sea to sea.” PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49 (1968). For most of the seventeenth and well into the eighteenth century, Great Britain let the colonies develop their own policies for the management of these granted lands, and the primary policy was promoting their settlement and development.

Although part of the incentive for that promotion was to raise revenue, it was also a reflection of political philosophy. The colonies' lands were the place where John Locke's ideas could be worked out in practice. Land ownership would be within the grasp of those willing to invest their labor. For some, such as Thomas Jefferson, the abundant lands would be the cradle of a citizenry of yeoman farmers, steadfastly clearing and breaking an inhospitable wilderness and virtuously cultivating the reclaimed lands. As Jefferson saw it, "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country, and wedded to its liberty and interests, by the most lasting bonds." Thomas Jefferson, Notes on the State of Virginia, QUERY XIX, at 157 (quoted in DANIEL KEMMIS, COMMUNITY AND THE POLITICS OF PLACE 20 (1990)).

This Jeffersonian vision of the public lands as a nursery of virtuous citizens was long to hold sway in public land policy and even today exerts significant influence. Great Britain's interference with this vision was one of the triggering events of the Revolution. In the Proclamation of 1763 and the Quebec Act of 1774, Great Britain insisted on a common land policy, prohibiting further settlement west of the Appalachians, halting grants by colonial governors and requiring that in the future land be surveyed and sold at public auction. Jefferson denounced this exercise of British authority over land title and two years later, in the Declaration of Independence, he raised the same grievance, accusing Great Britain of endeavoring "to prevent the population of these States" and "raising the conditions of new appropriations of lands."

Although the Declaration of Independence and the Revolution solved the problem of Great Britain imposing a common land policy on the colonies, it only ushered in a new set of perplexing questions. Would the colonies, now states, set their own land policies? How would the overlapping land claims of the new states be resolved? Would the newly-formed federal government assume ownership of any of these lands? Could additional states be created out of these western lands? Under what terms? And what about competing claims of other European sovereigns? How could those be resolved? Finally, what about the land claims of Indian tribes?

A. ACQUISITION OF LANDS FROM THE STATES WITH WESTERN LAND CLAIMS

After the Revolution, the Continental Congress had the monumental task of paying war debts and organizing the federal union. The greatest stumbling block in ratifying

the Articles of Confederation was the issue of what to do about the western lands. As noted above, some of the original charters had granted the colonies land "from sea to sea." The states with such generous charters saw no reason to hand over their control. But, led by Maryland, the states without western lands argued that those western territories had been "wrested from the common enemy by the blood and treasure of the thirteen states [and] should be considered as common property." 14 JOURNAL OF THE CONTINENTAL CONGRESS 621 (May 1779); 17 JOURNAL OF THE CONTINENTAL CONGRESS 806–08 (Sept., 1780) (1910). They threatened not to ratify the Articles of Confederation until the western territories were recognized as the property of the confederation and used to retire the heavy debt from the Revolutionary War. 11 JOURNAL OF THE CONTINENTAL CONGRESS 650 (June 1778).

Virginia responded that the complaints were the result of more cynical motives, noting that the legislatures of Maryland and New Jersey were both heavily influenced by prominent individuals who had invested in land companies and speculative land ventures in the west. See GATES, supra pages 50–51. Nevertheless, the Continental Congress, in dire need of money and in need of lands promised as bounties to Revolutionary War veterans, recommended to the legislatures of the landholding states that they cede their western territories. 17 JOURNAL OF THE CONTINENTAL CONGRESS 807 (Sept. 1780) (1910). It was only when Virginia and New York indicated that they would do so that Maryland acceded to the Articles of Confederation. GATES, supra page 51–52. As it turned out, it took until 1802 for all of the seven landholding states to make their cessions.

B. ACQUISITION OF PUBLIC LANDS FROM EUROPEAN POWERS

Federal acquisition of land from the landholding states is, of course, only a part of the acquisition story. Although some of the Crown grants nominally extended from sea to sea, the reality was that they extended as far as British possession, which at the time of the Revolution was to the Mississippi River, with a couple of exceptions such as the Spanish claim to Florida, which stretched along the Gulf Coast to New Orleans. The next part of the acquisition story—the acquisition of land from European sovereigns—is spread out over almost 100 years, until the purchase of Alaska in 1867. (Although Hawaii was not annexed until 1898, the United States acquired very little public land when it annexed Hawaii.)

Early in our nation's history, the primary artery of commerce

was rivers, and the primary artery beyond the Alleghenies was the Mississippi. Thus as settlers pushed westward, an area of immediate concern was Spain's control of New Orleans at the mouth of the Mississippi. When Napoleon and France secured Louisiana from Spain in 1800, the Mississippi problem became a French problem. President Jefferson sent representatives to France to negotiate the purchase of New Orleans at the mouth of the river and, he hoped, a part of Louisiana. Progress in the negotiations was slow until French military reverses prompted Napoleon to offer the entire Louisiana territory. Despite some concern whether there was the constitutional authority for the purchase and objections from New Englanders disturbed about the growing political power of the new West, Jefferson quickly accepted the offer. The 1803 Louisiana Purchase roughly doubled the national area, adding more than 523 million acres at a cost of about 3 cents per acre. GATES, *supra* pages 75–78.

As Georgia's population increased and settlers pushed into the Mississippi territory, Spain's remaining territorial claims in Florida came under increasing pressure. The result was an 1819 treaty with Spain ceding all of Florida. In return, the United States surrendered a weak claim to Texas and agreed to pay \$5 million of U.S. citizens' claims against Spain, the effective price for Florida. Just the year before, the United States had firmed up its northern border, at least as far as the Rocky Mountains, agreeing with Great Britain that the border separating the two countries would extend from the northwest point on the Lake of the Woods (in current Minnesota) down to the 49th parallel and from there westward to the Rockies. GATES, *supra* pages 78–79.

Some time elapsed before Texas became the next territorial addition, although not much time considering the amount of land the young nation needed to digest. Following its independence from Spain, Mexico welcomed American immigrants, offering land at favorable prices (2.5 cents to 5.6 cents per acre compared with the \$1.25 per acre in the United States) and giving particularly large grants to boosters like Stephen Austin who agreed to bring a certain number of settlers. Mexico, however, was sowing the seeds of its own downfall. By 1830, there were 20,000 Americans in Mexico who were becoming increasingly disenchanted with Mexican rule. In 1835 this produced a revolution, famous for defeat at the Alamo and ultimately victory over Santa Anna at San Jacinto, leading to Mexico's recognition of Texas's independence in 1836. Concern about Texas altering the balance of power too much in favor of slave states, however, delayed Texas's admission to the Union until nine years later in 1845. From the public lands perspective, a chief outcome of this delay was that Texas,

which during the interim period had been an independent sovereign managing its own public lands, was able to retain its public lands when it entered the Union. Texas in 1850 did sell just under 79 million acres along its western border to the United States, but within Texas's remaining borders, the United States owns very little public land. Thus it is that most public land law books skip over Texas despite its abundant natural resource base. GATES, *supra* pages 80–83.

Increasing contacts with Mexico in Texas and California prompted yet more expansion to the southwest. Professor Gates summarizes the story.

President Polk and the expansionists were becoming anxious to acquire California from Mexico. Polk had tried to buy California and to pay Mexico a fair price for the disputed territory between the Rio Grande and the Nueces Rivers, but, having lost Texas, no official of Mexico dared to favor sale of any part of its territory. There were numerous issues between the two countries in addition to the boundary disputes that were exasperating both sides. They were sufficient, Polk thought, to justify the declaration of war for which he was preparing when Mexican troops crossed into the disputed territory, fired on American troops that were already there, and gave Polk a better pretext. War was promptly declared. Generals Scott and Taylor proceeded to defeat the Mexican armies, captured Mexico City, and were in a position to compel surrender of the country and make a peace acceptable to the Americans.

All that Polk and the moderate expansionists wanted was gained in the [1848] Treaty of Guadalupe Hidalgo, though some politicians were disappointed that a larger part of Mexico was not gained. Mexico recognized the Rio Grande as the boundary separating Texas from Mexico, and agreed to sell for \$15 million all of what is now California, Nevada, Utah, Arizona north of the Gila River, New Mexico west of the Rio Grande, and parts of southwestern Wyoming, and southwestern Colorado. Included in this great area containing 334,479,360 acres were the enormously rich mineral and agricultural regions of California, the Interior Basin that the Mormons were just beginning to develop, and some of the most spectacular scenery in the world, such as the Grand Canyon, and . . . present day Bryce and Zion National Parks. . . .

PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 83 (1968).

Along with Stephen Austin's move into Texas and Brigham Young and the Mormons' trek into the Great Basin, missionary settlers like Marcus Whitman, following the path

of Lewis and Clark, were moving into the Oregon region, creating tension with its British occupants (primarily the Hudson's Bay Company). In 1846, the United States and Great Britain ended their joint occupation of the Oregon country, extending the border between the two nations along the 49th parallel from the Rocky Mountains to the Pacific Coast. This division of the Oregon country (present day Oregon, Washington, Idaho, and part of Montana) added another 180.6 million acres to the public domain. GATES, *supra* pages 80–84.

With the Treaty of Guadalupe Hidalgo and the Treaty of 1846 with Great Britain, the borders of the contiguous United States were largely complete. The last piece of the puzzle was the 1853 purchase from Mexico of a tract of land south of the Gila River, the purpose of which was to facilitate construction of a railroad from New Orleans to San Diego. This \$10 million Gadsden Purchase (named after James Gadsden, a South Carolina railroad promoter) added almost 19 million acres to the public domain in present-day Arizona and New Mexico. Although the Gadsden Purchase marked the end of land acquisition in the contiguous United States, one significant addition remained—Alaska. Hoping in part to bracket British Columbia and make its annexation possible, Secretary of State Seward negotiated the purchase of Alaska from Russia in 1867. Although annexation of British Columbia was never to occur, at a relative bargain of \$7.2 million (about 2 cents per acre), 325 million resource-rich acres were added to the public lands. GATES, *supra* pages 84–86.

C. ACQUISITION OF LANDS FROM INDIAN TRIBES

Although describing the entire process of land acquisition from the original states and the European powers is a useful organizational approach, it should not be mistaken for telling the entire acquisition story. Throughout the same time period and continuing beyond it, another story was unfolding; namely the United States' acquisition of land and resources from the Indian tribes who had peopled the continent prior to European arrival. In essence, the agreements with European powers merely cleared the way for bilateral dealings with the tribes actually dwelling in the area. The history of the United States' dealings with Indian tribes is complex. Yet some understanding of that history is critical to understanding the history of the public lands and natural resources law more generally because it is entwined with a wide range of current natural resource disputes. Indian tribes have treaty rights to half the salmon runs in the states of Washington and Oregon and claims to potentially vast quantities of water throughout the western United

States. Indian reservations contain significant reserves of timber, coal, natural gas, and critical biodiversity.

Recall that prior to the Proclamation of 1763, the colonies had largely set their own land policies within the extent of their generously interpreted charters. This meant that each colony decided upon its own approach for treating with Indian tribes. Most of the colonies prohibited individuals from purchasing land from Indian tribes without prior governmental permission, although in some instances individuals were allowed to negotiate on their own. At the beginning of the French and Indian war in 1754, however, Great Britain, mostly in an effort to win to its side the tribes of the Ohio and Mississippi River basins, took control of land policy from the individual colonies and prohibited further settlement west of the Appalachians. To the frustration of the colonies, this war-time policy was formalized in the Proclamation of 1763. Although a number of the colonists, including leading Founders, continued to purchase land from Indian tribes in the speculation that Crown policy would change, the policy itself remained a significant source of colonial angst and, as discussed above, was another significant grievance cited in the Declaration of Independence.

Following the Revolution, the question whether states or the federal government would have authority to treat with Indian tribes was bound up with the question of who would have ownership of the western lands. Just as the lands ultimately came to the federal government, so too did the power to treat with Indian tribes, although for a period of time under the Articles of Confederation, states retained the right to purchase Indian lands within their boundaries. Art. IX (4). Nevertheless, when the Constitution was ratified, Congress, under what has been termed the “Indian Commerce Clause,” was authorized to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The practical import of this language has been to vest the federal government with complete control over Indian affairs.

III. ALLOCATING THE NATION'S LANDS AND NATURAL RESOURCES

By virtue of the deeds of cession and negotiations with European powers and Indian tribes, the United States took ownership of vast lands and natural resources. Along with that ownership came a number of what Professor Gates identifies as “nagging” questions:

Did the acts of cession of those early years and the later acquisitions of Florida, Louisiana, and California require

that the lands be administered for the benefit of all the states, as the Original Thirteen States were inclined to maintain? Or should they be managed to assure speedy settlement of the newer communities into which they were being divided, without regard to the effects their rapid development would have on the older ones? Should the development of western states be promoted by generous grants of public land within their boundaries to aid educational institutions and finance internal improvements such as roads, canals, and railroads? Should the states in which the lands lay, and not the Federal government, be the major dispenser of land titles? Had the older communities no right to share in this largesse?

GATES, *supra* page 3. One of the nagging questions Professor Gates asks is who would be the primary decision-maker with respect to the distribution of land and resources, the states within which the public lands lay or the federal government? Part A below takes up this issue. As with any question respecting the relationship between the states and the federal government, this is one of constitutional law. Stated in terms of the federal government's enumerated powers, the issue is federal power to create new states and to retain and own land within newly created states. As Part A discusses, over time the courts decided that the United States could dispose of or retain public lands as it chose, although a presumption in favor of state ownership would develop for land under navigable waters. In this regard, the key constitutional provision is the Property Clause which gives to Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

Part B then looks at a companion question, namely state power to dispose of or retain the land and resources granted to it by the federal government (or, in the case of the original thirteen states, received at the time of the Revolution). As discussed in Part B, a state's power over its land and resources is plenary, except as preempted by federal action and except for those resources that the state is obligated to hold in trust for the whole people under the public trust doctrine, which focuses on the special case of land under navigable waters.

Having reviewed the legal sources of federal power to grant or retain public lands as the government saw fit, Parts C and D look at the historical and practical application of that power. What did the United States actually do with the lands it had acquired from the original states, European powers, and Indian tribes? As Part C shows, for most of the nineteenth and into the twentieth century, the primary goal of United States policy was to dispose of as much of the

public lands and natural resources as possible. Reservation of public lands for the public would occur sporadically in the nineteenth century, as for example with the mineral leases discussed below in *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840), and the creation of Yellowstone National Park in 1872. But it was not until 1891 and the creation of large forest reserves that later became our national forests that the federal government began more broadly and systematically to retain public lands under federal management. Part D recounts the creation of the national forests and the other moves toward federal retention of the public lands and resources over the course of the twentieth century.

A. THE EQUAL FOOTING DOCTRINE

In the debate over whether Virginia should cede its western lands and, if ceded, what sort of states might be created from the western territories, Thomas Jefferson was one of the powerful voices. Jefferson understood that the western territories were more than a source of income. They were a key to the political balance of power in North America. The British and Spanish could entice away the loyalty of disgruntled occupants of the territory, shifting the balance of power in favor of old adversaries and jeopardizing the stability of the United States. Alternatively, subservient colonies might easily become disgruntled with a secondary political status given to them by the United States and seek their independence. Many in the East had serious doubts about the western settlers' loyalty to the United States. By offering fair and equitable terms of admission into the Union, the fledgling nation could better ensure the ongoing loyalty of the territories and the further expansion of the Union. Gordon T. Stewart, *The Northwest Ordinance and the Balance of Power in North America*, in *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY* (Frederick D. Williams ed., 1988). Thus, in its instrument conveying its territories northwest of the Ohio River, Virginia stipulated that the states formed out of this ceded territory "shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom and independence, as the other states." 26 JOURNALS OF THE CONTINENTAL CONGRESS 113, 114 (Mar. 1784) (1928) (Virginia's cession).

In the end, the land and sovereignty afforded new states would reflect the tension between the Jeffersonian concern about political equality and the original states' concern of sharing in the benefits of the West's resources. Reflecting the vision of Virginia's deed of cession, the Northwest Ordinance, which served as a constitutional document for

the political structure of new states northwest of the Ohio River, decreed that new states would be admitted into the Union “on an equal footing with the original States, in all respects whatever. . . .” 1 U.S.C. § 22. On the other hand, the new states’ enabling acts (the legislation authorizing a new state to enter the Union) provided for federal retention of significant lands within each state. From the perspective of some of the original states this was only a good beginning. In 1826, for example, the Rhode Island legislature directed its congressional representatives to seek an act of Congress appropriating for Rhode Island “her proportion of the public lands” for “the establishment of an educational fund in this State.” GATES, *supra* page 7. Over the years other states floated similar proposals. Most did not bear fruit with the notable exception of the 1862 Morrill Act, which gave each state scrip for 30,000 acres of public land per representative and senator in Congress for purposes of funding state colleges of agricultural and mechanic arts. These “A & M” or “land grant” colleges have evolved into some of the leading institutions of higher learning in the nation, including, for example, Cornell University, the University of Illinois, the Massachusetts Institute of Technology, Michigan State University, Ohio State University, and the University of Wisconsin. GATES, *supra* pages 22–23. (The states received scrip rather than land in an effort to avoid the jurisdictional conflicts that could arise if one state owned land within another.)

From the perspective of many in the new states, the Morrill Act and like legislation appeared less like an equitable distribution of the benefits of the nation’s resources and more like a “plunder scheme.” GATES, *supra* page 22. Although the new states’ enabling acts had given them some land to support education and a small percentage of the proceeds from land sales to support internal improvements like roads and canals, from their perspective this was far too little. Between 1828 and 1833, state legislatures in Alabama, Indiana, Louisiana, Missouri, Illinois, and Indiana demanded cession of all federal lands. Indiana’s memorial is typical: “This State, being a sovereign, free, and independent State, has the exclusive right to the soil and eminent domain of all the unappropriated lands . . . which right was reserved for her by the State of Virginia, in the deed of cession. . . .” GATES, *supra* page 9. From Indiana’s perspective, for new states to enter the Union on an equal footing with the original states, the federal government could not retain land within those new states. Indiana’s position would subsequently be tested in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), a classic public land law case, and one that sagebrush rebels wise use advocates still rely upon to argue that the federal government has no legal authority to retain ownership of the public lands.

Pollard involved a dispute about the United States’ power to grant title to tidelands in Alabama’s Mobile Bay. To those who have never heard of *Pollard*, it may seem odd that this particular dispute caused Justice Catron, in dissent, to proclaim that “this is deemed the most important controversy ever brought before this court, either as in respects the amount of property involved, or the principles on which the present judgment proceeds.” *Id.* at 235. What Catron understood to be at stake in *Pollard* was not just whether the United States could grant *Pollard* the particular property at issue, but the entire question of federal power to retain and manage land and natural resources within the area to the west of the original thirteen states. Without that power, national parks like Yellowstone and Yosemite would not exist, nor would national forests or wilderness areas, or even federal grazing districts.

In reaching its conclusion that the United States’ grant of the tidelands was invalid, the *Pollard* Court addressed three distinct issues. The Court first held that the Northwest Ordinance’s command that new states enter the Union on an equal footing was not only a statutory requirement but was also a constitutional imperative. Congress, suggested the Court, did not have the power to admit states of lesser sovereignty than the original thirteen because Article IV, § 3, gave Congress only the power to “admit new states into this Union.” 44 U.S. at 222–23. As the Supreme Court later explained in *Coyle v. Smith*, 221 U.S. 559 (1911):

To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

Id. at 567.

If all states were to be on an equal sovereign footing with the original thirteen, the obvious next issue is what it meant for a new state to be equal. Although *Pollard*’s answer to this question has not been followed in subsequent Supreme Court decisions, the answer is one that is critical to understanding the evolution of public land law and to comprehending the

foundation of many current natural resource policy debates. As the Court saw it, Georgia ceded the Alabama territory to the United States for the purpose of paying off the war debt. It was only when the United States sold the land into private ownership that Alabama would be a complete sovereign like the original thirteen states. Essentially, the Court viewed the federal government as an ordinary proprietor with respect to the public lands. The United States, the Court said over and over, had no “municipal sovereignty,” which was another way of saying that the United States lacked police power over the public lands.

The Court recognized that in the Property Clause of the Constitution, Art. IV, § 3, Congress had been given the “power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.” But this provision, said the Court, merely “authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.” 44 U.S. at 224. It was not intended to give the United States the authority to keep and regulate public lands. Instead, the Property Clause was something like temporary management authority pending the final sale and disposition of the public lands that would make Alabama a full sovereign.

According to Pollard, the Constitution provided only one way for the United States to obtain complete authority over public land and that way was the Enclave Clause. *Id.* at 223–24. The Enclave Clause gives Congress the power

to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

U.S. CONST., art. I, § 8, cl. 16. The need for the Enclave Clause with respect to the original thirteen states is relatively clear. Absent such a provision, the United States would not be able to obtain either the land or the exclusive jurisdiction necessary to perform various federal functions. What the Court was suggesting is that the United States should be under the same disability with respect to lands it acquired in the deeds of cession and then later from other European sovereigns and Indian tribes. Although it might hold such lands to fulfill any trust obligations imposed by the deeds or by treaties, it was like any other proprietor with respect to such lands. It did not have any particular regulatory

authority except that which could be obtained through the Enclave Clause.

The import of the Court’s reasoning is massive. Imagine what our national landscape would look like if the Court’s understanding of severely limited federal ownership and jurisdiction had been implemented. As described below, the Court’s view of severely limited federal power has not been followed in many subsequent Supreme Court decisions. Indeed, even before Pollard, the Supreme Court had confirmed federal power to issue short-term mineral leases for public land mining, remarking that “the words ‘dispose of’ [in the Property Clause], cannot receive the construction . . . that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress.” See *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840). Subsequent to Pollard, the Court on a number of occasions has found that the Property Clause power to “dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States,” U.S. CONST. art. IV, § 3, cl. 2, is plenary and presumes federal power to retain the public lands until it chooses to dispose of them. See, e.g., *Light v. United States*, 220 U.S. 523 (1911) (“The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely.”); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

One of the reasons why subsequent cases were so easily able to dismiss Pollard’s view of narrow federal power to retain and regulate land within the states is that it was dicta—i.e., a part of a court’s reasoning that is not strictly necessary to its decision and is instead something like surplus advice. Recall that Pollard held that the patent issued by the United States was invalid. In light of the Court’s conclusion that the United States was obligated to sell its lands into private ownership to ensure Alabama’s equal footing, this conclusion may seem strange. Why couldn’t the United States grant the disputed patent if the Court’s reasoning was controlling? The answer is that the particular land at issue was former tideland that had been overflowed by Mobile Bay prior to statehood.

At first glance, it would seem as though selling land formerly covered by Mobile Bay would be no different than any other non-overflowed land. Yet the Court held that unlike non-overflowed lands—which the United States was under a duty to sell—the United States lacked the power to convey the lands under Mobile Bay because those lands had to pass to Alabama when it entered the Union. Thus, the Court’s discussion of “fast lands”—i.e., non-overflowed lands was

dicta because fast lands were not at issue in the case.

Unlike the Court's dicta about the United States being obligated to dispose of non-overflowed lands, this core holding of Pollard—that the United States lacks power to grant away land under navigable water prior to statehood, or to retain it after statehood, because state ownership of such lands is critical to equal sovereign footing—has had real impact on the distribution of land and natural resources between the states and the federal government, although again the doctrine has changed over time. The Court now recognizes that land under navigable water is not part and parcel of state sovereignty and thus the United States may convey such lands prior to statehood, or retain them following statehood, without running afoul of the Constitution's equal footing mandate. However, in recognition of how critical navigable waters are to the public for navigation, commerce, and fishery, the Court requires that any pre-statehood grant or retention be expressed in unmistakably clear language.

[A] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). The strong presumption in favor of state ownership of land under navigable water has left an interesting geographical legacy. In the midst of the vast swaths of federal land in the western United States are long ribbons of state-owned beds of navigable rivers and patches of state-owned bedlands under navigable lakes.

In the end, references to Pollard and the equal footing doctrine must be understood in context. Sometimes the reference is to the well-established rule that the United States will be presumed to have held land under navigable water in trust for the future state unless it very plainly indicates a contrary intent. In other cases, reference to Pollard and the "equal footing doctrine" refers to its constitutional holding that new states must enter the Union on an equal sovereign footing. This is still basic constitutional law, although as subsequent courts have clarified, equal footing "applies to political rights and sovereignty, not to economic or physical characteristics of the states." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997), cert. denied, 522 U.S. 907 (1997). See also *United States v. Texas*, 339 U.S. 707, 716 (1950) ("Area, location, geology, and latitude have created great diversity in the economic aspects of the several States.

The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty."); *Coyle v. Smith*, 221 U.S. 559 (1911) (striking down as violating equal footing a provision in Oklahoma's enabling act requiring it to locate the state capitol in Guthrie). In still other cases, invocations of equal footing are an argument from Pollard's dicta that the federal government should not be able to retain and regulate land within the states except under the Enclave Clause.

Pollard's suggestion that the Enclave Clause was the only constitutional option for the United States to obtain ownership and jurisdiction over land within the states suffered a further blow when the United States passed the General Condemnation Act of 1888, authorizing the condemnation of land for public uses whenever it is "necessary or advantageous to the Government to do so." 40 U.S.C. § 257. See also *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668 (1896) (upholding United States' condemnation of land for inclusion in Gettysburg National Military Park). No provision of the Constitution explicitly gives the United States the power of eminent domain, but as the Gettysburg Court observed:

It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers.

Id. at 681. If the federal government can condemn land within the original thirteen states and condemn or simply retain land within the new states, what purpose is left for the Enclave Clause?

B. THE JEFFERSONIAN SURVEY SYSTEM

To comprehend how the public lands were disposed of (whether to states, private individuals, or corporations), it is important to have some understanding of the way in which the United States was mapped and surveyed. Recall that prior to the Revolution, each colony largely formed its own land policies. The policy of the New England states was generally to grant to a group of proprietors a township of approximately six square miles on which to establish an entire community. Lots within each township were surveyed in advance of settlement with in-lots for residences and out-lots for cultivation and pasture. Because the groups typically had a common religion and background, lots were also reserved for the minister, the church, and for schools. The New England system contrasted with that of the middle

and southern colonies which employed a more laissez-faire approach with individuals striking out westward and choosing land they desired. When it came time for the federal government to dispose of its lands, elements of both approaches were incorporated in a system devised in part by Thomas Jefferson and adopted by the Continental Congress as the Land Ordinance of 1785. Under this “rectangular survey system,” the land was to be surveyed from a single point or meridian into 36-square-mile townships. Each township would be divided for sale into lots/sections one mile square containing 640 acres. While the selling of individual lots credited the approach of the middle and southern states, the Ordinance did not contain any preemption rights (a squatter’s right to obtain title by settling and improving land rather than purchasing it at auction). As discussed below, whether to allow settlers such preemption rights would be a source of constant tension in federal land policy. Although there was no reservation for religion as had been the practice in New England, section 16 in every township was reserved for the maintenance of the schools within the township. GATES, *supra* pages 33–74. This reservation of school lands was to continue as a fixture of public lands policy.

The job of surveying—which was as difficult and hazardous as that of early settlers, fur traders and miners—originally fell to surveyors appointed by Congress and then in 1812 to the General Land Office, which was within the Department of Treasury until the Office was shifted to the Department of the Interior in 1846. As Dana and Fairfax point out,

The decision to divide the nation into a checkerboard . . . has had a tremendous but frequently unnoticed effect on the way we think about and use land. For example, the grid system for land disposition led to a similar pattern of straight lines in field borders and furrows. Farmers simply plowed along the boundary lines of their property. Following the dust storms of the 1930s, we turned away from the grid pattern of plowing in favor of contour plowing, which adapts to the contours of the land. Moreover, political organization followed the same grid as the survey and plowing. The effort to manage irregularly shaped watersheds proposed by reformers in the 1880s floundered on county, township, and state boundaries, which were based on rectangular surveys. Thus, the first sales policy—the decision to divide the land into little blocks and sell it—had a critical influence on everything that followed.

DANA & FAIRFAX, *supra* page 13. Most land outside the original thirteen colonies was originally described under the rectangular survey system. In urban and suburban areas, the rectangular survey has generally given way to a system of

plat maps specific to the particular area, but the rectangular survey remains in use throughout much of rural America.

C. LAND GRANTS TO STATES

The next step in understanding the geography of our nation’s land and resources is reviewing how the federal government chose to dispose of the public lands to states. Federal grants to states fall within two broad categories: lands given to states at the time of their admission to the Union and lands granted to existing states by way of legislation enacted after statehood. Recall that before a state could be formed from a territory, Congress needed to authorize its admission by means of an “enabling act.” This process sparked contention within Congress and between Congress and the people of the territory. Because admitting a new state with its two senators had the potential to alter the political balance of power, it usually resulted in a power struggle between the major political parties in Congress. Nowhere was this more evident than with the contentious debates about slavery and whether new states would be slave or free. For land and resource purposes, however, the more important negotiation was between Congress and the people of the territory about how much public land they would receive. The early enabling acts set a basic pattern that continued to be followed, although the federal government grew more generous over time. As the first state to be created out of the Northwest Territory, Ohio’s 1803 enabling act was a key precedent. Under the terms of the Northwest Ordinance, Congress had provided that the legislatures of the new states “shall never interfere with the primary disposal of the soil by the United States . . . nor with any regulations Congress may find necessary for securing title in such soil to bona fide purchasers. No tax shall be imposed on lands the property of the United States.” Relying on this language, Ohio’s enabling act required Ohio to disclaim any right, title, or interest in the public lands within its boundaries. In partial consideration for that disclaimer and also because it would not obtain tax revenue from the federal lands until they were sold to private owners, Ohio was granted one section (Section 16) in every township to generate income for the support of its common schools, given additional public lands for other purposes such as supporting a seminary, and promised five percent of the net proceeds from federal land sales for road building to and within the state.

Subsequent enabling acts took a similar approach, although they were increasingly generous in their funding of education. Beginning with Illinois, most of the proceeds clauses required that the five percent of federal land sales proceeds be devoted to education. With the admission of California in 1850, new states received two sections within

each township for supporting their public schools. Then in 1896, when Utah was admitted to the Union, Congress set aside four sections for the support of the schools. Over time, the amount of land granted by enabling acts for other purposes also grew. In addition to its four sections for school grants, Arizona, for example, received another 240,000 acres to support a university, 300,000 acres for an A&M college, 200,000 acres for normal schools, 200,000 acres for an insane asylum, 200,000 acres for a penitentiary, 200,000 acres for a deaf, dumb & blind asylum, 100,000 acres for a miner's hospital, 200,000 acres for a school of mines, and 200,000 acres for military institutes. Arizona ended up with some 14% of its area under the terms of its enabling act, whereas Illinois received only about 4% of its area. GATES, *supra* pages 291–316.

As soon as states received lands in the enabling acts, they were back to the bargaining table asking for more. As Professor Gates describes,

They soon urged the federal government to give them additional lands to help finance the building of specified canals and wagon roads and the improvement of waterways. Later they wanted land grants for railroads and for the endowment of agricultural colleges. They demanded also that the swamplands, that is, all the overflowed, wet, swampy or poorly drained land, be turned over to the states to be reclaimed by them and made into cultivable farmlands. Far more land went to the states under the many general and special laws granting land for various purposes than was transferred to them under the provisions of the various state enabling acts.

GATES, *supra* page 319. Although in most of these cases of post-statehood land grants the federal government defined the amount of land to be granted, it departed from this practice by enacting a series of Swamp Land Acts allowing states to select “swamp and overflowed lands unfit for cultivation.” In light of current federal efforts to protect wetlands from filling and development, this largesse may seem odd, but, at the time, wetlands/swamplands were considered a nuisance to be conquered by draining and filling rather than a provider of important ecosystem services. The federal government estimated that some 20 million acres might pass out of the public domain, but the states had a more generous interpretation of the Acts. By trading on the ambiguity of the “unfit for cultivation” language, by carefully timing their inspections for the wet season, and by promising selection agents a proportion of any land to which they could secure a patent, the states selected some 80 million acres of land, many of which bore little resemblance to a swamp. The selections taxed the resources of the General Land Office

and resulted in frequent litigation. In fact, almost 200 swampland cases reached the Supreme Court by 1888. In the end, about 63 million acres (an area roughly the size of the State of Oregon) were patented under the Swamp Land Acts. GATES, *supra* pages 319–334.

D. LAND GRANTS TO SETTLERS

The driving purposes of early federal land policy were to open western lands for settlement and development and to produce revenue for the federal treasury. Ideally, both would occur by orderly survey and careful disposition of surveyed lands through the General Land Office. Reality, however, was a bit different. From the beginning, revenues were disappointing. Few settlers could afford the \$640 necessary to purchase an entire section at the \$1 per acre price set in the 1785 ordinance. And even those who could were more likely to take up state lands offered at more favorable prices or to simply squat on lands without payment or legal title. In an effort to promote more sales, in 1796, 1800, and 1804, Congress passed acts allowing settlers to pay for land on an installment basis. Although this increased sales, many settlers failed to pay their debt. In theory the government could have evicted these settlers, but there was little public support for such action, particularly in the areas where settlement was occurring. In 1820, Congress abandoned credit sales and returned to cash sales but reduced the minimum purchase from 640 acres to 80 acres. In 1832, the minimum was further reduced to 40 acres (a quarter quarter-section). Lands were to be sold at auction to the highest bidder but for no less than \$1.25 per acre, and there was no limit on the number of acres any person could purchase.

If the federal land sales program was to generate revenue, something had to be done about “squatting” on the public lands. If persons could simply head west and claim land, there would be no incentive to buy the land at auction. The federal government made a variety of efforts to prosecute squatters, from imposing fines for trespass, to authorizing the army to eject the squatters from their lands. Almost all of these efforts proved useless. Not only was the burden of administering such a vast landscape overwhelming, but particularly in the western lands where squatters were regarded as hardy yeomanry fulfilling the Jeffersonian ideal, public opinion ran strongly against limiting access to the public domain and prosecuting squatters.

One manifestation of this opinion was the lack of interference with “claims associations” formed by the settlers who had preceded government survey and/or auction. The purpose of a claims association was to protect the settlers from subsequent survey and sale. Professor Gates relates a couple of accounts about their methods:

There was little competitive bidding as “the settlers,” or “squatters” as they are called by speculators, have arranged matters among themselves to their general satisfaction. If, upon comparing numbers, it appears that two are after the same tract of land, one asks the other what he will take not to bid against him. If neither will consent to be bought off, then they retire, and cast lots, and the lucky one enters the tract at Congress price—\$1.25 per acre—and the other enters the “second choice on his list.” If a speculator “showed a disposition to take a settler’s claim from him, he sees the white of a score of eyes snapping at him, and at the first opportunity he craw-fishes out of the crowd.” * * *

[Claims associations] were designed to meet pressing emergencies which existing political institutions did not, or were not able to handle. Settlers on a new frontier . . . soon made sufficient improvements that called for protection by the community. Squatters felt that their “right” to their claims should include protection against invaders or claim jumpers, the right to sell their claims, and the right to buy the land for its value before their improvements had been made at the usual government minimum of \$1.25 an acre.

As western states came into the Union and the composition of Congress changed, the squatter’s view of his rights gained traction in Congress. The result was the passage of a series of “preemption acts.” Although Congress had earlier allowed limited preemption, 1830 marked the first general preemption act. It provided a one-year window for every settler or occupant who could prove that he had settled and cultivated land to purchase up to 160 acres at the minimum price of \$1.25 per acre. In the 1841 Preemption Act, Congress abandoned the view that settlement should occur only on land which had been auctioned (so-called “offered” land) and opened up all unoffered land to preemption claims. Although the 1841 Act only allowed preemption of surveyed land, by 1862 that limitation had also been removed and settlers were free to make preemption claims on public domain lands that were both unsurveyed and unoffered. Unfortunately, yeoman settlers were not the only ones to take advantage of the new Act. False swearing from family members or employees about occupation and cultivation allowed separate 160-acre claims to be collected. Other persons would file declarations of their intent to improve and preempt land, which allowed them to hold the land for one year prior to improvement, and then merely strip the land of timber and move on.

Although preemption avoided the problems, largely resolved by claims associations anyway, of claim jumpers and speculators coming along at a government auction and

gaining title to land already occupied by a settler, it did not address the demand for free land. That demand was to be satisfied with the Homestead Act.

E. LAND GRANTS TO RAILROADS

Another aspect of federal land policy that had significant impact on the national geography is the federal land grants in aid of railroad construction. Early on, Congress granted railroads a free right-of-way through public lands, but the right-of-way alone proved insufficient to stimulate entrepreneurs to undertake the great task of extending railroads across the nation. The builders pushed for a stronger incentive, and Congress complied. In 1850, Congress decided to subsidize the construction of the Illinois Central Railroad from Chicago to Mobile by granting Alabama, Mississippi, and Illinois a 200-foot-wide right-of-way and every even-numbered section of land for six sections on either side of the right-of-way, which the states could sell to subsidize Illinois Central. Congress saw this approach as more than a simple subsidy. As Congress envisioned it, the checkerboard grant assured that the railroads would not hold a monopoly along the lands near the primary transportation route and the presence of the railroad would allow the federal government to sell its own alternate sections at a premium, effectively paying for the subsidy to the railroad. Although the finances did not work out in practice, the approach continued.

Many probably recall the story of the building of the first transcontinental railroad and the race between the Union Pacific and the Central Pacific to lay track, ending in the pounding of the Golden Spike at Promontory Point in the Utah Territory. While the railroad was undoubtedly a heroic achievement, the competition between the two railroad companies was about much more than pride. In 1862, Congress had promised that the railroads would receive alternate sections of the public land for a distance of 10 miles, and then later 20 miles, on either side of the railroad. In 1864, the Northern Pacific Railroad (to be built from Duluth to Tacoma and then Portland) was given the largest grant of all, alternate sections out to 40 miles on each side of the railroad within territories and to 20 miles within states, which amounted to approximately 45 million acres, an area slightly larger than the state of Missouri. A variety of other railroad grants followed. Although a number of the grants provided for the granted sections to be subject to settlement and preemption if not sold or otherwise disposed of within three years, courts upheld the railroads’ argument that they had disposed of their lands by placing a blanket mortgage on them. By the time Congress reconsidered and ended railroad grants in 1871, railroad corporations had received

more than 94 million acres of land (a million acres more than the entire acreage of Montana) and another 37 million acres had been given to states for the specific benefit of railroads. See DANA & FAIRFAX, *supra* page 20; GATES, *supra* pages 356–386.

F. FEDERAL RETENTION OF PUBLIC LANDS AND RESOURCES

1. EARLY FEDERAL RETENTION AND NATIONAL PARKS

Although most of the nineteenth century was devoted to disposal, with the early stirring of the conservation movement, federal policy began to incorporate the idea that some lands should be retained by the federal government. The idea that the federal government might retain some of the public lands was not a novel one. In 1817 the federal government had reserved for naval construction public lands containing live oak and red cedar and in 1832 had reserved Hot Springs, Arkansas because of its perceived medicinal value. The Supreme Court in *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840), had also upheld federal leasing of lead mines. But the first significant instance of retention for conservation purposes was Congress' 1864 decision to cede Yosemite Valley and Mariposa Big Tree Grove to California for public recreation. Act of June 30, 1864, 13 Stat. 325 (California later re-ceded the land to the federal government). Eight years later, Congress reserved two million acres of public land in the Wyoming Territory to create Yellowstone National Park as a "pleasuring ground for the benefit of the people." Act of March 1, 1872, ch. 24, 17 Stat. 32. Congress, however, appropriated no money for its management, and the Interior Department relied on the Army to do what little it could to manage the Park. Although the national park idea is one of the United States' unique contributions to world conservation, Yellowstone can only be described as a tentative first step. Nevertheless, it was a significant step because it symbolized not only that some public lands may be best left in government hands but that they should be left undeveloped.

In the next 18 years, only one other park was created—Mackinac Island National Park in Michigan. But in 1890, Congress created Yosemite (a federal donut of land surrounding the land previously ceded to the state), Sequoia, and General Grant (later to become part of Sequoia). Other parks followed: Mount Rainier in 1899, Crater Lake in 1902, Mesa Verde in 1906, Grand Canyon in 1908, Zion and Olympic in 1909, Glacier in 1910, and Rocky Mountain in 1915. The number of parks was augmented by passage in 1906 of the Antiquities Act, which gave the president

authority to declare national monuments. Using this Act, Theodore Roosevelt set aside 18 monuments, including the Petrified Forest and what became Grand Canyon. By 1916, the Interior Department was responsible for 14 national parks and 21 national monuments.

2. NATIONAL FORESTS

The 1870s saw not only the reservation of Yellowstone, but also the beginnings of a movement for forest protection. New York, in 1872, established a commission to consider the creation of a state forest preserve in the Adirondacks. Their initial recommendation was ignored, but in 1885 the state legislature designated as a "forest preserve" all of the lands in fourteen counties in the Adirondacks and Catskills. Although the purpose of the preserve was partly for aesthetic and recreational purposes, its primary purpose was watershed protection. During the same time frame, the American Forestry Association was formed, forestry classes sprang up at several universities, and John Muir had begun traipsing the Sierra Nevadas and extolling the virtues of California's magnificent forests. The stage was set for some federal action on forests. The vehicle came along in 1891, when Congress passed what it termed the General Revision Act. The primary purpose of the Act was to revise public land laws in light of a report that had been issued by the Public Lands Commission in 1879. Among its many revisions was the repeal of the Timber Culture Act and the Preemption Act. But what the Act became known for was a provision, added in conference committee, that gave the president authority to "set apart and reserve . . . public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations" 26 Stat. 1095.

President Benjamin Harrison quickly took up Congress' offer, establishing one reserve the next month. Before he left office two years later, he had established 14 more forest reserves covering more than 13 million acres of public land. In his first year in office, President Cleveland added two more reserves with a combined area of about 4.5 million acres but then stopped because Congress had not provided any guidance for the forests' protection or management. A forest commission was appointed to make legislative recommendations, which it did as well as recommending the creation of another 13 forest reserves. Its legislative recommendations came too late for Congress to act prior to the conclusion of Cleveland's presidency but Cleveland at the close of his term (February 22, 1897) went ahead with the 13 forest reserves, concluding that his action would likely hurry along legislation. Cleveland was right. The 21 million acres he reserved created a firestorm in the West.

On June 4, 1897, Congress passed the Forest Management Act. The Act suspended Cleveland's last-minute reserves and reopened them to settlement for one year until they could be redrawn. The Act gave the Department of the Interior authority to make rules and regulations regarding "the occupancy and use" of the forests. 30 Stat. 34. It also authorized the continuing creation of forest reserves "to improve and protect the forest . . . or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." 16 U.S.C. § 475.

Although the 1897 Forest Management Act placed the forest reserves under the management of the Interior Department, Congress had 11 years earlier tasked the Department of Agriculture with studying forestry and timber production. Soon after the Act's passage, Gifford Pinchot became the head of the Agriculture Department's Bureau of Forestry. Pinchot, who had studied forestry in France and Germany, was among the first professionally trained foresters in the United States, but more than that he proved to be one of the most capable public servants the country has seen. Soon after the Act's passage, Pinchot had been hired by Interior as a "Special Forest Agent" to propose a structure for a forest bureau at Interior. But he quickly became disenchanted with Interior officials, concluding that "the Interior Department, with its tradition of political toad-eating and executive incompetence, was incapable of employing the powers the act gave it." GIFFORD PINCHOT, *BREAKING NEW GROUND*, 116 (1947). At Pinchot's urging, Congress passed the Transfer Act of 1905 which transferred jurisdiction over the national forests to the Bureau of Forestry at the Department of Agriculture. Several months later, the Bureau of Forestry was renamed the United States Forest Service, and Pinchot was installed as its first Chief.

Together, Pinchot and President Theodore Roosevelt forged the program of conservation that was to become one of the hallmarks of the Roosevelt administration. The important role played by Roosevelt in the designation of our first national monuments, many of which are now national parks, is noted briefly above. On the forestry side, Roosevelt was just as aggressive, more than quadrupling the number of acres devoted to national forests. Western hostility to the forest reserves peaked in 1907. In an appropriations act for the Department of Agriculture, Congress forbade the further creation of forest reserves (which the Act renamed "National Forests") in Washington, Oregon, Idaho, Montana, Wyoming, and Colorado. Roosevelt was unwilling to veto the appropriations act and so Pinchot and his staff worked night and day to prepare a list of 32 last-minute forest proclamations, which Roosevelt made in the last two

days before signing the bill. Senator Patterson of Colorado remarked that Congress had succeeded in shutting the barn door but only after the horse had been stolen. GATES, *supra* page 582. At the end of the McKinley presidency, there were 41 forest reserves with about 46 million acres. By the end of Roosevelt's presidency, there were approximately 172.5 million acres of national forest, mostly in the western part of the United States, which is just a bit less than the total combined acreage of California and Arizona. Today the Forest Service manages 193 million acres of land in 154 national forests and 20 national grasslands. See <http://www.fs.fed.us/about-agency/newsroom/by-the-numbers>.

In acreage terms, the reservation of national forests was certainly the most significant move by the federal government to assert permanent control over a portion of the public lands. That is why the reservations drew such ire in the West. Recognize, however, that federal retention of public lands is not the equivalent of federal preservation of those lands. Although the national forests can appropriately be described as part of Roosevelt's conservation legacy, they were not nature preserves. They remained open to entry under the mining law, and timber production remained one of the primary uses. Over the years, Congress has expanded the purposes served by national forests to encompass a wide range of uses including outdoor recreation, range, timber, watershed, minerals, and wildlife and fish purposes, but the sustained yield of the forest resources has remained an overarching goal. Management of the national forests is now governed by the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–31, and the National Forest Management Act of 1976, 16 U.S.C. §§ 1601 et seq.

3. THE DECISION TO RETAIN THE PUBLIC DOMAIN LANDS

The move toward reservation of public lands for national parks, forests, monuments, wildlife refuges, naval petroleum reserves, and the like was a substantial change in public lands policy. Nevertheless, these reservations can still be understood as exceptions to the still-prevailing idea that the public lands were largely intended for disposition to private owners. The rest of the public domain remained open for entry under the Homestead Act and the General Land Office remained open for business. Remember that even the national forests remained open for entry under the mining laws and that in the same year (1916) Congress created the National Park Service, it passed the Stock Raising Homestead Act under which 23 million acres of public lands were patented. The change to a presumption of federal retention of all the public lands, under which we operate today, was yet to come.

Before the Homestead Act and after, the primary use of that portion of the public domain that had not been taken up by settlers was grazing. Congress placed no restrictions on grazing the public domain. Although ranchers did manage in some instances to effectively exclude others from portions of the range, the public's grass was free to all comers. One of the reasons that national forests were initially so unpopular was that Gifford Pinchot began regulating grazing in the national forests and charging a small fee to graze. But, outside of national forests, grazing on the rest of the public domain required neither permit nor fee. The result of treating the public domain as a grazing commons had just the effect Garrett Hardin described, much of the public land was overgrazed and range conditions deteriorated.

Overgrazing was not the only problem. During the teens and 1920s, with prices high and rainfall plentiful, more and more farmers had been willing to try dry farming farther and farther west. But all the sod-busting for dry land farms, along with profligate grazing, had left little vegetation to hold the soil in place. When the weather turned dry in 1934, disaster struck in the form of massive dust storms in the Plains states that continued through the spring and summer. The dust storms helped concentrate Congress' attention on the long-brewing problem of overgrazing, resulting in the passage that summer of the Taylor Grazing Act, which ended free grazing on the public domain. The Act authorized the Secretary of the Interior to create grazing districts from 80 million acres of the public domain "chiefly valuable for grazing and raising forage crops," to withdraw those acres from entry or settlement, and to then issue ranchers permits for grazing. 43 U.S.C. § 315. Because the 80 million acres was less than half of the remaining public domain, and because President Franklin D. Roosevelt was convinced that all of the public domain needed more orderly administration, he issued two executive orders that withdrew the rest of the public domain from settlement. Congress responded by adding 62 million acres of the land withdrawn by Roosevelt to the grazing districts. To administer the Taylor Act, the Interior Department established a Grazing Division, which was renamed the U.S. Grazing Service in 1941. In 1946, the Interior Department merged the Grazing Service and the General Land Office to create the Bureau of Land Management (BLM).

By setting aside almost all of the remaining public domain for grazing purposes, the Taylor Act, helped along by Roosevelt's executive orders, effectively ended disposition of the public domain, at least outside Alaska. Nevertheless, because the Taylor Act also stated that the land was only being placed in grazing districts "pending its final

disposal," some still held out hope that the grazing districts would one day be reopened to entry and settlement. This hope was finally dashed in 1976 with the passage of the Federal Land Policy Management Act (FLPMA) in which Congress declared its intention that the "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest[.]" 43 U.S.C. § 1701(a). FLPMA repealed scores of old public lands laws and also served as an organic act for the BLM, directing that the grazing and other lands managed by the BLM, like the national forests, should be managed for a range of uses including extraction, recreation, and preservation, a philosophy commonly called "multiple use and sustained yield" that had originally been championed by Gifford Pinchot.

Because the multiple use standard gives such wide discretion to the BLM and the Forest Service, the lands managed by those agencies have triggered the most frequent and bitter disputes about public land management as different interests have worked to encourage the agencies to exercise their discretion in favor of particular resource uses and values. Thus, commodity and extractive interests have urged the agencies in one direction, preservation interests have pushed in another, and recreation and other interests have tugged in still more directions. The same push and pull has occurred within the agencies themselves as different administrations have emphasized different multiple use values.

The western states' frequent opposition to federal retention of land is not just about sovereignty and jurisdiction. It is also about revenue. Because federal land is exempt from state taxation, those states and counties with significant federal lands have a reduced base for property taxation. The school land grants were one effort to ameliorate this difficulty. Over time, a variety of other federal laws have been enacted to compensate states and counties. Perhaps the most prominent of these acts is the so-called Payment-in-Lieu-of-Taxes (PILT) Act which sends federal dollars to counties based on a formula of acreage and population. 31 U.S.C. § 6903 (1994). A variety of other acts pay counties based on federal revenues from commodity and extractive uses of the public lands. See, e.g., 16 U.S.C. § 500 (promising counties 25% of the receipts from timber harvests in national forests); Mineral Leasing Act, 30 U.S.C. § 191 (providing for the state of origin to receive 50% of revenues from oil and gas leasing and for Alaska to receive 90%).

Coming full circle back to acquisition, the federal government has now begun purchasing some lands for conservation and preservation purposes. Acquisition is

carried out under a variety of federal statutes and programs, the most prominent of which is probably the Land and Water Conservation Fund, which is funded with revenues from oil and gas leasing on the outer continental shelf. See Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601–4 to 4601–11. Since 1964, the public land base outside Alaska has increased approximately 19.8 million acres, an area equivalent to the size of the state of Maine. See James R. Rasband & Megan E. Garrett, *A New Era in Public Land Policy? The Shift Toward Reacquisition of Land and Natural Resources*, 53 ROCKY MTN. MIN. L. INST. 11–1.

IV. FEDERAL POWER OVER NATURAL RESOURCE MANAGEMENT

Recall that following the American Revolution, all power to regulate natural resources fell to the people and their fledgling states. The study of federal power over natural resources is thus an inquiry into how much of that power the people, or the states, gave up to the federal government in the Constitution. From one perspective, the answer that Congress and the courts gave for most of the nineteenth century was that the states had given up very little. From another perspective, however, the inquiry remained largely unanswered during that period because there was little need for the federal government to test the limits of its power. Natural resources were abundant and there was broad agreement that development of those resources was in the national and local interest. Whichever perspective is accurate, for most of the nineteenth century, natural resources were just another form of property and property was a matter of state, not federal, law. This was true even for the public lands, where state law applied in the absence of federal regulation. See *Omaechevarria v. Idaho*, 246 U.S. 343, 346–47 (1918) (holding that the “police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject”).

Although for the better part of the nineteenth century the federal government was largely content to allow state law to govern natural resource issues, when it did decide to assert its regulatory jurisdiction, it needed to point to some source of authority in the Constitution. This section investigates the constitutional provisions upon which the federal government has relied as it has exercised increasing regulatory authority over natural resources. Part A below focuses on federal power over natural resources that flows from the Constitution’s Property Clause, which gives to Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST.

art. IV, § 3, cl. 2. More specifically, to the extent the United States owns land within a state, what is the federal government’s power to regulate not only its land but also activities on state or private land that may affect the federal land and resources?

While Part A focuses on the Property Clause and federal power derived from land and resources owned by the federal government, Part B recalls that federal power over land and natural resources is not solely, or even primarily, a function of federal land ownership. Whereas the Property Clause is commonly cited as a source of federal authority on public lands, or sometimes even when public lands are just nearby, in other locales (think particularly about the original thirteen states and most states east of the Mississippi which have little public land), the source of authority is more likely to be the Commerce Clause, or perhaps the treaty power, spending power, or even the war power. Although we separate the study of federal power over land and resources into these two parts, recognize again that the inquiries typically overlap and support one another. Congress, for example, often cites multiple sources of constitutional authority for any particular statute.

A. FEDERAL POWER DERIVED FROM FEDERAL LAND OWNERSHIP: THE PROPERTY CLAUSE

Federal authority to retain the public lands rather than disposing of them to the states and people flows largely out of the Property Clause. As discussed previously, the United States Supreme Court has held in a number of cases that the federal government has power to retain the federal lands. The most prominent statement in that regard came in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *Kleppe* involved a dispute between New Mexico and the United States where New Mexico claimed that the United States lacked the authority to regulate wild horses on the public lands and that New Mexico possessed full authority to round up and remove wild horses on public lands where those wild horses were interfering with a rancher’s livestock.

The Court rejected New Mexico’s argument and held that, “while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that “[the] power over the public land thus entrusted to Congress is without limitations.” *Id.* The Court rejected an argument that the Enclave Clause was the only path by which the federal government should be able to gain ownership of land within a state:

Appellees’ claim confuses Congress’ derivative legislative

powers, which are not involved in this case, with its powers under the Property Clause. Congress may acquire derivative legislative power from a State pursuant to Art. I, § 8, cl. 17 [the Enclave Clause], of the Constitution by consensual acquisition of land.... *Paul v. United States*, 371 U.S., at 264; *Fort Leavenworth R. Co. v. Lowe*, 114 U.S., at 541–542.11. But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent..., the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

1976, the year *Kleppe v. New Mexico* was decided, was a tough year for advocates of greater state and private control of the public lands. In June, *Kleppe* emphasized that the Congress' power under the Property Clause was without known limitations and gave the federal government "power over its own property analogous to the police power of the several States." 426 U.S. at 540. Then, four months later, in October, Congress passed the Federal Land Policy Management Act (FLPMA) which declared federal policy that the "public lands be retained in federal ownership." 43 U.S.C. § 1701(a) (1976). Although western frustration with federal land ownership and management has ebbed and flowed throughout our nation's history, *Kleppe* and FLPMA precipitated a movement against federal land ownership among those in the West's rural communities whose livelihood depended upon the public lands and among many state and federal politicians. The movement, which became known as the Sagebrush Rebellion, and which has been known by several other names since then, had been percolating since the 1964 passage of the Wilderness Act and its prohibition on most resource development within wilderness areas. Further heightening their sensitivity, FLPMA had tasked BLM with inventorying all of BLM's lands for areas suitable for wilderness designation.

The Sagebrush Rebellion had both a political and legal component. On the political side, the next few years saw several western states pass related legislation. Leading the way, Nevada's legislators appropriated \$250,000 for the state attorney general to pursue legal action to force a transfer of BLM lands to the state and created a state board to supervise the sale of the lands it hoped to receive. Utah, Arizona, New Mexico, and Wyoming followed with similar bills, although Wyoming added a claim to the national

forests as well as BLM lands. In Washington, the legislature passed a sagebrush bill, only to see it overturned by popular referendum. In California and Colorado, bills passed but were defeated by governors' vetoes. At the federal level, in 1979, Utah's Senator Orrin Hatch, along with a number of cosponsors from the interior West, introduced a sagebrush rebellion bill that proposed transferring BLM lands to the states. S. 1680, Congressional Record 26 (1979), S. 11657. Then, shortly after his election in 1980, President Ronald Reagan pledged his support to "all my fellow sagebrush rebels" and promised "to work toward a sagebrush solution." With President Reagan's appointment of James Watt, an avowed sagebrush rebel and former head of the Mountain States Legal Foundation (a public interest law firm dedicated to protecting private property rights and to promoting private access to and use of the public lands), to be his Secretary of the Interior, it looked as though the Sagebrush Rebellion might produce some real changes in the makeup of the public lands. In the end, however, the momentum began to wane and the bills introduced in Congress quietly expired.

The Sagebrush Rebellion, however, did not die. Hibernation would probably be a better description. The frustrations that drove the wise use movement have continued to persist and, if anything, have increased as the West's demographics continue to change. As more and more people have flocked to the West's urban and suburban areas, the constituency for preservation and recreational use of the public lands instead of "wise use" (i.e., resource extraction and development under state governance) has only increased since the late 1970s and early 1980s. Thus, it was not surprising that in the 1990s the rebellion took shape again, this time under the banner of the "County Supremacy Movement."

The Sagebrush Rebellion has sparked again in recent years. One manifestation is the renewed legislative effort of certain states in the West to claim federal lands within their borders. This argument relies partly upon "proceeds clauses" in state enabling acts. Section 9 of Utah's Enabling Act is illustrative:

[F]ive per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

Act of July 16, 1894, ch. 138, 28 Statutes at Large 107. Relying on the language indicating that the public lands

lying within Utah “shall be sold by the United States,” in 2012, Utah passed legislation requiring the federal government by December 31, 2014 to transfer to the state all public lands except national parks, national monuments, wilderness areas, lands previously ceded for military use, and a few other areas. See Utah Code Ann. § 63L–6–101. The statute further provided that for any transferred land subsequently sold by the state, the United States would receive 95% of the proceeds and the state school trust fund would receive 5%. Since the passage of Utah’s transfer of public lands statute, eight other western states have pursued the idea in some fashion, including Arizona which passed a bill like Utah’s but it was vetoed by Republican Gov. Jan Brewer. See Brian Calvert, *Western States Eye Federal Lands—Again*, HIGH COUNTRY NEWS, Oct. 27, 2014. Similar bills have been introduced in Congress by western representatives but have not made it out of committee. See H.R. 2852, 112th Cong. (2011) (“To authorize Western States to make selections of public land within their borders in lieu of receiving 5 percent of the proceeds of the sale of public land lying within said States as provided by their respective enabling Acts.”)

Utah’s December 31, 2014 deadline for the federal government to relinquish its lands has come and gone without any action, although Utah is now considering litigation to require federal transfer of the public lands.

B. FEDERAL POWER OVER LAND AND RESOURCES: OTHER CONSTITUTIONAL SOURCES

As discussed above, prior to the twentieth century, state law largely controlled the use of natural resources. The Property Clause is one vehicle through which the federal government began to assert its authority. Although the Property Clause is important authority for the federal government to retain public lands, it is important to recognize that even if formerly public lands were privatized or assigned to the states, the federal government would continue to have broad regulatory authority over those lands under other constitutional provisions such as the Commerce Clause or federal taxing power. Thus, even if lands are privatized, it doesn’t eliminate federal control.

V. THE TAYLOR ACT AND GRAZING AS AN EXAMPLE OF THE DEBATE OVER FEDERAL CONTROL OF THE PUBLIC LANDS

As a manifestation of the debate about federal control of the public lands it is useful to consider the debate about ownership and regulatory of the range resource, particularly

on those lands managed under the Taylor Grazing Act. The preceding text had some discussion of the Taylor Act but to understand the complexity and source of the passions behind the range debate, it is important to review more of the history of ranching in the West. Similar to other natural resource legal regimes, grazing law for a significant period of time was more a species of property law than environmental law. For the first century or so, range policy was about the efforts of ranchers, primarily but not exclusively, to acquire rights, privileges, and control of the rangeland resource.

A. THE RISE OF RANCHING ON THE PUBLIC COMMONS

Cattle and sheep are not native to North America. They were introduced to the Americas between 1515 and 1530 by Hernando Cortez, Spanish conqueror of the Aztec Indians, in what is present-day Mexico, and first made their way into the present United States when Francisco Vasquez de Coronado in 1540 went searching for the Seven Cities of Cibola and their purported treasures of gold and silver. Some of the cattle and sheep Coronado took with him escaped and began stocking the ranges of New Mexico, Arizona, Texas, and Colorado. Coronado was followed by the Spanish mission system, which established outposts along the rivers in the Southwest and the coast of California and which brought more cattle and sheep. But all of this amounted to relatively few livestock and insignificant pressure on the range. The story of what Walter Prescott Webb called “the cattle kingdom” really begins in Texas in the decades preceding the Civil War. Starting from the wild and hardy cattle of Spanish origin later known as Texas longhorns, the cattle business took root. Texas went from an estimated 100,000 head of cattle in 1830 to 330,000 head in 1850 to 3,535,768 head in 1860. WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 212 (1931).

At the end of the Civil War, northern markets were paying \$30 to \$40 per head for the same cattle that could be bought in Texas for \$3 and \$4 per head. Webb, *supra*, at 216. Thus began the long cattle drives of western lore as cowboys trailed thousands of Texas cattle northward to the new railheads in now-historical cattle towns like Abilene and Dodge City. From there, spurred by the growing markets and a sea of free grass covering the plains, the cattle kingdom spread out over the West. For some fifteen years, the plains were almost the pure commons of Garrett Hardin’s theory. Indian tribes were being pushed westward and forced onto reservations. Homesteaders had not yet come so far West; and barbed wire, which made fencing economical, had not yet been invented. The range was wide open to livestock grazing and more and more grazers came.

As more cattlemen, and then sheep ranchers and settlers, arrived, the pressure on the open access, rangeland resource increased. The ranchers' response to the open access problem took several forms but can be broadly characterized as an effort to maintain private rights in the common resource, whether by legal recognition or on-the-ground fiat. From the beginning, ranchers hoped their use of the public domain would ripen into private title as had been the case with settlers/squatters under the various preemption acts and miners under the 1866 and 1872 mining laws. If the ranchers could just get control of the range, legal recognition, they hoped, would follow. Ranchers' control efforts took many forms. Perhaps the most common was controlling water. Testifying before the Public Land Commission in 1879, a Colorado rancher remarked:

Wherever there is any water there is a ranch. On my own ranch (320) acres I have two miles of running water; that accounts for my ranch being where it is. The next water from me in one direction is twenty-three miles; now no man can have a ranch between these two places. I have control of the grass, the same as though I owned it. . . . Six miles east of me, there is another ranch, for there is water at that place. . . . Water accounts for nine-tenths of the population in the West on ranches.

Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 Mont. L. Rev. 155, 162 (1967). As evidenced by the 320 acre ranch, ranchers used the land disposal laws to their advantage. By using homestead or preemption laws to take up a base ranch of 160 acres along fertile riparian areas (or multiples of that acreage if members of his family or his cowhands were willing to enter additional and sometimes fraudulent claims), a rancher could exclude other aspiring grazers and settlers from the surrounding range and assure himself of water for growing winter feed.

Where control of the water was not sufficient, many ranchers asserted a "range right" to the land within the relevant watershed. Other cattle ranchers, and the cattlemen's associations into which they organized themselves, recognized these customary range rights. But homesteaders and sheep ranchers were not so accommodating and constantly tested the ranchers' claims. Homesteaders did so by taking up land within ranchers' customary ranges, and adjacent to water if possible. Shepherders, who were typically more nomadic, did so by ignoring range rights and trailing their sheep across ranchers' customary areas. Ranchers also claimed that sheep caused particular harm because sheep consume plants all the way down to the

ground whereas cattle, ranchers asserted, leave more of the plant, allowing for quicker regeneration. As depicted by Hollywood in movies like *Shane* and *Tom Horn*, the ranchers' reaction to homesteaders and sheepherders was sometimes violent.

Range wars tend to make good copy but less violent tactics were more common. Cattlemen's associations also drove newcomers from the range by denying them participation in local roundups, use of common corrals, and group protection from Indians and rustlers. A more common tactic was taking advantage of the new barbed wire technology to fence in portions of the public domain. Fencing led to more violence between so-called fenced range men and free grass men, the latter typically consisting of small stockmen and itinerant sheepherders who were dependent on open range. It also led to legislation and then to lawsuits.

B. FENCE LAW

If the ranchers saw open access to the range (or at least any more access) as an evil to be remedied, the initial federal response was to remove impediments to open access. In 1885, Congress passed the Unlawful Inclosures Act, forbidding construction and enclosures on public lands. 23 Stat. 321 (1885). By 1886, the General Land Office had 375 fencing cases involving over six million acres of public land. Among the most interesting prosecutions under the Act were those involving ranchers who managed to fence in federal land without ever erecting a fence on public property. As discussed above, federal railroad land grants and state school trust grants of alternate sections of land resulted in a checkerboard pattern of public and private ownership. A person who had acquired title to all of the odd-numbered sections in a certain area could enclose a vast amount of federal land by erecting a fence along the top edge of an odd-numbered section, leaving a six-inch gap, and then continuing the fence along the bottom edge of the diagonally-situated odd-numbered section. By repeating this process at top and bottom of a number of sections, he could construct a fence entirely on his own property that would close off access to and effectively control a large number of sections of public domain. Whether this ingenious practice could be prosecuted led to one of the significant public land law decisions of the nineteenth century in *Camfield v. United States*, 167 U.S. 518 (1897), involving a Colorado rancher who had managed to enclose some 20,000 acres of the public domain. Finding that the Act was intended to prohibit even fences situated solely upon private land, the Court rejected the rancher's challenge that Congress lacked the power to regulate private land use:

The general Government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. . . . While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

Id. at 525–26.

If they could not fence others out of the public domain, ranchers sought to accomplish the same purpose by claiming trespass when another user, most often itinerant sheepherders, crossed the rancher’s privately-owned, odd-numbered sections to get at even-numbered sections of the public domain. One such claim made it to the Supreme Court in *Buford v. Houtz*, 133 U.S. 320 (1890). Buford was a partner in the Promontory Stock-Ranch Company which had purchased from the Central Pacific Railroad 350,000 acres of alternate, odd-numbered sections in the Utah Territory. On those sections and the adjoining sections of the public domain, totaling some 921,000 acres, the company ran 20,000 head of cattle. Houtz was a sheep rancher. Buford sought to enjoin Houtz from trailing his sheep across Buford’s land to the interspersed sections of public domain which, conveniently, would have made Buford the effective owner of all 921,000 acres. The Court refused to enjoin Houtz, remarking that the “equity of this proceeding is something which we are not able to perceive.” It did, however, articulate a justification for all grazing on the public domain:

We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use. . . . The government of the United States in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

Id. at 526–27. The Court’s message was a mixed bag for ranchers. They could not exclude others from the public domain, but they themselves also had “an implied license, growing out of the custom of nearly a hundred years,” to use the public lands for grazing. On the other hand, that implied license fell well short of the title to which they aspired. The license only lasted as long as “no act of government” forbade the use.

C. INITIAL FEDERAL LIMITATIONS ON OPEN ACCESS GRAZING

The Supreme Court in *Buford v. Houtz* had warned that ranchers’ implied license to graze the public domain was subject to revision by federal law, but in the years that followed, grazing on public lands continued to mean free grass and federal indifference. The first real federal foray into restricting open access to public rangelands did not come until 1906, and it was a modest one. Fresh from his success at convincing President Theodore Roosevelt to transfer the national forests from the Department of Interior to the Department of Agriculture where he was serving as chief of the Division of Forestry, Gifford Pinchot embarked upon a program to regulate grazing in the approximately 100 million acres of national forests now under his jurisdiction. The regulation consisted primarily of requiring ranchers to obtain a grazing permit and pay a fee. The fee was \$.05 per animal unit month (AUM). An AUM is the amount of forage one cow (more precisely one cow and calf), one horse, or five sheep or goats would be expected to consume in one month.

Pinchot’s 1906 program led to a lot of hostility from the cattle industry. Several western legislatures passed memorials criticizing federal regulation of the range. “Pinchotism” was front-page news in western newspapers, and the chief of the Forest Service was labeled a dictator and a carpetbagger. See *Wilkinson, Crossing, supra*, at 91.

A challenge to Pinchot’s program filed by a Colorado rancher and supported by the Colorado legislature found its way to the United States Supreme Court in 1911 in the form of a challenge to federal power to retain the public lands and restrict access to them. In *Light v. United States*, 220 U.S. 523 (1911), the Court upheld the regulations and affirmed the United States’ power of retention. Although Pinchot’s grazing regulations survived legal challenge, it did little to decrease the amount of grazing. By 1915, the number of AUMs available for grazing in national forests had actually increased by more than half. Moreover, grazing outside of national forests on the rest of the public domain required neither permit nor fee.

As the condition of much of the open range continued to deteriorate, many ranchers started to look more favorably on federal intervention. When President Roosevelt's Public Lands Commission surveyed stockmen in 1903, 78% favored federal control of public lands grazing and the Commission recommended that grazing be allowed only by ten year permits. Roosevelt and Pinchot also proposed a grazing lease program that was strongly supported by large cattle operators and livestock associations who were most concerned about their ability to control the incursions of smaller operators, sheep ranchers, and farmers onto their customary ranges. Their leasing proposal and others introduced up through a 1929 bill in Congress continued to be rejected, partly on the ground that the land should be left available for Jefferson's yeoman farmers and John Wesley Powell's irrigators, and partly for fear that the public's resources should not be controlled by a few "cattle barons."

In 1928, Congress did pass the Mizpah-Pumpkin Creek bill which provided for a grazing management experiment on just over 100,000 acres of land in Montana. The experiment called for the lands to be leased for ten years at just over three cents an acre and managed largely by designated ranchers. The result was considered a success. With the leases in place, the ranchers constructed fences and artificial reservoirs and by 1932, the forage value of the area had increased by 38%. Paul W. Gates, *History of Public Land Law Development* 610 (1968).

Overgrazing was not the only problem. During the teens and 1920s, with prices high and rainfall plentiful, more and more farmers had been willing to try dry farming further and further West. When the weather turned dry, disaster struck. All the sod-busting for dry land farms, along with profligate grazing, had left little vegetation to hold the soil in place. As Marc Reisner described it:

The first of the storms blew through South Dakota on Armistice Day, November 11, 1933. By nightfall, some farms lost nearly all their topsoil. "Nightfall" was a relative term, because at ten o'clock the next morning the sky was still pitch-black. People were vomiting dirt. Machinery, fences, roads, shrubs, sheds—everything was covered by great hanging drifts of silt. "Wives packed every windowsill, door frame, and keyhole, with oiled cloth and gummed paper," William Manchester wrote, "yet the fine silt found its way in and lay in beach-like ripples on their floors." As a gallon jug of desert floodwater, after settling, contain a quart and a half of solid mud, the sky seemed to be one part dust to three parts air. A naked human tethered outside would have been rendered skinless—such was the scouring

power of the dirt-laden gales. Huge numbers of jackrabbits, unable to close their eyes, went blind. That was a blessing. It gave the human victims something to eat.

The storms, dozens of them, continued through the spring and summer of 1934. An old physician in southwestern Nebraska wrote in his diary, "Wind forty miles an hour and hot as hell. Two Kansas farms go by every minute." With the temperature up to 105 degrees and the horizon lined with roiling clouds that seemed to promise ten inches of rain but delivered three feet of dirt, the plains took on a phantasmagorical dreadfulness. The ravenous storms would blow for days at a time, eating the land in their path, lifting dust and dirt high enough to catch the jet stream, which carried it to Europe. In 1934, members of Congress took time out from debating the Taylor Grazing Bill—designed to control overgrazing on the public lands—to crowd the Capitol balcony and watch the sky darken at noon . . .

See Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* 149–50 (1993).

D. ENDING OPEN ACCESS TO PUBLIC RANGELANDS

The dust storms helped catalyze what had long been brewing in the leasing proposals and the Mizpah-Pumpkin Creek experiment—a decision by the federal government to end open access grazing on the rest of the public domain. The result was the 1934 passage of the Taylor Grazing Act with the acquiescence, and in some cases blessing, of ranchers. The Act provided:

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . . which in his opinion are chiefly valuable for grazing and raising forage crops. . . .

43 U.S.C. § 315 (emphasis added). Although the Taylor Act's "pending final disposal" language appeared to contemplate eventual transfer of the public lands to private ownership, the Act's focus was on increased federal control of the range. The Secretary was charged with insuring "the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range. . . ." 43 U.S.C. § 315a. Within the grazing districts, the Secretary was to issue grazing permits "upon the payment

annually of reasonable fees,” and to give preference, in the issuance of those permits, “to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.” 43 U.S.C. § 315b. In other words, in deciding to whom the new permits would be issued, the Act enshrined a significant part of prior custom: ranchers who had homesteaded, say, a 160 or 320 acre section along a river or creek would be given preference to permits on adjoining or nearby public rangelands and itinerant grazers would be last in line. This preference was one of the reasons why the Taylor Act attracted the support of a significant number of ranchers. The grazing permits were to be issued for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. . . . So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

43 U.S.C. § 315b.

The Taylor Act set forth a daunting task for the Department of the Interior. It had to ascertain the bounds of the range, establish grazing districts, determine their grazing capacity, and divide that capacity among the various applicants with sometimes conflicting claims of historic use. To administer the Taylor Act, the Interior Department established a Grazing Division (which was renamed the U.S. Grazing Service in 1941 and in 1946 merged with the General Land Office to become the BLM) and named Farrington Carpenter, a lawyer and rancher from Colorado, to run it. Having been charged with administering an area larger than France with only seventeen other employees, Carpenter turned to local ranchers for help, setting up advisory boards of stockmen. The advisory boards were given clearer legal status by a 1939 amendment to the Taylor Act that provided for five to twelve local stockmen, and one wildlife representative, to give the Secretary “the benefit of the fullest information and advice concerning physical, economic and other local conditions.” 43 U.S.C. § 315o–1(a). The boards were also to “offer advice or make recommendations concerning rules and regulations for the administration of” the Taylor Act and to advise on “the seasons of use and carrying capacity of the range.” See 43 U.S.C. § 315o–1(b).

By 1938, 50 grazing districts had been established covering

some 142 million acres with 19,342 permittees. Paul W. Gates, *History of Public Land Law Development* 614–15 (1968). Although the configuration of grazing districts has undergone some change, ranchers’ grazing privileges remained remarkably stable after their initial allocation. Permits were renewed year after year to the same individuals, typically for the same number of AUMs. Wesley Calef, *Private Grazing and Public Lands* 43 (1960); Joseph Feller, *What Is Wrong with the BLM’s Management of Livestock Grazing on the Public Lands?* 30 *Idaho L. Rev.* 555, 570–81 (1994).

In part because of this consistent renewal, and despite the language in Section 315b of the Taylor Act providing that the Act “shall not create any right, title, interest, or estate in or to the lands,” a recurring legal issue has been whether ranchers’ grazing permits constitute a property right whose taking requires compensation under the Fifth Amendment. The Supreme Court’s first clear statement on this issue did not come until 1973. In *United States v. Fuller*, 409 U.S. 488, an issue arose about whether the United States’ condemnation of a 920 acres of a 1280 acre base ranch required compensation for the value of the grazing rights attached to the base ranch. The Court held that the United States was not required to compensate for value associated with the grazing permits because the permits could be terminated by the federal government without paying any compensation. *Id.* (“Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.”)

Although the Supreme Court declined to find that associated grazing permits were an appropriate part of the valuation of a base ranch, banks have accepted grazing permits as collateral and that permits are typically capitalized into the value of a ranch.

Another twist on the issue of whether there is a property right in a grazing permit arose in litigation filed in the Federal Court of Claims by rancher-activist Wayne Hage. Hage and his wife, Jean, both of whom have now passed away, argued that by canceling their grazing permit and then denying them access to the associated state water rights and federal ditch rights (created by the 1866 Ditch Rights-of-Way Act), the government had taken not only the water and ditch rights, but also an appurtenant right to have livestock graze within the ditch right-of-way. In a bifurcated proceeding, the court first concluded that the Hages did indeed have a property interest in various water and ditch rights, as well as forage rights within the ditch right-of-way. See *Hage v. United*

States, 51 Fed. Cl. 570 (Fed. Cl. 2002). As the court saw it, “[t]he government cannot cancel a grazing permit and then prohibit the plaintiff from accessing the water to redirect it to another place of valid beneficial use. The plaintiffs have a right to go on land and divert the water.” *Id.* at 584.

In the second proceeding, the court concluded that the federal government had taken the Hages’ state water rights and 1866 Act ditch rights and that they should be awarded compensation of \$2,854,816.20. See *Estate of Hage v. U.S.*, 82 Fed. Cl. 202 (Fed. Cl. 2008). The court accepted the Hages’ argument that the Forest Service’s threats of trespass and its prohibition on maintaining their ditches with anything other than hand tools was a taking. *Id.* at 211. The Hages’ inability to access and maintain their water rights, said the court, deprived them of the water they needed for irrigation for their base ranch and prevented them from selling the water to another irrigator. On the third issue left over from the prior litigation, the court declined to find a taking of the forage rights within the ditch right-of-way because it would have been “economically unfeasible to graze cattle on the 100 foot wide strips while being unable to graze on land beyond that mark.” *Id.* at 213 n.11.

However, the Court of Federal Claims decision was vacated on appeal by the Federal Circuit, which found that the Hages’ taking claim was not ripe because they had failed to seek a special use permit to access and maintain their irrigation ditches. See *Estate of Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 2824 (2013). The Federal Circuit did suggest that a permit limiting the Hages to using hand tools for maintenance would go too far but ultimately deemed the takings question unripe. *Id.* at 1288.

E. FLPMA: THE BLM GETS AN ORGANIC ACT

Although grazing was the predominant use of the public lands (at least in its geographic scope), concern about the limits of the Taylor Grazing Act was one of many issues relating to management of the public domain. In 1964, as part of the compromises involved with passage of the Wilderness Act, the Public Land Law Review Commission was tasked with studying the nation’s approach to the public domain and making recommendations for modernization of public land management. Act of Sept. 19, 1964, Pub. L. No. 88–606, 78 Stat. 982. The Commission published its study in June of 1970 and one of its key recommendations—that an organic act be passed to direct the BLM’s management—was achieved with the passage of the Federal Land Policy and Management Act in 1976. See 43 U.S.C. § 1701–84. FLPMA’s passage was a triumph for the BLM. As one former associate director at the BLM remarked: “Many

of us oldtimers in the Bureau said that before we retired we wanted a basic organic act—and not all this crossword puzzle kind of stuff we’d had to work with for 30 years.” JAMES MUHN & HANSON R. STUART, *OPPORTUNITY AND CHALLENGE: THE STORY OF BLM* 170 (1988). FLPMA covered much more than grazing. It altered mining law, limited executive withdrawal power, required broad land use planning, and revised the process for acquiring rights-of-way across public lands.

Although FLPMA did not repeal the Taylor Act, it impacted grazing policy in a number of ways. Whereas the Taylor Act established grazing districts on the public lands “pending its [sic] final disposal,” 43 U.S.C. § 315, FLPMA declared the policy of the United States that “the public lands be retained in Federal ownership.” 43 U.S.C. § 1701(a)(1). This important shift in federal policy dampened the hopes of some that the public lands would be assigned to the states or that grazing permits would be privatized. FLPMA also required the Secretary of the Interior to manage the public lands for “multiple use and sustained yield.” 43 U.S.C. § 1732(a). FLPMA also mandated that the Secretary “[i]n managing the public lands . . . shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

In addition to its dominant multiple use message, FLPMA dealt with several range management issues. It conformed grazing permit duration (ten years) and the process for canceling a permit for both the BLM and the Forest Service. See 43 U.S.C. § 1752. It emphasized that both the Secretary of the Interior and the Secretary of Agriculture may

cancel, suspend, or modify, a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.

Id. § 1752(a). FLPMA also amplified the Taylor Act’s statement that the Secretary should “specify from time to time number of stock and seasons of use,” 43 U.S.C. § 315b, by providing that the Secretary shall incorporate in grazing permits and leases such terms and conditions as he deems appropriate for management of the permitted or leased lands pursuant to applicable law... [and] shall also specify therein the number of animals to be grazed and the seasons of use and that he may reexamine the condition of the range at any time and, if he finds on re-examination that the condition of the range requires adjustment in the amount or other aspect

of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary . . . deems necessary.

43 U.S.C. § 1752(e). Finally, FLPMA reemphasized that grazing permits could be canceled for other purposes such as when the agency decides in its land use planning process to devote land to a different public purpose. FLPMA did, however, assure ranchers of some protection in such instances.

Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in the authorized permanent improvements placed or constructed by the permittee or lessee. . . . Except in cases of emergency, no permit or lease shall be canceled . . . without two years' prior notification.

43 U.S.C. § 1752(g).

